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The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit

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**THE ROLE OF CAUSATION WHEN DETERMINING THE
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Jan G. Laitos* and Teresa Helms Abel**

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INTRODUCTION

The Takings Clause of the Fifth Amendment of the United States Constitution is a check on government action restricting the use and enjoyment of private property.¹ But before a plaintiff can trigger its provisions, the various requirements of the Clause must be satisfied. The text of the Clause is deceptively simple: “[N]or shall private property be taken for public use, without just compensation.”² Courts have interpreted this language to require that several threshold conditions be present before a litigant can obtain relief under the Clause.³

One important, but often overlooked, precondition to a successful takings claim is that the government-defendant must be the entity that *caused* the harm to the property

¹ See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536–37 (2005).

² U.S. CONST. amend. V.

³ See *infra* Part I. In Part I, we will discuss the most commonly litigated threshold requirements for bringing a legally cognizable takings challenge.

owner.⁴ The law surrounding this causation requirement, though commonly litigated, is unsettled and therefore uncertain. This confusion is due in part to the causation issues, which may arise in no less than five different factual contexts, that have a bearing on whether a takings claim can be brought at all against a particular defendant. This Article will focus primarily on the first factual variant, which occurs when there is some nexus, but not necessarily a sufficient one, between the government-defendant's action and the taking of the plaintiff owner's property.⁵ The question of "causation" becomes particularly difficult and complicated in this situation because the government-defendant has, in fact, had some causative connection to the plaintiff's injury, but that connection may not necessarily be enough. The issue for the court to resolve is whether that connection and causative link are substantial enough to establish sufficient causation for the defendant to be the proper subject of a takings claim.

The other four factual variants that arise in the case law seem to have their own tests for whether the government-defendant named in the lawsuit is the proper defendant. Those remaining variants occur in four situations: (1) when actions by private parties, taken pursuant to state or federal law, damage the plaintiff's private property;⁶ (2) when the plaintiff-property owner, not the defendant, is the true cause of the taking;⁷ (3) when the taking of the property has been caused by normal market forces or acts of nature;⁸ and finally, (4) when the taking has been caused by some third party who is not the government-defendant.⁹

Within each of the five factual contexts, courts have struggled to define what is required to prove a causative link between the plaintiff's harm and the named defendant.¹⁰ The judicial tests seem to vary by jurisdiction and according to the particular facts at issue.¹¹ These tests range from requirements that are unique to takings challenges, to tests that mirror traditional tort-like requirements for causation, to takings-torts hybrids.¹² The courts seem to adopt the widest range of differing approaches to the causation issue when they are faced with the first factual variant, in which all agree there has been some government involvement, and when the inquiry revolves around whether causation tests adopted in tort law should play a role in a takings case.¹³ In

⁴ See, e.g., *Abdullah v. Comm'r of Ins.*, 84 F.3d 18, 22 (1st Cir. 1996) (finding no taking when there was no "causal connection between the statute facially attacked and the [insurance] rates claimed to be confiscatory [by the plaintiff]").

⁵ See, e.g., *Dunn v. City of Milwaukie*, 250 P.3d 7, 8–9 (Or. Ct. App. 2011) (determining whether the city's cleaning of sewer lines for the public benefit, but which resulted in damage to the plaintiff's house, amounted to a taking).

⁶ See *infra* Part II.B.1.

⁷ See *infra* Part II.B.2.

⁸ See *infra* Part II.B.3.

⁹ See *infra* Part II.B.4.

¹⁰ See *infra* Parts III–IV.

¹¹ See *infra* Parts III–IV.

¹² See *infra* Parts III–IV.

¹³ See *infra* Part III.

this situation, courts have used all manner of different combinations of intent, cause in fact, and proximate cause requirements to decide the causation question.¹⁴

For example, in *Dunn v. City of Milwaukie*,¹⁵ a state court takings case, the central issue was not whether the plaintiff had been injured or whether the injury constituted an uncompensated taking.¹⁶ Rather, the issue was whether the government-defendant had intended to cause the plaintiff's injury.¹⁷ To answer this question, the court wrestled with the problem of deciding whether the causation requirement should be addressed using a torts test or a pure takings test.¹⁸ The plaintiff in *Dunn* sought "compensation for damage to her home resulting from raw sewage that backed up through bathroom fixtures when the city 'hydrocleaned' a nearby sewer line."¹⁹ The defendant argued that no taking occurred because the plaintiff presented no evidence that the city had *intended* the harm.²⁰ Although the court maintained that intent was a necessary element to finding a taking, it ultimately found that the Takings Clause was violated.²¹

What was critical to this result was "whether 'there is evidence' that the sewage intrusion was the natural and ordinary consequence of the city's hydrocleaning."²² Even though the sewage intrusion was not a usual result of routine hydrocleaning, it was not an unnatural or extraordinary event, and it did not involve any intervening cause.²³ Therefore, the city was responsible for, and had caused, the plaintiff's injury.²⁴ This analysis suggests that, in the absence of intent, some courts will apply a tort-like proximate cause test to determine whether there is a sufficient causative link between the government action and the plaintiff's harm.

Other courts, however, refuse to rely on tort-like concepts to find causation in a takings action. For example, in *Arkansas Game & Fish Commission v. United States*,²⁵ the United States Court of Appeals for the Federal Circuit declined to find the Takings Clause violated by government-induced flooding that resulted in substantial and permanent damage to trees on the plaintiff's land.²⁶ The Federal Circuit concluded that the action should be brought as a tort rather than as a taking, because "[a]n injury that is only 'in its nature indirect and consequential,' i.e. a tort, cannot be a taking."²⁷ This statement suggests that the court was using a test for causation in a takings case that

¹⁴ See *infra* Part III.

¹⁵ 250 P.3d 7 (Or. Ct. App. 2011).

¹⁶ See *id.* at 8–10.

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 9–11, 13.

¹⁹ *Id.* at 8.

²⁰ *Id.*

²¹ *Id.* at 13.

²² *Id.* at 10 (quoting *Vokoun v. City of Lake Oswego*, 56 P.3d 396, 402 (Or. 2002)).

²³ *Id.* at 11.

²⁴ *Id.* at 11, 13.

²⁵ 637 F.3d 1366 (Fed. Cir. 2011).

²⁶ *Id.* at 1367.

²⁷ *Id.* at 1374 (quoting *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924)).

is different from a torts test, and that the distinction between an action that lies in tort rather than takings could actually turn on the sort of causation the court finds. If the Federal Circuit had found that the harm was a direct result of the government action, it may have held that the higher causation threshold for a taking had been satisfied.

In this Article, we will focus on this first factual variant, involving direct government action that may not be sufficient to trigger the Takings Clause, but instead may be considered tortious. This is the issue squarely before the courts in the *Dunn* and *Arkansas* cases.²⁸ We will examine this particular issue, as well as the larger issue of takings and causation, in five Parts. Part I takes up the question of how and why the issue of causation is so prevalent, yet so often ignored, in cases in which the plaintiff–property owner is seeking Fifth Amendment “just compensation” from a government actor. Because a Fifth Amendment takings claim is a constitutional challenge to an act by the government, the state action doctrine is triggered.²⁹ Part I will therefore examine how the question of causation in a takings case is linked also to the Supreme Court’s requirement that constitutional guarantees apply only to harms induced or compelled by non-private, government-defendant decisions.

Part II considers and contrasts the five types of factual settings that give rise to the causation issue in takings claims. Part III reviews and analyzes how courts have resolved the causation question for the first, often-litigated factual variant, for which there is no judicial consensus. In Part IV, we take up how the courts have resolved the causation issue when (1) the government-defendant has only *authorized* private action that harms the plaintiff, (2) the plaintiff itself may be the source of the plaintiff’s harm, (3) the plaintiff’s harm appears to be due to “Acts of God” or market forces, and (4) the plaintiff’s harm may be because of some party other than the government defendant. In Part V, we propose a more unifying theme for causation that can be applied to all five factual variants, which will be largely drawn from our analysis of the first.

I. DID THE DEFENDANT CAUSE THE PLAINTIFF’S HARM? AN OVERLOOKED THRESHOLD ISSUE WHEN BRINGING A TAKINGS CLAUSE CLAIM

A governmental “taking” can be understood simply as an exercise of the power of property confiscation, or eminent domain power, that is held by the federal and state governments of the United States.³⁰ The federal power to take is not explicitly conferred

²⁸ See *id.* (stating the issue as whether the government action was sufficient to constitute a taking); *Dunn*, 250 P.3d at 10.

²⁹ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (“[C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.”); see, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) (“New York is in no way responsible for [the warehouseman’s] decision, a decision which the State . . . permits but does not compel . . .”).

³⁰ See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005) (describing the Takings Clause as restricting the government’s power to take private property).

by the Constitution, but it is presumed because the Fifth Amendment provides a remedy—just compensation—when such power is exercised.³¹ Most state constitutions explicitly confer eminent domain power, along with a remedy of just compensation.³² This just compensation relief exists regardless of whether the law-making body intended to take private property.³³ “The taking power is certainly being deployed in the case of intentional takings, when the government formally condemns private property by an exercise of eminent domain.”³⁴ The courts must also determine if an uncompensated taking has occurred “when a government action unintentionally takes private property through an exercise of some other power, such as the police power. Irrespective of whether the taking is intentional or unintentional, the constitutional remedy for the private property owner is the same—just compensation.”³⁵

This Article will not address formal condemnations of property through use of the eminent domain power, as causation issues typically do not arise when the government formally states its intention to take private property for a public use.³⁶ In such cases, the dispute is generally about the adequacy of the compensation.³⁷ Instead, we will focus entirely on takings claims that arise when the government intends to act, but does not intend to exercise eminent domain. Such claims, termed inverse condemnation or regulatory taking claims, are triggered when some government action—initiated without an intention to formally exercise the power of eminent domain—seems to result in harm to private property that is equivalent to eminent domain being exercised.³⁸ The injured property owner then asserts that the government action has risen to the level of an unconstitutional, uncompensated taking.³⁹ Such takings claims arise in at least five distinct factual contexts.

The scenarios that generate the most complicated questions of causation occur when there is a nexus between the government action and the plaintiff’s harm, but

³¹ See U.S. CONST. amend. V.

³² For example, Iowa’s Constitution provides that “[p]rivate property shall not be taken for public use without just compensation first being made.” IOWA CONST. art. I, § 18. Washington’s Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made.” WASH. CONST. art. I, § 16; see also *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005) (“Because the federal and state constitutional provisions regarding takings are nearly identical, federal cases interpreting the federal provision are persuasive in our interpretation of the state provision.”).

³³ JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS 8-15 (Supp. 2012).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *id.* at 8-16.

³⁸ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“[T]he natural tendency of human nature is to extend [the police power] more and more until at last private property disappears. . . . [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

³⁹ LAITOS, *supra* note 33, at 8-18 to -19.

that nexus may not be substantial enough to require the government-defendant to be deemed responsible for an unconstitutional taking.⁴⁰ The question for the reviewing courts, and for this Article, is when is some government involvement in the plaintiff's injury sufficient to become a taking, and when is it not? And if it is not sufficient to become a taking, might it nonetheless be a tort? And do the answers to these questions also dispose of the other four factual variants involving causation?

Under each of the five factual variants involving causation, when a property owner has an interest in property that appears injured by the government, one recourse is to assert that the government has taken that interest without just compensation.⁴¹ For such a takings claim, the issue of causation arises twice. First, the plaintiff must select from the several merit-based tests available to courts that are applied to takings cases, and decide if the facts of the plaintiff's injury fit best into one, or several, of these standards for determining whether a taking has occurred.⁴² For each test of whether the claim has substantive merit under the Takings Clause, the element of causation must be alleged.⁴³ The plaintiff must state in its complaint that the government-defendant was responsible for action that satisfies one of the standard tests under the Takings Clause.⁴⁴ Second, before addressing the merits, the plaintiff must allege—and ultimately prove as a threshold condition—that there is a sufficient causal connection between the plaintiff's injury and the named defendant.⁴⁵ These two allegations about causation—one going to the merits of the taking claim and one addressing a threshold condition—are not the same.

A. The Merits—Did the Defendant's Action Cause an Injury to the Plaintiff that Satisfies One of the Tests Under the Takings Clause?

The government does not have to initiate formal eminent domain proceedings to effect a taking for which just compensation is required.⁴⁶ A taking can occur when some exercise of government power in effect “takes” private property without providing just compensation.⁴⁷ The Supreme Court and lower courts have, over time, identified the types of government impacts on private property that give rise to arguable takings claims.⁴⁸

⁴⁰ *Id.* at 10-48.7 to .8.

⁴¹ *Id.* at 10-48.8.

⁴² *Id.* at 10-48.4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 8-15.

⁴⁷ *Id.*

⁴⁸ *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 394–95 (1994) (holding that a dedication requirement failed to demonstrate a reasonable relationship between the dedication and the impact of the proposed use of property); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (finding that total takings are compensable); *Hodel v. Irving*, 481 U.S. 704, 716–17

In *Lingle v. Chevron U.S.A., Inc.*,⁴⁹ the Supreme Court confirmed that in a non-eminent domain situation, when the government has not declared its intention to confiscate private property, a plaintiff seeking to bring a takings challenge against a government regulation may proceed only under one of four theories.⁵⁰ The first two theories, “physical takings” and “total regulatory takings,” both address categories of regulatory action that generally will be deemed per se takings for purposes of the Fifth Amendment.⁵¹ Regulatory takings challenges that fall “[o]utside these two relatively narrow categories” are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*.⁵² Additionally, as a final form of regulatory challenge, a plaintiff may allege an uncompensated taking when a land-use exaction violates the standards set out in *Nollan v. California Coastal Commission*⁵³ and *Dolan v. City of Tigard*.⁵⁴

1. Physical Takings

If government action or regulation causes private property to be physically occupied, the regulation is a categorical per se taking regardless of the reason for the occupation or the impact on the owner.⁵⁵ A per se taking of private property requires a permanent physical occupation or invasion, not simply a restriction on the use of the property.⁵⁶ “Permanent does not mean forever.”⁵⁷ Rather, it involves substantial physical intrusion of the property.⁵⁸ Moreover, the occupation does not need to be

(1987) (finding that a law abolishing the right of descent and devise was a taking of an essential property right); *Boyle v. United States*, 200 F.3d 1369, 1374 (Fed. Cir. 2000) (holding that at a minimum, government action must have destroyed, physically occupied, or excessively regulated plaintiff’s property for a takings claim to be stated); *Richardson v. Cox*, 26 P.3d 970, 976 (Wash. Ct. App. 2001) (ruling that construction of a public road across plaintiff’s land is a per se physical invasion taking absent a dedication of an easement by plaintiffs).

⁴⁹ 544 U.S. 528 (2005).

⁵⁰ *See id.* at 538–40.

⁵¹ *Id.* at 538.

⁵² 438 U.S. 104 (1978); *see also Lingle*, 544 U.S. at 538–40.

⁵³ 483 U.S. 825, 831–32 (1987).

⁵⁴ 512 U.S. 374, 384 (1994).

⁵⁵ *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (finding that an ordinance requiring landlords to install a cable box and wires in apartment building is a per se taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (finding the same for the imposition of navigational servitude).

⁵⁶ *See, e.g., Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1209 (10th Cir. 2009) (finding no per se physical taking because the statute amendments applied to all property owners, only limited the use of their property, and did not require property owners to deed portions of their properties to the state for public use).

⁵⁷ *Otay Mesa Prop. L.P. v. United States*, 86 Fed. Cl. 774, 786 (2009) (quoting *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991)) (internal quotation marks omitted).

⁵⁸ *Id.*

exclusive or continuous to constitute a taking.⁵⁹ Causation is relevant for physical takings because a court must first determine if the defendant, or some other entity, was responsible for the invasion, and second whether the physical invasion is substantial enough to constitute a per se taking.⁶⁰

2. Total Takings

A “total regulatory taking[]” is the second form of per se taking that the Supreme Court has recognized.⁶¹ If there has in fact been a total taking, this is the easiest case for a court to consider, but it is the most difficult kind of case for a plaintiff to prove. A regulation that denies an owner all economically viable use of property affected by the regulation is considered a categorical or “total” taking of the use value of that property interest.⁶² The case that confirmed this rule is *Lucas v. South Carolina Coastal Council*.⁶³ In *Lucas*, the Supreme Court held that when regulations deprive an owner of “all economically beneficial use” of the property, the government must pay just compensation, except to the extent that “background principles of nuisance and property law” apply.⁶⁴ The Court’s viewpoint is that the total deprivation of beneficial use is—from the property owner’s point of view—equivalent to a physical invasion, which itself is a per se taking.⁶⁵ A plaintiff alleging a total taking must show that the defendant—a government actor—was responsible for the loss, and that the loss was a deprivation of all beneficial and viable use of the property.⁶⁶

3. Regulatory Takings

The Supreme Court has explicitly recognized a type of unintentional taking that is a regulatory, rather than physical, interference.⁶⁷ These are known as regulatory takings,⁶⁸ and they occur when a law, ostensibly adopted under the police power, takes property by action “other than acquisition of title, occupancy, or physical invasion.”⁶⁹

⁵⁹ *Id.* (citing *Hendler*, 952 F.2d at 1377).

⁶⁰ *Id.*

⁶¹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (citation omitted).

⁶² *Id.* at 538.

⁶³ 505 U.S. 1003 (1992).

⁶⁴ *Id.* at 1029–30.

⁶⁵ *Id.* at 1017.

⁶⁶ *See id.* at 1016 n.6.

⁶⁷ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 516 (1987) (Rehnquist, C.J., dissenting).

⁶⁸ *See Lucas*, 505 U.S. at 1015. *See generally* STEVEN J. EAGLE, *REGULATORY TAKINGS* 3 (1996); Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 571–73 (2003).

⁶⁹ *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting); *see also Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123 n.25 (1978)

The kind of government action that causes a regulatory taking is an action seeking to restrict or limit the owner's use of property.⁷⁰ Such actions typically diminish, but do not entirely wipe out, the economic value of the property.⁷¹ In *Pennsylvania Coal Co. v. Mahon*,⁷² Justice Holmes stated that a regulatory law may be intended to be an exercise of the police power, but if a court believes the police power "reaches a certain magnitude" and thereby "goes too far,"⁷³ the regulation will have "gone beyond its constitutional power" and become a taking.⁷⁴

In *Penn Central*, the Supreme Court set out the modern test for when a regulation's economic impact on private property constitutes a taking.⁷⁵ The *Penn Central* Court decided that the "economic impact" of the law in question was only one of three "ad hoc, factual inquiries" that had particular significance to the takings determination.⁷⁶ The other two consider the "character of the governmental action" and its interference with the plaintiff's "investment-backed expectations."⁷⁷ The *Penn Central* decision acknowledges that economic impact has relevance to takings claims, but "reject[s] the proposition that diminution in property value, standing alone, can establish a 'taking.'"⁷⁸ In *Lingle* and other cases, the Supreme Court suggested that the *Penn Central* multi-factor balancing test should be the default test in most takings cases.⁷⁹ Consistent with the *Penn Central* test, then, the plaintiff must prove that the government-defendant both caused the loss of economic value and caused the interference with investment-backed expectations.

("[W]e do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel."); *Fruman v. City of Detroit*, 1 F. Supp. 2d 665, 676 (E.D. Mich. 1998) (holding that a government entity operating under its police powers can cause a taking).

⁷⁰ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537–38 (2005).

⁷¹ See, e.g., *Henry v. Jefferson Cnty. Comm'n*, 637 F.3d 270, 275 (4th Cir. 2011) (rejecting an argument that a regulatory taking occurred when county planning commission granted a property owner permission to build only 14 townhouses, rather than the 51 units to which he claimed he was entitled).

⁷² 260 U.S. 393 (1922).

⁷³ *Id.* at 413, 415.

⁷⁴ *Id.* at 413.

⁷⁵ *Penn Central*, 438 U.S. at 124; see also *Lingle*, 544 U.S. at 538–39 (acknowledging the *Penn Central* test as the modern test for regulatory takings).

⁷⁶ *Penn Central*, 438 U.S. at 124.

⁷⁷ *Id.* at 124, 127.

⁷⁸ *Id.* at 131.

⁷⁹ *Lingle*, 544 U.S. at 538. In both *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), the Court embraced the *Penn Central* test, especially when the issue involved deciding whether the government's action should be characterized as a physical per se taking or a regulatory taking. The Court in these cases evidenced a reluctance to find per se takings, opting instead for the flexibility of the *Penn Central* regulatory takings test. See *Tahoe-Sierra*, 535 U.S. at 326–27; *Palazzolo*, 533 U.S. at 635–36; see also *Lingle*, 544 U.S. at 538–39.

4. Land-Use Exactions

The final type of impact that may give rise to a takings action occurs when the government conditions land use on a dedication or transfer of private property interests.⁸⁰ In *Nollan* and *Dolan*, the Supreme Court held that for such an “exaction” to be upheld, there must be an essential nexus and reasonable relationship between the anticipated effects of a land use and the real property exaction.⁸¹ In exaction cases, causation is rarely an issue because the conditions on development being challenged are almost always imposed by the government-defendant.⁸² A different causation question arises in these cases: Did the proposed action by the property owner cause the problem that the condition is designed to correct?⁸³

B. Threshold Conditions in Takings Claims

Causation is also one of several threshold conditions that must be met before the merits of a takings case will even be considered.⁸⁴ These conditions arise either because they are mandated by the language of the Takings Clause or Article III,⁸⁵ or because the judiciary wants to avoid the task of deciding whether government action constitutes an unconstitutional taking.⁸⁶ If a threshold condition is not met, the court can dismiss on that ground alone, without ever reaching the merits.⁸⁷

The first such condition is that the interest affected by the action must be “private property” within the Fifth Amendment.⁸⁸ Second, the plaintiff must be capable of bringing a takings claim.⁸⁹ Third, the timing of the takings lawsuit must meet certain constitutional standards, and the action must be brought in the proper forum.⁹⁰ This condition is a barrier to takings litigation when the case is brought too early, or when it is brought in a federal court before state remedies have been exhausted.⁹¹ Finally, causation must be present.⁹² As a threshold condition, causation requires that the defendant be a government actor responsible for the harm alleged to be the taking of the private property interest.⁹³

⁸⁰ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987).

⁸¹ *Dolan*, 512 U.S. at 386, 391; *Nollan*, 483 U.S. at 837.

⁸² See, e.g., *Dolan*, 512 U.S. at 386, 391; *Nollan*, 483 U.S. at 837.

⁸³ See *Dolan*, 512 U.S. at 380–81.

⁸⁴ LAITOS, *supra* note 33, at IV-1.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at IV-1 to-2.

⁹⁰ *Id.* at IV-4 to -5.

⁹¹ *Id.* at IV-5.

⁹² *Id.* at IV-2 to -3.

⁹³ *Id.* at IV-3.

1. Is the Interest Taken Considered “Property” Protected by the U.S. Constitution?

The protections of the Takings Clause apply only to interests that qualify as “property.”⁹⁴ For Fifth Amendment purposes, the concept of property is not limited to real property or physical possessions; it can also include legal rights that are appurtenant to other rights such as ownership.⁹⁵ However, the Takings Clause does not apply to property rights that have been either voluntarily relinquished by the plaintiff or extinguished by operation of law.⁹⁶ The Takings Clause states that “private” property shall not be taken, but courts have occasionally construed this language to apply to federal actions that allegedly harm land owned by state and local government entities.⁹⁷ When the military destroys property that has been designated by the executive branch as enemy war-making property,⁹⁸ or when it freezes assets to prevent their use to support international terrorism,⁹⁹ the protections of the Fifth Amendment will not be extended.¹⁰⁰ Accordingly, regulatory measures that serve the interest of national security may not be compensable takings even if they adversely affect individual interests that have been deemed private property.¹⁰¹

2. Is the Plaintiff Capable of Initiating a Takings Action?

One important question is identifying *who* is a proper private party to initiate a takings claim against the government. Although the right to compensation for a taking may extend beyond the actual property owner (whose property has been taken) to those who have a legal status that runs with the land, a mere user or possessor of the property typically cannot bring a taking claim.¹⁰² Moreover, nonresident aliens with no voluntary or contractual relationship with the United States are also not entitled to Fifth Amendment rights.¹⁰³

⁹⁴ *Id.* at IV-1.

⁹⁵ *Id.* at IV-1 to -2, *see also* Phillips v. Wash. Legal Found., 524 U.S. 156, 156–57 (1998); United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945).

⁹⁶ LAITOS, *supra* note 33, at IV-1.

⁹⁷ *Id.*

⁹⁸ El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751, 764 (2003).

⁹⁹ *See* Paradissiotis v. United States, 304 F.3d 1271, 1275–76 (Fed. Cir. 2002).

¹⁰⁰ LAITOS, *supra* note 33, at IV-1.

¹⁰¹ *Id.*

¹⁰² Layne v. City of Manderville, 743 So. 2d 1263, 1268 (La. Ct. App. 1999); *see also* Johnson v. United States, 317 F.3d 1331, 1333–34 (Fed. Cir. 2003). The plaintiff must have standing to bring a takings claim. *See, e.g., Johnson*, 317 F.3d at 1334 (“When a plaintiff bring[s] an action on behalf of a corporation . . . but does not maintain shareholder status throughout . . . the litigation, the plaintiff no longer has standing to bring the action.”).

¹⁰³ Johnson v. Eisentrager, 339 U.S. 763, 782–84 (1950); Hoffman v. United States, 53 F. Supp. 2d 483, 490 (D.D.C. 1999).

3. Timing and Appropriate Forum

The jurisdictional “case/controversy” requirement found in Article III applies to takings claims.¹⁰⁴ A court cannot review a claim that is moot because it is brought too late, or that is not ripe because it is brought too early.¹⁰⁵ Mootness issues in takings claims are less frequent than ripeness issues, although a takings claim will be deemed moot if it is time-barred by a statute of limitations.¹⁰⁶ A takings lawsuit may be too early when: (1) it is a facial attack on the validity of the allegedly harmful government action, as opposed to an as-applied challenge, that must wait for the action to be applied to the plaintiff’s property, or (2) the plaintiff brings the action before first exhausting all possible remedies.¹⁰⁷

“[F]or an ‘as applied’ challenge, a property owner must obtain a *final* decision from the [local land-use authorities].”¹⁰⁸ Finality may require that before the property owner can claim that a regulatory restriction has taken the owner’s property, the owner must make “at least one ‘meaningful application’” for a development permit under the regulation.¹⁰⁹ “[I]t may also be necessary to (1) apply for a variance if the application is denied and (2) submit additional applications for other, less [ambitious or] intensive uses of the property that the regulatory authority might find acceptable.”¹¹⁰

If the property owner is dissatisfied or experiencing an adverse economic result because a relevant government entity has denied development or imposed restrictions

¹⁰⁴ LAITOS, *supra* note 33, at 10-5 to -7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; *see also* *Mildenberger v. United States*, 63 F.3d 938, 945 (Fed. Cir. 2011) (“Claims for compensation under the Tucker Act . . . are subject to a strict statute of limitations provision: ‘[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after the claim first accrues.’”) (citing 28 U.S.C. § 2501); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006), *cert. granted*, 550 U.S. 968 (2007) (granting certiorari to the limited question of whether the Tucker Act’s statute of limitations constitutes a clear congressional statement of a limit of the subject matter jurisdiction of the Court of Federal Claims), *aff’d*, 552 U.S. 130 (2008) (“Without a restriction on the time for contesting property development conditions, the government would be perpetually exposed to unlimited takings challenges.”); *Goodman v. United States*, 100 Fed. Cl. 289, 306 (2011); *Wilson v. Bd. of Cnty. Comm’rs of Teton*, 153 P.3d 917, 925 (Wyo. 2007).

¹⁰⁷ LAITOS, *supra* note 33, at 10-10.

¹⁰⁸ *Id.*; *see also* *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186–94 (1985); *Cooley v. United States*, 324 F.3d 1297, 1301–02 (Fed. Cir. 2003) (finding that if a permit denial is final, the takings claim based on denial is ripe).

¹⁰⁹ *See, e.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987); *see also, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985); *Burlington N. R.R. Co. v. United States*, 752 F.2d 627, 629 (Fed. Cir. 1985).

¹¹⁰ LAITOS, *supra* note 33, at 10-13 (citing *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 352–53 n.8 (1986)); *see also* *Christensen v. Yolo Cnty. Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993).

on it—or if the owner is making a facial challenge—the plaintiff owner must *exhaust state remedies* before seeking redress in federal court.¹¹¹ This requirement means that a plaintiff must “‘seek compensation through the procedures the State has provided for doing so’ before turning to the federal courts.”¹¹² If a party does not avail herself of state procedures to attempt to obtain compensation, a federal takings claim usually will not ripen.¹¹³ In *Williamson County Regional Commission v. Hamilton Bank*,¹¹⁴ the Court held that a plaintiff cannot sue under the Fifth Amendment in *federal court* until the plaintiff has exhausted “[s]tate . . . procedure[s] for seeking just compensation” in *state court*.¹¹⁵

“Even if a state does not have a compensation remedy available as a matter of state law, the United States Supreme Court has ensured that such a remedy is . . . available [in state court] under federal law.”¹¹⁶ But if the plaintiff brings a takings case in state court, a Fifth Amendment federal remedy in federal court may be unavailable.¹¹⁷ A private property owner who follows the *Hamilton Bank* exhaust-state-remedies requirement by bringing the action first in state court risks that court deciding that the claim is not a taking under state and federal takings law, in which case “*res judicata* and claim preclusion may prevent the Fifth Amendment claim from being subsequently argued in federal court.”¹¹⁸

4. Causation—Did the Plaintiff Sue the Correct Defendant?

Even if the claim is ripe, located in the proper court, and brought by the correct plaintiff alleging harm to “property” under the Fifth Amendment, judicial review of

¹¹¹ *Williamson Cnty. Reg’l Planning Comm’n*, 473 U.S. at 194–97.

¹¹² *Christensen*, 995 F.2d at 164 (quoting *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989)).

¹¹³ *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003) (“[S]tate and federal takings claims are premature . . . because plaintiffs have not exhausted their remedies under state law and thus have not established that the government is refusing to pay whatever compensation may be required by the Constitution.”); *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 381 (9th Cir. 2002).

¹¹⁴ 473 U.S. 172 (1985).

¹¹⁵ *Id.* at 195.

¹¹⁶ LAITOS, *supra* note 33, at 10-28; *see also* *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 321 (1987) (holding that because of the self-executing nature of the Fifth Amendment, a state court may not refuse to award just compensation under federal law when a taking is found).

¹¹⁷ *See, e.g., Wilkinson v. Pitkin Cnty. Bd. of Cnty. Comm’rs*, 142 F.3d 1319, 1324–25 (10th Cir. 1998).

¹¹⁸ LAITOS, *supra* note 33, at 10-29; *see also* *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 341, 346 (2005); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 950 (9th Cir. 2008); *Wilkinson*, 142 F.3d at 1324–25 (10th Cir. 1998); *Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1223 (9th Cir. 1998); *Palomar Mobilehome Park Ass’n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993); *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1058–59, 1061 (11th Cir. 1987); *Treister v. City of Miami*, 893 F. Supp. 1057, 1071 (S.D. Fla. 1992).

the takings claim may be avoided if the government-defendant can successfully show that it is not the entity responsible for causing the harm to the property owner.¹¹⁹ For the Takings Clause to apply, the plaintiff must demonstrate that the injury that is the subject of the claim was caused by the government-defendant, and not by someone or something else, such as an act of nature.¹²⁰ This threshold inquiry requires a determination of whether the defendant is the proper party for the plaintiff to sue, based on the nexus between the plaintiff's injury and the defendant's action.¹²¹

C. Problems with Causation as a Threshold Condition

The question of causation in a takings lawsuit is frequently overlooked by plaintiff's counsel, who too often assumes (or hopes) that the proper defendant is a deep-pocketed government actor with some connection to the plaintiff's injury. However, this issue of the wrong defendant is commonly litigated, especially when the government-defendant wishes to shift the blame elsewhere and when the government in fact may not be responsible for a private party's harm.¹²² Additionally, many litigants do not adequately address the causation threshold requirement because courts have not provided a consistent definition for what level of, or test for, causation applies.¹²³

"The [general rule for causation] can be stated simply: In order to have a legally cognizable takings claim, the property owner must demonstrate that the property has been taken because of the action of the [government-defendant]."¹²⁴ However, the presence of causation is not always an objective determination. Causation issues become complicated when the alleged harm is caused, either wholly or in part, by one or more parties other than the government-defendant or when nature and market forces contribute to the harm.¹²⁵ In such situations, the judicial decisions often turn on policy considerations.¹²⁶ Courts' differing interpretations of the purpose and meaning of the Takings Clause can lead to contrasting decisions regarding causation.¹²⁷ Until courts clarify the analytical framework for deciding these issues, litigants must attempt to decipher the multiple inconsistent decisions that address causation as a threshold condition for takings claims.

¹¹⁹ LAITOS, *supra* note 33, at IV-2.

¹²⁰ *Id.* at 10-48.9.

¹²¹ Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGICAL L.Q.* 307, 321-22 (2007).

¹²² See LAITOS, *supra* note 33, at 10-48.19.

¹²³ Meltz, *supra* note 121, at 321.

¹²⁴ LAITOS, *supra* note 33, at 10-48.6.

¹²⁵ See Meltz, *supra* note 121, at 322-23; see also *Jackson Court Condos. v. City of New Orleans*, 874 F.2d 1070, 1081 (5th Cir. 1989).

¹²⁶ See *Jackson Court Condos.*, 874 F.2d at 1081.

¹²⁷ See Meltz, *supra* note 121, at 321.

1. Causation and the State Action Doctrine

The Takings Clause is written in the passive voice—“nor shall private property be taken. . . .”¹²⁸ As such, the language of the Clause does not reveal who, or what, may not take private property without just compensation, nor does it reveal who is responsible for paying just compensation in the event of a taking. The Supreme Court has interpreted the Clause to apply to actions by both the federal government¹²⁹ and instrumentalities of state governments.¹³⁰ Therefore, to obtain relief under the Takings Clause, a property owner who believes it has suffered an unconstitutional taking of private property must (1) sue a state or federal entity, and (2) show that the government entity is the cause of the harm to the property.¹³¹

Because federal takings challenges are brought under the Constitution,¹³² and because the Takings Clause only applies to government-defendants,¹³³ the state action doctrine must be satisfied for all takings actions.¹³⁴ The state action doctrine holds that a constitutional challenge can be brought only when the conduct allegedly causing the deprivation of a constitutional right is attributable to the government—either a federal, state, or political subdivision.¹³⁵ This general state action precondition to triggering the protections of the Constitution overlaps with the Takings Clause’s causation requirement;¹³⁶ the lack of state action will entail the lack of takings causation.¹³⁷ Both concepts require the plaintiff to prove more than the existence of government action affecting private property.¹³⁸ They each involve consideration of whether there is a sufficient link between the government action and the harm to the plaintiff, and whether the government-defendant is responsible for that harm in its capacity as a

¹²⁸ U.S. CONST. amend. V.

¹²⁹ *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 250–51 (1833).

¹³⁰ *Chi., B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897); *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896).

¹³¹ LAITOS, *supra* note 33, at 10-48.5.

¹³² U.S. CONST. amend. V.

¹³³ *See Am. Bankers Mortg. v. Fed. Home Loan Mortg.*, 75 F.3d 1401, 1406 (9th Cir. 1996).

¹³⁴ *See, e.g., Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) (observing that state action must be present before plaintiffs can allege deprivation of a constitutional right).

¹³⁵ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 934–35 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

¹³⁶ *Compare City of Dall. v. CKS Asset Mgmt., Inc.*, 345 S.W.3d 199, 203 (Tex. Ct. App. 2011) (finding that the City caused the harm, but there was no state action because it behaved in the manner of a private party), *with Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (finding that the government was acting in its official capacity, but did not cause the harm).

¹³⁷ *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358–59 (1974) (finding that Pennsylvania was not the cause of the deprivation of property because a heavily regulated private utility company was not sufficiently connected to the state to be considered a state actor).

¹³⁸ *See id.* at 358 (holding that proving that a private company is under heavy state regulation is not enough to show state action).

state actor.¹³⁹ If a government actor engages in conduct that does not necessitate use of sovereign powers, the state action requirement may not be satisfied.¹⁴⁰

To satisfy the standards of these two concepts, the plaintiff must show that the government-defendant either intended to act in its sovereign capacity and *caused* the taking, or that the defendant's challenged actions created some legal compulsion resulting in the harm to the property.¹⁴¹ Legal compulsion becomes an issue when a plaintiff-property owner alleges that the government-defendant compelled a private party to act in a way that caused harm to the owner's property.¹⁴² If the private party's action is approved by the government—and if the government also encourages, coerces, induces, demands, or in some way requires the private action—then the government can be said to be the cause of the harm and is a proper defendant.¹⁴³ Conversely, the Takings Clause will not provide relief if the plaintiff's harm was caused by a non-government actor or some other factor that is not attributable to the government-defendant.¹⁴⁴ The question for both state action and the Takings Clause is whether the harm was inflicted by the government-defendant, or someone (or something) else.

2. Causation and Torts

“Causation” is a fluid concept with a meaning that can differ depending on the context in which it arises. The causation requirement in a takings challenge is similar to problems of causation in torts, in which not all actions that might have some connection to an injury are considered proximate enough to be fairly attributed to a defendant as a matter of common law policy.¹⁴⁵ In torts, proximate cause is essentially a product

¹³⁹ *Id.* at 354–59.

¹⁴⁰ *CKS Asset Mgmt., Inc.*, 345 S.W.3d at 203–04 (finding no state action when a government-defendant acted “akin to a private citizen” in a dispute over property ownership) (citation omitted); *see also* *Carolina Chloride, Inc. v. Richland Cnty.*, 714 S.E.2d 869, 877 (S.C. 2011) (“To prevail in [an inverse condemnation action], a plaintiff must prove ‘an affirmative, aggressive, and positive act’ by the government entity that caused the alleged damage to the plaintiff’s property.” (citing *WRB Ltd. P’ship v. Cnty. of Lexington*, 630 S.E.2d 479, 481 (S.C. 2006))).

¹⁴¹ *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (“The government effects a physical taking only where it *requires* the landowner to submit.”); *Greystone Hotel Co. v. City of N.Y.*, 13 F. Supp. 2d 524, 527 (S.D.N.Y. 1998).

¹⁴² *See, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass’n*, 396 F.3d 178, 187 (2d Cir. 2005).

¹⁴³ *Id.*; *see also* *Yee*, 503 U.S. at 527.

¹⁴⁴ *See, e.g.*, *DeShaney v. Winnebago Cnty. Soc. Servs. Dep’t*, 489 U.S. 189, 201 (1989) (rejecting a 42 U.S.C. § 1983 claim when a private actor caused the harm and the state had no duty to act).

¹⁴⁵ *See* *Hoover v. Pierce Cnty.*, 903 P.2d 464, 468 (Wash. Ct. App. 1995) (finding a Fifth Amendment taking when the government damages property by artificially channeling surface water, and distinguishing the case from government action that merely causes an increase in surface water that damages property).

of the underlying purpose and goals of tort law.¹⁴⁶ If the harm is completely unexpected and unforeseeable, proximate cause may not be satisfied.¹⁴⁷ An argument can be made that, as torts and takings share a common origin in property rights, the policies that form the boundaries for proximate cause in tort law should also apply to takings challenges.

Many torts causation concepts, however, such as enhanced risk of future harm, joint and several liability, concurrent causes, and mass torts, arguably do not have a place in takings jurisprudence. Moreover, different purposes underlie tort law and takings doctrine. The former is meant “to deter [private] conduct which has been identified as contrary to public policy and harmful to society,” and to make whole victims of such conduct.¹⁴⁸ The latter is to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁴⁹ The overlap between torts and takings, along with their conceptual differences, has required courts to decide which causation concepts should apply to the two kinds of claims.

3. How to Determine Causation in a Takings Case

The legal issue to be resolved by courts considering causation in a takings case is to try to determine who (or what) is the true cause of the harm suffered by the plaintiff.¹⁵⁰ This inquiry involves comparing the contribution of the government-defendant to all other potential causative factors and weighing the substantiality of their contributions to the plaintiff’s harm.¹⁵¹ Any supervening events that have an effect on the plaintiff’s injury must be considered.¹⁵² Another consideration that may have an effect on the judicial analysis of causation is the extent of the injury caused by each contributing factor, especially when there are potentially multiple causes.¹⁵³

Although plaintiffs bringing takings challenges often seem most impacted by decreases in the worth of their property, such issues involving diminution in economic value are secondary to the threshold question of causation.¹⁵⁴ Questions regarding the extent of an alleged decrease in value or imposition of additional costs will never be

¹⁴⁶ Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 75–76 (1975).

¹⁴⁷ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

¹⁴⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O’Connor, J., concurring).

¹⁴⁹ *United States v. Armstrong*, 364 U.S. 40, 49 (1960).

¹⁵⁰ LAITOS, *supra* note 33, at 10-48.6.

¹⁵¹ *See, e.g., Norman v. United States*, 429 F.3d 1081, 1088 (Fed. Cir. 2005) (finding that there were too many other causal factors, making the connection too attenuated to sustain a takings claim).

¹⁵² *See, e.g., id.*

¹⁵³ *See, e.g., Kau Kau Take Home No. 1 v. City of Wichita*, 135 P.3d 1221, 1226 (Kan. 2006) (finding that the harm was actually caused by the negligence of the contractors and not government action).

¹⁵⁴ *See Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 266 (Alaska 2000).

reached without a factual showing that the loss of value or additional cost is causally related to the government action.¹⁵⁵

The necessary causative link may be missing for a number of reasons. If the government is acting as a market participant, the takings claim will fail because the state action doctrine will not be satisfied.¹⁵⁶ If a causative connection cannot be drawn between the alleged taking and the government-defendant entity, if there was no government compulsion, or if the owner's harm is due to the voluntary participation of the owner, the takings claim cannot go forward against the named government-defendant.¹⁵⁷ Additionally, the merits of the taking claim will not be considered if the court finds that the plaintiff's property injury has been caused by: (1) another private party,¹⁵⁸ (2) another government actor,¹⁵⁹ (3) the plaintiff,¹⁶⁰ or (4) acts of nature.¹⁶¹

Causation plays a particularly critical role when a plaintiff's challenge to governmental regulation is neither a categorical per se taking nor a taking caused by an unconstitutional exaction, but is instead one of the more commonly occurring challenges to government actions recognized in *Lingle* as regulatory takings.¹⁶² Within this context, the most difficult of the five factual causation variants is when the government-defendant is involved in the impact to the plaintiff's property, but that involvement might be missing some elements necessary to trigger a takings challenge against that defendant.¹⁶³ This situation invokes the most disagreement among the courts.¹⁶⁴ Moreover, resolving this difficult issue is a way to resolve the question of causation for all the other factual variants.¹⁶⁵

II. THE FIVE FACTUAL SETTINGS

The resolution of causation problems in takings claims requires courts to focus narrowly on the particular facts at issue.¹⁶⁶ In any claim for just compensation, the

¹⁵⁵ *Id.*; see also *Weber v. Kenai Peninsula Borough*, 990 P.2d 611, 616 (Alaska 1999).

¹⁵⁶ *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 549 (2001); *LAITOS*, *supra* note 33, at 10-48.5.

¹⁵⁷ See, e.g., *Weber*, 990 P.2d at 616 (finding no causal connection between government action and harm).

¹⁵⁸ See, e.g., *Sullivant v. City of Okla. City*, 940 P.2d 220, 224 (Okla. 1997) (finding no taking when police damaged property in hot pursuit of a criminal suspect).

¹⁵⁹ See, e.g., *Jackson Court Condos. v. City of New Orleans*, 874 F.2d 1070, 1081 (5th Cir. 1989) (finding that the market caused the harm).

¹⁶⁰ See, e.g., *FDIC v. Griffin*, 935 F.2d 691, 699 (5th Cir. 1991) (deciding that the plaintiff's failure to reduce his agreements to writing caused the harm).

¹⁶¹ See, e.g., *Leeth v. United States*, 22 Cl. Ct. 467, 485 (1991) (finding that the harm was caused by nature and not the Truman Dam).

¹⁶² 544 U.S. 528, 539-40 (2005).

¹⁶³ See *LAITOS*, *supra* note 33, at 10-48.5 to .20.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed. Cir. 1993) (noting "the fact-intensive nature of just compensation jurisprudence").

causation analysis begins with an understanding of how, historically, judges have altered the tests that they use for causation according to the particular factual context that give rise to specific claims.¹⁶⁷ There are five types of factual situations in which causation issues commonly arise.¹⁶⁸

The first category consists of actions in which (1) the plaintiff alleges that a government-defendant acted in a way that resulted in harm to private property, and (2) the government-defendant concedes to having committed the act that the plaintiff believes was the cause of its harm.¹⁶⁹ Under these facts, the issue then becomes whether the government-defendant's conduct was the legal cause of the plaintiff's harm for the purposes of a takings claim.¹⁷⁰ A government-defendant's action will constitute a legal cause of a plaintiff's harm only when there is a sufficient nexus between the government act and the private harm.¹⁷¹ Consistent with the state action doctrine, every claim brought under the Fifth Amendment must have a government actor as the defendant.¹⁷² The first category is characterized by the extent of involvement of that government action with the plaintiff's injury.¹⁷³

The second factual category involves action taken by a private party pursuant to government regulation that results in harm to a plaintiff–property owner.¹⁷⁴ If one were to consider the enactment of regulation to be “government action,” these facts could theoretically fit into the first category. However, the second factual category is different because of the contribution of the additional action by a private party.¹⁷⁵ In other words, the plaintiff is not alleging that government's enactment of regulation independently caused the plaintiff–property owner's harm. Rather, the plaintiff is arguing that the government's action caused the harm in concert with the action of some other private party. As such, the court's analysis must be adjusted to address the relationship between the government regulation, a private party's action taken pursuant to the regulation, and the harm to the plaintiff–property owner.¹⁷⁶

The third category implicates the *plaintiff* as the causative actor responsible for the plaintiff's harm.¹⁷⁷ For this category, there may have been a government act, but

¹⁶⁷ See Meltz, *supra* note 121, at 321–22.

¹⁶⁸ See *infra* Part II.

¹⁶⁹ See, e.g., *Dunn v. City of Milwaukie*, 250 P.3d 7, 9–10 (Or. Ct. App. 2011) (holding that the government was still the cause of the damage even though damage was unintended).

¹⁷⁰ See, e.g., *id.* at 11 (finding that the government was the legal harm).

¹⁷¹ See *id.* at 9.

¹⁷² *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 50 (1999).

¹⁷³ See *Dunn*, 250 P.3d at 8.

¹⁷⁴ *Abdullah v. Comm'r of Ins.*, 84 F.3d 18, 22 (1st Cir. 1996) (finding that the insurance company acting pursuant to state insurance law was not a state actor).

¹⁷⁵ Compare *Dunn*, 250 P.3d 7 (finding the government's own sewage system caused the harm), with *Abdullah*, 84 F.3d at 22 (finding harm was caused by insurance company applying insurance law).

¹⁷⁶ See *Abdullah*, 84 F.3d at 22.

¹⁷⁷ See, e.g., *FDIC v. Griffin*, 935 F.2d 691, 699 (5th Cir. 1991).

the plaintiff's own decisions may have been responsible for the injury.¹⁷⁸ The fourth category fingers nature, or some economic system, as the true source of the plaintiff's problems.¹⁷⁹ The government-defendant is thought to play a de minimus role.¹⁸⁰ The final category considers whether the blame should be placed on some third party, not the government-defendant.¹⁸¹ As with the other categories, the government-defendant may have taken an action but the plaintiff's harm seems more traceable to the action of someone else.¹⁸²

A. Government Involved, but Involved Enough?

When government action indirectly damages private property, a plaintiff may bring a takings claim for just compensation.¹⁸³ A government-defendant wishing to avoid a plaintiff's takings claim may argue that the harm resulting from its action was not intended, not foreseeable, or not a direct result of the action.¹⁸⁴ One consequence of this defense is that the claim should be brought as a tort rather than as a taking.¹⁸⁵ The issue in such cases is not whether the government committed the action, but whether, as a matter of causation, the government should be held responsible for the consequences of that action.¹⁸⁶

For example, in *Dunn v. Milwaukie*, the government-defendant did not dispute that it conducted hydrocleaning of sewer lines, which resulted in harm to the plaintiff's private property.¹⁸⁷ Instead, causation became an issue when the government-defendant alleged that the plaintiff's claim for just compensation failed because the government did not intend to cause intrusion of sewage and odor into the plaintiff's home, and because the harm was not a usual result of hydrocleaning.¹⁸⁸ Similarly, in *Arkansas Game & Fish Commission v. United States*, a case involving flooding and destruction of private property allegedly caused by a dam that was built by the government-defendant, the government-defendant did not dispute that it built the dam.¹⁸⁹ Instead, it argued that the claim sounded in tort, and thus the Federal Claims Court had no jurisdiction over it.¹⁹⁰ The crux of the government-defendant's argument in *Arkansas*

¹⁷⁸ See, e.g., *id.*

¹⁷⁹ See, e.g., *Leeth v. United States*, 22 Cl. Ct. 467, 485 (1991).

¹⁸⁰ See, e.g., *id.*

¹⁸¹ See, e.g., *Sullivant v. City of Okla. City*, 940 P.2d 220, 224 (Okla. 1997).

¹⁸² See, e.g., *Mongrue v. Monsanto Co.*, 249 F.3d 422, 429 (5th Cir. 2001) (finding that Monsanto had not been conferred the powers of eminent domain).

¹⁸³ See, e.g., *Dunn v. City of Milwaukie*, 250 P.3d 7, 9–10 (Or. Ct. App. 2011).

¹⁸⁴ See, e.g., *id.*

¹⁸⁵ See *infra* note 249.

¹⁸⁶ *Id.*

¹⁸⁷ 250 P.3d at 9.

¹⁸⁸ *Id.*

¹⁸⁹ 637 F.3d 1366, 1367 (Fed. Cir. 2011).

¹⁹⁰ *Id.* at 1376.

was that even if the alleged harm did result from government action, the damages to the plaintiff's property were merely consequential and thus did not give rise to an action under the Takings Clause.¹⁹¹

*Barnes v. United States*¹⁹² and *Moden v. United States*¹⁹³ are two additional cases with facts falling within the first factual category. In *Barnes*, the plaintiff alleged that a dam, built by the government in an effort to control the flood of a river, resulted in the flooding of adjacent privately owned land.¹⁹⁴ In *Moden*, the plaintiff alleged that a harmful chemical leaked from an Air Force base onto the plaintiff's nearby property, causing extensive damage that amounted to a taking.¹⁹⁵ As in *Dunn* and *Arkansas*, the defendants in these cases conceded to having committed the act, but contested the existence of the necessary nexus between that act and the harm experienced by the plaintiff–property owner.¹⁹⁶

Also included in this first factual category are takings claims in which the plaintiff alleges that the government caused harm by entering into an international agreement.¹⁹⁷ Actions taken by the legislative and executive branches of the United States government for foreign policy reasons can occasionally harm private domestic entities.¹⁹⁸ The private entities that have experienced such negative economic impacts may advance the theory that they have suffered an unconstitutional taking caused by the federal government's manipulation of the relevant market.¹⁹⁹ The success of such a claim, however, turns on the question of who, or what, really caused the plaintiff's harm.²⁰⁰

Apart from the United States, there are three other sources often identified as being responsible for the plaintiff's harm. In each of these three alternative explanations for the plaintiff's harm, the United States concedes its complicity in the international agreement.²⁰¹ “A reviewing court might ask if the plaintiff's own actions have in some way produced the harm it is experiencing.”²⁰² Second, “[t]he United States may try to show that it should not be made to pay compensation under the Fifth Amendment when the taking was actually caused by foreign actors.”²⁰³ Third, the federal government may assert that any adverse effect on American parties was due to the economic market, not the treaty or agreement.²⁰⁴

¹⁹¹ *Id.* at 1373.

¹⁹² 538 F.2d 865 (Ct. Cl. 1976).

¹⁹³ 404 F.3d 1335 (Fed. Cir. 2005).

¹⁹⁴ *Barnes*, 538 F.2d at 870.

¹⁹⁵ *Moden*, 404 F.3d at 1338.

¹⁹⁶ *Id.* at 1342–43; *Barnes*, 538 F.2d at 872.

¹⁹⁷ See LAITOS, *supra* note 33, at 10-48.20 to .22.

¹⁹⁸ *Id.* at 10-48.20.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See generally *id.* at 10-48.20 to .22.

²⁰² *Id.* at 10-48.21 (citing *McKay v. United States*, 199 F.3d 1376 (Fed. Cir. 1999)).

²⁰³ *Id.* (citing *Anglo Chinese Shipping Co. v. United States*, 127 F. Supp. 553 (Ct. Cl. 1995); *Huther v. United States*, 145 F. Supp. 916 (Ct. Cl. 1956)).

²⁰⁴ *Id.* (citing *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988)).

B. The Other Four Factual Settings

1. Actions by Private Parties, Taken Pursuant to State or Federal Law, that Damage Private Property

Sometimes private action is tantamount to a government taking, even though a private party accomplished the actual taking.²⁰⁵ However, “[a]s a general proposition,” under the state action doctrine, “an action simply taken *pursuant to* state or federal statute that affects a private party” is not attributable to the government for the purposes of a “constitutional challenge to the action. The same rule applies with respect to the Takings Clause: The fact that the conduct that harms a property owner is authorized by federal or state law does not necessarily mean that the conduct is government action under the Fifth Amendment.”²⁰⁶

For example, in *Abdullah v. Commissioner of Insurance of Massachusetts*, the central issue was whether actions by a third party insurance company, taken pursuant to state insurance law, gave rise to a takings claim against the state.²⁰⁷ Similarly, the plaintiffs in *Harms v. City of Sibley* claimed that a city’s action in rezoning a business property to allow for construction and operation of a cement mixing plant was the true cause of harm to their property.²⁰⁸ The reviewing court had to determine whether it was the city’s action in rezoning the property or the third party’s construction and operation of the plant pursuant to the rezoning that resulted in the harm to the plaintiff.²⁰⁹

²⁰⁵ *Id.* at 10-48.7 (citing *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992); *Richards v. Wash. Terminal*, 233 U.S. 546 (1913); *Flagg v. Yonkers Savs. & Loan Ass’n*, 396 F.3d 178 (2d Cir. 2005)).

²⁰⁶ *Id.* at 10-48.6 to .7; *see B & G Enters., Ltd. v. United States*, 220 F.3d 1318, 1325 (Fed. Cir. 2000) (holding that a federal statute conditioning receipt of funds by the state on the limitation of tobacco sales did not directly restrict the placement of cigarette vending machines and therefore did not constitute a taking); *Broad v. Sealaska Corp.*, 85 F.3d 422, 431 (9th Cir. 1996); *Fidelity Fin. Corp. v. Fed. Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986); *Casa de Cambio Comdiv S.A. de C.V. v. United States*, 48 Fed. Cl. 137, 142 (2000) (holding that Treasury’s likely expectation that a private party would debit plaintiff’s account did not make that debiting an act of the Treasury under the Takings clause); *Cranley v. Nat’l Life Ins. Co. of Vt.*, 144 F. Supp. 2d 291, 303 (D. Vt. 2001) (holding that a decision made by an insurance company to reorganize, based on state reorganization statute, did not involve state action); *see also Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 163 (1978) (holding that a warehouse owner’s proposed sale of goods entrusted to him for storage to execute a lien under state statute did not constitute state action). *See generally* J. David Beemer, *The Evolution of the “Essential Nexus”*: *How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 375–76 (2002).

²⁰⁷ 84 F.3d 18, 22 (1st Cir. 1996).

²⁰⁸ 702 N.W.2d 91, 101 (Iowa 2005).

²⁰⁹ *See id.* at 96.

As *Abdullah* and *Harms* illustrate, an action as simple as the enactment of a zoning law could potentially result in a takings claim being alleged against the government.²¹⁰ Therefore, when a plaintiff claims that the government should be held responsible for actions of third parties taken pursuant to a law, it is necessary to undertake a careful analysis of the relationship between the government-defendant's law and the third party's action. For example, *Navajo Nation v. United States*²¹¹ involved a "mutual consent" requirement that was imposed by the United States Department of Interior on two Indian tribes that shared joint and undivided interests in the same land.²¹² The requirement, which mandated that the Hopi and the Navajo tribes obtain each other's written consent before undertaking development projects in the region, was later codified by Congress.²¹³ Thereafter, the Hopi imposed a moratorium on all further Navajo construction activities.²¹⁴ When the Navajo tribe filed a claim against the United States government for just compensation, "[it] argued that the mutual consent requirement 'constitute[d] a continuing taking of [its] property without just compensation and violate[d] the trust responsibility owed by [the United States] to the [Navajo Nation] as an Indian Tribe.'"²¹⁵ The issue to be decided by the Federal Circuit was whether the government's codification of the mutual consent requirement had caused the harm to the plaintiff for purposes of a takings action.²¹⁶

When a takings suit involves some action by a state-run third party taken pursuant to federal authorization, the federal government-defendant may argue that because the state acquired the interest first, the federal government had only acted consistently with the pre-existing state's interest and therefore was not responsible for the private injury.²¹⁷ This was the defense offered by the United States Army Corps in *National Food & Beverage Co. v. United States*.²¹⁸ There, a state-run entity commandeered privately owned land chosen by the Corps as necessary for a hurricane protection project and granted the federal government a "right of entry" to the commandeered property.²¹⁹ The federal government subsequently entered and removed clay from the property for use in repairing a damaged hurricane levee.²²⁰ The court's causation analysis involved an examination of the precise relationship between the federal government-defendant's authorization of the hurricane protection project and the state-run third party that had commandeered the private property.²²¹

²¹⁰ See *Abdullah*, 84 F.3d at 21–22; *Harms*, 702 N.W.2d at 99.

²¹¹ 631 F.3d 1268 (Fed. Cir. 2011).

²¹² *Id.* at 1270.

²¹³ *Id.* at 1271.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 1273.

²¹⁷ See *Nat'l Food & Beverage Co. v. United States*, 96 Fed. Cl. 258, 264–66 (2010).

²¹⁸ *Id.*

²¹⁹ *Id.* at 261.

²²⁰ *Id.*

²²¹ *Id.* at 264–66.

2. Is the Plaintiff–Property Owner the Cause of the Taking?

Occasionally, a government-defendant to a takings action will claim that the harm experienced by the plaintiff–property owner was caused not by the government, but was instead due to the property owner’s decisions or actions.²²² If the government’s defense is successful, causation is missing and a reviewing court need not address the merits of the takings claim.²²³ For example, “[a] property owner is responsible for a law’s adverse effect on the property when the owner makes decisions which then [trigger the law].”²²⁴ If an owner *voluntarily* rents land to tenants, and if a rent control law subsequently changes the nature of the leasing arrangement such that the tenants remain, the owner cannot claim the law has caused a per se taking by physical invasion.²²⁵ The owner’s act of permitting the tenants access in the first place resulted in their occupation of the property.²²⁶ It is only when the law in question effects “required acquiescence” that it may be identified as the cause of the occupation.²²⁷

There are three ways in which a court reviewing a claim for just compensation may find that property owners are responsible for the taking of their property as a result of their own voluntary behavior. First, an owner’s actions may have put the property in jeopardy of being taken.²²⁸ This finding may occur if the taking is a consequence of the owner’s failure to take certain actions that would have preserved the interest.²²⁹ The owner, not the government, is the cause of a taking if the owner destroys or voluntarily relinquishes control over, or consents to an occupation of, the property alleged to have been taken.²³⁰ The owner is the cause when the owner either abandons the property or acquires property that is, by its geographical configuration, at risk of being adversely affected by later government action.²³¹

²²² LAITOS, *supra* note 33, at 10-48.13.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Yee v. City of Escondido*, 503 U.S. 519, 527–28 (1992).

²²⁶ *Id.*

²²⁷ *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987); *Gulf Power Co. v. United States*, 998 F. Supp. 1386, 1392–93, 1395 (N.D. Fla. 1998); *see also Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 179, 181 (1872).

²²⁸ *See, e.g., FDIC v. Griffin*, 935 F.2d 691, 699 (5th Cir. 1991); *Oblin Homes, Inc. v. Vill. of Dobbs Ferry*, 935 F. Supp. 497, 499–500 (S.D.N.Y. 1996); *Worsley Cos., Ins. v. Town of Mount Pleasant*, 528 S.E.2d 657, 660 (S.C. 2000); *Dean v. Lehman*, 18 P.3d 523, 530, 533 (Wash. 2001).

²²⁹ *Griffin*, 935 F.2d at 699; *Oblin Homes*, 935 F. Supp. at 499–500; *Worsley*, 528 S.E.2d at 660; *Dean*, 18 P.3d at 533 (holding that deductions from funds received by prison inmates to assist in costs of incarceration do not constitute takings).

²³⁰ *See, e.g., Dep’t of Transp. v. Hewett Prof’l*, 895 P.2d 755, 763 (Or. 1995) (“Here, it was [the property owner], not ODOT [Oregon Department of Transportation], that demolished the Sylvan Building.”).

²³¹ *See, e.g., Anthony v. Franklin Cnty.*, 799 F.2d 681, 685–86 (11th Cir. 1986) (“The plight in which [the property owners] claim to find themselves has not been produced by the county [which terminated public ferry service to the owner’s island] but by nature itself.”).

*Rocket Oil & Gas Co. v. Donabar*²³² is an example of how an interest in private property can be abandoned by a property owner.²³³ In this case, the property owner failed to demonstrate his intention to retain his mineral interest in property, by either filing notice or some other title transaction, after the mineral deeds were filed in a gas company's chain of title.²³⁴ The legal cause of the lapse of mineral rights was found to be the property owner's failure to preserve his interests, not the action of the state in having the mineral rights lapse.²³⁵

Second, the owner may be said to have caused the taking when the property purchased by the owner is subject to limitations already imposed by background principles of the state's law of property and nuisance.²³⁶ When a limitation "inheres in the title itself," the owner cannot claim that state action consistent with the limitation has brought about a taking.²³⁷

Third, a property owner has caused the taking when the owner assumes the risk of subsequent regulatory control.²³⁸ This occurs if it was unreasonable for the owner to expect that the property would not be subject to some future liability or restriction.²³⁹ In this situation, the owner cannot claim that a law has effected a taking by its interference with reasonable investment-backed expectations.²⁴⁰ The owner's expectations should have included some subsequent regulatory condition affecting the property.²⁴¹

3. Has the Taking Been Caused by Acts of Nature or Normal Market Forces?

One frequently occurring factual situation giving rise to an inverse condemnation claim is when a private owner's property is flooded and the flooding is arguably the

²³² 127 P.3d 625 (Okla. Civ. App. 2005).

²³³ *Id.* at 636.

²³⁴ *Id.* at 638; *see also* *United States v. Locke*, 471 U.S. 84, 89 (1985) (holding that the failure to comply with a recording requirement constitutes an abandonment of a mining claim).

²³⁵ *Rocket Oil & Gas*, 127 P.3d at 637 (citing *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982)).

²³⁶ *See, e.g.*, *Hendler v. United States*, 38 Fed. Cl. 611, 615 (1997) (observing that persons who have created or maintained a nuisance are subject to the "nuisance exception" to the Takings Clause).

²³⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). When common law property doctrine imposes limitations that are inherent in the title *and* government regulatory action deprives an owner of the use of his property, a court will have to determine on a case-by-case basis which limitation—the owner's title or the regulation—is the cause of the taking. *See, e.g.*, *Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994) (holding that despite deed restrictions in the title, the regulatory actions of the federal government caused the taking).

²³⁸ *See, e.g.*, *Branch v. United States*, 69 F.3d 1571, 1582 (Fed. Cir. 1995); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994); *Burditt v. U.S. Dep't of Health & Human Servs.*, 934 F.2d 1362, 1376 (5th Cir. 1991).

²³⁹ *Branch*, F.3d at 1582; *Golden Pacific Bancorp*, 15 F.3d at 1074; *Burditt*, 934 F.2d at 1376.

²⁴⁰ *See Connolly v. Pension Benefits Guar. Corp.*, 475 U.S. 211, 226–27 (1986).

²⁴¹ *Id.* at 227.

result of some government action, such as the operation of a dam,²⁴² flood control improvement,²⁴³ or drainage system.²⁴⁴ In such cases, if factors other than the government-defendant are responsible for the harm suffered by the plaintiff, including acts of nature such as storm events, or the decision of the plaintiff to build on a flood plain, the defendant will not be found to be the cause of the taking.²⁴⁵ This rule applies generally to factual situations in which the government's actions produce harm in concert with acts of nature.²⁴⁶ For example, an owner's home can be destroyed by a fire that was initially ignited by a government entity, but became out of control due to unexpected winds.²⁴⁷ In these cases, the plaintiff must marshal facts that demonstrate that the government is the party responsible for the plaintiff's injuries, despite being, at most, an indirect cause.²⁴⁸ Such plaintiffs risk a court characterizing an action not as a taking, but as, at most, a tort.²⁴⁹

If the nature of the harm experienced by the property owner is some diminution in the economic value of the property, an important causation issue is whether a government actor is responsible for this loss or whether negative price and property value changes are simply the result of normal market forces.²⁵⁰ When the effects of a law depend upon a buyer's possible action in a market, it may be that marketplace realities—not the action of the state—are responsible for depressed property values.²⁵¹ The market-as-cause explanation for financial loss or failure is especially likely when the owner takes a knowledgeable risk in purchasing property, only to see its value plummet when market and legal forces conspire to depress economic conditions.²⁵²

²⁴² See, e.g., *Leeth v. United States*, 22 Cl. Ct. 467, 485 (1991).

²⁴³ See, e.g., *Belair v. Riverside Cnty. Flood Control Dist.*, 764 P.2d 1070, 1071 (Cal. 1998).

²⁴⁴ *Hoover v. Pierce Cnty.*, 903 P.2d 464, 468 (Wash. Ct. App. 1995).

²⁴⁵ *Belair*, 764 U.S. at 1075, 1080.

²⁴⁶ See, e.g., *Teegarden v. United States*, 42 Fed. Cl. 252, 257 (1998) (holding that the Forest Service's decision to focus fire extinguishing efforts in high priority areas did not amount to a taking of plaintiff's land).

²⁴⁷ See, e.g., *Thune v. United States*, 41 Fed. Cl. 49, 53–54 (1998) (holding that although the plaintiff's claim would sound in tort, he could not recover on a taking theory because the damage was caused by “intervening government impropriety or unanticipated natural events”).

²⁴⁸ See *Teegarden*, 42 Fed. Cl. at 257; *Applegate v. United States*, 35 Fed. Cl. 406, 417–18 (1996) (finding that issues of material fact precluded summary judgment as to whether there was a taking of beachfront property through erosion due to a federal harbor project).

²⁴⁹ *Teegarden*, 42 Fed. Cl. at 257; *Thune*, 41 Fed. Cl. at 53–54.

²⁵⁰ See, e.g., BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 147–48 (1977).

²⁵¹ *Sanitation & Recycling Indus., Inc. v. City of N.Y.*, 928 F. Supp. 407, 417 (S.D.N.Y. 1996); *Callaway Cmty. Hosp. v. Sullivan*, 784 F. Supp. 693, 698–99 (W.D. Mo. 1992).

²⁵² See, e.g., *Jackson Court Condos. v. City of New Orleans*, 874 F.2d 1070, 1081 (5th Cir. 1989) (“[The owner] took a knowledgeable risk in purchasing the property and failed. It was the market, rather than the City, which deprived [the owner] of that potential use.”); *Adams v. United States*, 20 Cl. Ct. 132, 138 (1990) (“Under this alleged set of facts, the market, not the [government], took plaintiffs' investments.”).

4. Has the Taking Been Caused by Some Third Party Who Is Not the Government-Defendant?

To avoid judicial review of the merits of a plaintiff's takings claim, a government-defendant may claim that its actions are not the cause of the plaintiff's alleged harm.²⁵³ To support this argument, the defendant can point to some other person or entity as being the true cause of the taking.²⁵⁴ Defendants assert this "it is not my fault" defense most frequently when they are able to identify another government or private actor that is more responsible for the plaintiff's harm.²⁵⁵

a. Another Government Actor

A government entity that has been sued under the Takings Clause can sometimes identify the action of another government entity as the true source of the taking.²⁵⁶ For example, if the United States government causes harm to a property owner by physically appropriating the property pursuant to express or implicit authority, it may be a proper defendant to a takings claim.²⁵⁷ However, if the defendant can show that the appropriation was not authorized, but rather was an ultra vires act of a government official, it may be able to avoid liability for the alleged harm.²⁵⁸ Similarly, when the allegedly harmed property is located in or under the control of a foreign nation, the United States may claim that the other nation is the cause of the taking.²⁵⁹ It is also conceivable for state and federal law to work together to effectuate a taking.²⁶⁰ When an owner is deprived of property by a combination of state and federal law, it must decide whether the state or federal regulatory entity (or both) is the cause of the harm.²⁶¹

b. Another Private Party

Sometimes a government-defendant will argue that the Takings Clause does not apply because the plaintiff's harm was caused not by the government, but instead by a private party.²⁶² To trigger the Takings Clause, the defendant must (1) be responsible

²⁵³ LAITOS, *supra* note 33, at 10-48.17 to .18.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 10-48.18.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 10-48.19 to .20.

for the harm, and (2) be a government entity.²⁶³ Consider, for example, damages caused to a store by a fleeing criminal who is being pursued by city police.²⁶⁴ The store owner will not be able to sue the city to recover for damages to the store because the police did not create the harmful situation and did not cause the criminal to enter the store.²⁶⁵ Moreover, if the criminal is deemed to be a private party rather than a government actor, the state action doctrine will prevent the store owner from invoking the protections of the Fifth Amendment.²⁶⁶ In considering whether the state action doctrine is satisfied, courts look for sufficient government control of, or nexus to, the defendant.²⁶⁷

III. GOVERNMENT ACTION AND THE TORT/TAKINGS DISTINCTION

The general rule for deciding causation issues that arise when choosing the proper defendant in a takings claim requires a “[plaintiff–]property owner [to] demonstrate that [its] property has been taken *because of* the action of the defendant–government entity.”²⁶⁸ This rule, which is derived from the language of the Takings Clause of the Fifth Amendment, requires causation between the plaintiff’s harm and the defendant,²⁶⁹ it allows for compensation only when a property owner can show that her property was taken as a result of some action by a government–defendant.²⁷⁰

The Takings Clause’s “because of” requirement does not describe what type of causation is required.²⁷¹ Consequently, litigants in takings actions frequently argue for and against competing formulations of causation.²⁷² The resulting undefined standard for causation has produced excessive litigation, and has left judges unable to standardize a coherent test for determining the proper defendant when a taking is alleged.²⁷³

To determine whether a particular act has caused an outcome, one must first define the term “cause” with some degree of precision.²⁷⁴ The word “causation” tends to invoke at least two separate concepts: (1) cause-in-fact and (2) proximate, or legal

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 10–48.6; *see also* United States v. Green, 33 F. Supp. 2d 203, 228 (W.D.N.Y. 1998).

²⁶⁹ LAITOS, *supra* note 33, at 10–48.5.

²⁷⁰ *Id.*

²⁷¹ *See id.*, at 10–48.5 to .6 (discussing the court’s application of the causation requirement).

²⁷² *See In re Smith v. Town of Mendon*, 4 N.Y.3d 1, 24 (Ct. App. 2004) (noting various tests for takings cases).

²⁷³ Kenneth Salzberg, “Takings” as Due Process, or Due Process as “Takings”?, 36 VAL. U. L. REV. 413, 413 n.* (2002).

²⁷⁴ It is important to note that “intent” is a concept which is distinct from the concept of “causation,” although the two ideas are often intertwined when causation is analyzed in takings actions. The distinction between “intent” and “causation” is significant for purposes of the following discussion outlining the history of causation analysis under the Fifth Amendment.

cause.²⁷⁵ A defendant's act is a cause-in-fact of a plaintiff's injury when, as a factual matter, the defendant's act contributed to producing the injury.²⁷⁶ Proximate cause is a policy-based legal limit on cause-in-fact that turns on whether the plaintiff's harm was a foreseeable result of the defendant's act.²⁷⁷ For purposes of this Article, we will assume that causation means "cause-in-fact," and we will use the term "legal causation" to refer to judicially imposed limits on harm for which a defendant may be held responsible.

Cause-in-fact and proximate cause concepts are used to determine liability in both tort claims and takings claims.²⁷⁸ However, standards of legal causation may be more difficult to meet for the purposes of establishing a taking than for prevailing on claims based in tort.²⁷⁹ For example, a defendant may be held liable in tort for the foreseeable incidental and consequential damages resulting from its negligent actions.²⁸⁰ By contrast, just compensation under the Fifth Amendment will not be provided for incidental and consequential harm resulting from an act of the government-defendant in a takings action.²⁸¹ When a plaintiff alleges that government action has caused a taking under the Fifth Amendment, its ultimate goal is to obtain just compensation for the alleged harm.²⁸² However, before a court will entertain the plaintiff's action, it must decide whether the claim is a tort or a taking.²⁸³ This section will examine the difference between torts and takings, and explore the various ways that federal and state courts have distinguished them.

A. *The Tort/Takings Distinction*

One heavily litigated causal concept that arises in takings claims is the "tort/takings distinction."²⁸⁴ When faced with a takings challenge, a government-defendant—especially a federal government-defendant—may concede that the action at issue did

²⁷⁵ See Martin J. Katz, *The Fundamental Incoherence of Title VII*, 94 GEO. L.J. 489, 495–96 (2006) (citing 5 ENCYCLOPEDIA OF PHILOSOPHY 60 (Paul Edwards ed., 1973)) (discussing two distinct concepts of causation in the law—"cause in fact" and "proximate cause"); see also H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 112 (2d ed. 1985).

²⁷⁶ See Katz, *supra* note 275, at 495 n.18.

²⁷⁷ See *id.*

²⁷⁸ See *Troup v. Fischer Steel Corp.*, 236 S.W.3d 143, 146–49 (Tenn. 2007); *Ventures Nw. Ltd. P'ship v. State*, 914 P.2d 1180, 1187 (Wash. Ct. App. 1996).

²⁷⁹ See *infra* notes 284–87 and accompanying text.

²⁸⁰ *Holladay v. Speed*, 208 S.W.3d 408, 415 (Tenn Ct. App. 2005).

²⁸¹ See *Ridge Line v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

²⁸² See U.S. CONST. amend. V (stating that there must be "just compensation" for a government taking of private property for public use).

²⁸³ See *City of Dall. v. Jennings*, 142 S.W.3d 310, 316 (2004) (discussing the difference between a tort and a constitutional taking).

²⁸⁴ See *Hansen v. United States*, 65 Fed. Cl. 76, 79 (2005) ("One issue that has over the decades divided this court is the distinction between torts and takings under the *Takings Clause of the Fifth Amendment*.").

stem from the government, but then argue that the action was actually a tort for which the reviewing court lacks jurisdiction.²⁸⁵ The primary purpose of the tort/takings distinction test is to resolve this jurisdictional issue: if the action resulted in a taking, then the reviewing court has jurisdiction to address the merits of the claim.²⁸⁶ If the result of the action was instead a tort, the takings claim must be dismissed.²⁸⁷

On the federal level, the importance of distinguishing between a tort and a taking derives primarily from a long-established reading of the Tucker Act.²⁸⁸ The Tucker Act pertains to the United States Court of Federal Claims (Court of Claims)²⁸⁹ and proscribes jurisdiction over claims sounding in tort.²⁹⁰ Pursuant to this act, federal courts have developed a general standard for determining whether a plaintiff's claim is properly brought as a taking.²⁹¹ State courts have also distinguished between torts and takings for jurisdictional purposes.²⁹²

Prior to the enactment of the Tucker Act in 1887, the Court of Claims had jurisdiction only over "claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."²⁹³ Although jurisdiction did not yet extend to cases arising under the Constitution, the Court of Claims recognized takings claims based on

²⁸⁵ *See id.*

²⁸⁶ *Id.*

²⁸⁷ *See Struthers v. City of Seattle*, No. 63943-9-I, No. 65201-0-I, 2011 Wash. App. LEXIS 878, at *9 (Wash. Ct. App. Apr. 18, 2011) ("[N]ot every government action that takes, damages, or destroys property is a taking." (citations omitted)).

²⁸⁸ 28 U.S.C. § 1491 (2006); *see also infra* notes 299–301 and accompanying text.

²⁸⁹ The Court of Claims originated in 1855 when it was created by Congress to provide for the determination of private claims against the United States. *United States Court of Federal Claims: The Peoples Court*, U.S. COURT OF FED. CLAIMS, available at http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited May 1, 2012). Today, the Court has nationwide jurisdiction over most suits for monetary damages against the federal government and sits, without a jury, to determine issues of law and fact and render final judgments. *Id.* This jurisdiction includes claims against the United States for just compensation brought under the Fifth Amendment. *Id.* Many state courts find the decisions of the Court of Claims to be persuasive authority. *See, e.g., Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005) ("Because the federal and state constitutional provisions regarding takings are nearly identical, federal cases interpreting the federal provision are persuasive in our interpretation of the state provision."). For a more detailed explanation of the history and jurisdiction of the Court of Claims, see U.S. COURT OF FED. CLAIMS, <http://www.uscfc.uscourts.gov> (last visited May 1, 2012).

²⁹⁰ *Hansen v. United States*, 65 Fed. Cl. 76, 95 (2005).

²⁹¹ *Id.* at 95 ("The general takings analysis in the Federal Circuit has been organized into a two-part prima facie test, requiring a plaintiff to demonstrate (1) a relevant property interest and (2) a government action that has resulted in a taking." (citing *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004))).

²⁹² *See, e.g., Struthers*, 2011 Wash. App. LEXIS 878, at *10 (applying a "necessary incident" test to determine whether a plaintiff's claim was properly brought as a taking).

²⁹³ Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855).

a theory of a breach of implied contract between the federal government and private parties.²⁹⁴ This practice was sanctioned by the Supreme Court.²⁹⁵ Under the implied contract theory, a plaintiff may prevail in a takings challenge if it proves that government action resulted in a breach of the implied contract not to “take” private property without providing just compensation.²⁹⁶ For such a claim to be successful, a plaintiff owner must show that the government-defendant subjectively intended to cause the harm to the plaintiff’s private property.²⁹⁷ Federal courts still use a subjective intent inquiry as part of the tort/takings distinction test.²⁹⁸

When the government enacted the Tucker Act, it waived sovereign immunity with respect to takings actions brought by private parties directly under the Fifth Amendment.²⁹⁹ The Tucker Act states in pertinent part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.³⁰⁰

Since the passage of the Tucker Act, a plaintiff that suffers a taking by the federal government is no longer required to establish a contractual claim for liability to

²⁹⁴ See, e.g., *Shreve v. United States*, 8 U.S. Cong. Rep. C.C. 205 (Ct. Cl. 1860); *Wirt v. United States*, 6 U.S. Cong. Rep. C.C. 172 (Ct. Cl. 1858); *Wilkes v. United States*, 6 U.S. Cong. Rep. C.C. 167 (Ct. Cl. 1858). As noted by the Court of Federal Claims in *Hansen v. United States*, “[t]his was an adaptation of the common law principle that plaintiffs could waive the tort that deprived them of property and sue in assumpsit.” 65 Fed. Cl. 76, 107 (2005) (citing *Jones v. Hoar*, 22 Mass. 285 (1827)).

²⁹⁵ *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884) (“Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant’s cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded ‘upon any contract, express or implied, with the government of the United States.’” (citations omitted)).

²⁹⁶ *Id.* at 657.

²⁹⁷ See *Hansen*, 65 Fed. Cl. at 96.

²⁹⁸ See *Ridge Line v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

²⁹⁹ 28 U.S.C. § 1491(a) (2006).

³⁰⁰ *Id.* State courts also recognize that sovereign immunity from takings actions is waived when state constitutions provide for just compensation remedies. For example, the Texas Constitution provides for adequate compensation as a remedy for takings caused by the government. TEX. CONST. art. I, § 17(a). Texas courts have held that, pursuant to this express constitutional waiver, governmental immunity does not shield government actors from an action for compensation under the takings clause. *City of Dall. v. CKS Asset Mgmt., Inc.*, 345 S.W.3d 199, 201 (Tex. App. 2011).

obtain just compensation.³⁰¹ Thus, the enactment of the Tucker Act prompted federal courts to formulate a causation-based standard to determine if a claim could be heard as a taking.

State courts have followed suit and developed their own tests for deciding whether a plaintiff's takings claim needs to be refiled as a tort.³⁰² Although state jurisdiction is not constricted by the Tucker Act,³⁰³ it is still important to distinguish a plaintiff's claim as either a tort or a taking, because the two claims usually require different elements of proof.³⁰⁴ For example, in *City of Tyler v. Likes*,³⁰⁵ the Texas Supreme Court held that "[a] person's property may be 'taken, damaged, or destroyed' and therefore require compensation if an injury results from either the construction of public works or their subsequent maintenance and operation. However, mere negligence which eventually contributes to the destruction of property is not a taking."³⁰⁶ *Tyler* was remanded to the trial court for further proceedings on the sole issue of whether the government-defendant was negligent when it took action that harmed the plaintiff.³⁰⁷ There, negligence could result in only a tort at best.³⁰⁸ And torts against state governments often must confront either the barrier of governmental immunity or the conditions of Governmental Tort Claims Acts.³⁰⁹

Policy reasons may also influence the decision to distinguish between torts and takings.³¹⁰ A policy against governments acting as de facto insurers against destructive acts of nature seemed to influence the court in *Struthers v. City of Seattle*.³¹¹ There, the government-defendant constructed a storm water outfall facility to channel water through pipes that bypassed the plaintiff's property.³¹² For decades, the facility worked according to its design and without incident.³¹³ It was only when the pipes fell into disrepair that damage to plaintiff's property began to occur.³¹⁴ The Washington Court of Appeals noted that "the City is not an insurer against all flood damage," and that in this case, "damage allegedly caused by the government negligently failing to properly maintain an outfall facility constructed years ago gives rise to a tort claim, not an

³⁰¹ See *Hansen*, 65 Fed. Cl. at 96.

³⁰² See *infra* notes 369–88 and accompanying text.

³⁰³ 28 U.S.C. § 1491(a) (2006).

³⁰⁴ See *infra* notes 369–73 and accompanying text.

³⁰⁵ 962 S.W.2d 489 (Tex. 1997).

³⁰⁶ *Id.* at 504–05 (citations omitted).

³⁰⁷ *Id.* at 505.

³⁰⁸ *Id.* at 504–05.

³⁰⁹ See, e.g., *Barton v. City of Midwest City*, 257 P.3d 422, 427 (Okla. Civ. App. 2011).

³¹⁰ See *infra* notes 311–16 and accompanying text.

³¹¹ No. 63943-9-I, No. 65201-0-I, 2011 Wash. App. LEXIS 878 (Wash. Ct. App. Apr. 18, 2011).

³¹² *Id.* at *2.

³¹³ *Id.* at *13–14.

³¹⁴ *Id.*

inverse condemnation claim.”³¹⁵ Accordingly, the trial court’s dismissal of the inverse condemnation claim on summary judgment was affirmed.³¹⁶

B. The Federal Tort/Takings Tests

The Federal Circuit has adopted a tort-taking inquiry that determines whether “treatment under takings law, as opposed to tort law, is appropriate under the circumstances.”³¹⁷ It is generally accepted that the major difference between a tort and a taking is that an injury which is only “in its nature indirect and consequential” is no more than a tort, and cannot be a taking.³¹⁸ *Ridge Line, Inc. v. United States*³¹⁹ is a frequently cited case that sets forth the modern two-part analysis for distinguishing between torts and takings within the Federal Circuit:

First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. . . . Second, the nature and magnitude of the government action must be considered.³²⁰

The *Ridge Line* decision incorporates both “intent” and “causation” requirements by stating the first prong of the test in the disjunctive: *either* intent or causation is sufficient for the government action to be considered a taking.³²¹ If the plaintiff to a takings action does not show that the government-defendant “intentionally appropriated” the plaintiff’s property, then the reviewing court must determine whether the harm was the “direct, natural, or probable result” of the government’s action—a taking—or “merely an incidental or consequential injury, perhaps compensable as a tort.”³²² According to *Ridge Line*, the “direct, natural, or probable result” standard will be satisfied—and the action will be a taking—if the plaintiff–property owner’s harm was the “predictable result” of the government action.³²³ The causation analysis can be confusing because it combines tort law’s traditional cause-in-fact requirement with a more limited

³¹⁵ *Id.* at *14. (citing *Peterson v. King Cnty.*, 252 P.2d 797, 800 (Wash. 1953)).

³¹⁶ *Id.* at *20.

³¹⁷ *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

³¹⁸ *See Sanguinetti v. United States*, 264 U.S. 146, 150 (1924); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 172 (1871).

³¹⁹ 346 F.3d 1346 (Fed. Cir. 2003).

³²⁰ *Id.* at 1355 (citations and internal quotation marks omitted). Within the Federal Circuit, the *Ridge Line* test “must be utilized in distinguishing a taking from a tort in inverse condemnation cases.” *Moden v. United States*, 60 Fed. Cl. 275, 282 (2004).

³²¹ *Ridge Line*, 346 F.3d at 1355.

³²² *Id.* at 1356.

³²³ *Id.*

standard for proximate cause that forecloses compensation for incidental or consequential injuries.³²⁴

The second prong of the *Ridge Line* test is less concerned with intent and causation, but it is just as important when distinguishing between a tort or a taking. It requires that a court look to the merits of the claim to “consider whether the government’s interference with any property rights of [the plaintiff] was substantial and frequent enough to rise to the level of a taking.”³²⁵ For example, in a case concerning aerial invasions of private property, the Court of Federal Claims noted that “[n]either this court, the Federal Circuit, nor the Court of Claims has held that a two-month increase in the number or intensity of flight operations at a military installation is sufficient to effect a taking of an avigation easement over nearby land.”³²⁶ As a result of this finding, the alleged harm caused by the invasions failed to satisfy the second prong of the *Ridge Line* test and did not rise to the level of a compensable taking.³²⁷

The tort/takings distinction test from *Ridge Line* reflects the close historical relationship between tort and takings, as it involves causal concepts that are inherent in both.³²⁸ The *Ridge Line* test holds that intent is not necessarily an essential element of a taking.³²⁹ It incorporates aspects of the negligence analysis from torts and uses a tort-like proximate cause test whereby the government is deemed the cause of the harm if the government’s action is (a) the cause-in-fact of the harm and (b) the proximate cause of the harm, with “proximate cause” defined as a natural, continuous, and uninterrupted flow of events between the government-defendant’s actions and the plaintiff’s harm with no superseding cause to remove liability from the government-defendant.³³⁰ When applying this test, judicial opinions sometimes refer to the consequential damages rule, which is essentially the same as a proximate cause test: causation is missing under the consequential damages rule when the actions of the defendant are too remote from the harm for liability to attach to the defendant.³³¹

The first prong of the *Ridge Line* test is usually applied by first checking for intent, and if no intent is found, ascertaining causation.³³² When *Ridge Line* framed its analysis of causation, it relied on precedent to explain what might be a “direct, natural, or probable result” of an action by government.³³³ To illustrate what this causation standard entails, *Ridge Line* cited several previously used causative formulations.³³⁴ A probable

³²⁴ See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 102–04 (N.Y. 1928).

³²⁵ *Ridge Line*, 346 F.3d at 1357.

³²⁶ *Goodman v. United States*, 100 Fed. Cl. 289, 316 (2011).

³²⁷ *Id.* at 316–17.

³²⁸ *Hansen v. U.S.*, 65 Fed. Cl. 76, 96–97 (2005).

³²⁹ *Ridge Line*, 346 F.3d at 1355–56.

³³⁰ *Id.*

³³¹ See, e.g., *Hansen*, 65 Fed. Cl. at 108.

³³² *Id.* at 113–14.

³³³ 346 F.3d at 1356.

³³⁴ *Id.*

result may be: (1) a “direct or necessary result,”³³⁵ (2) a result that could have been “foreseen or foretold,”³³⁶ or (3) a result that was within the natural order of events.³³⁷ *Ridge Line* cited a well-known analysis from *Cotton Land v. United States*³³⁸:

If engineers had studied the question in advance they would, we suppose, have predicted what occurred. If they had studied the question in advance and had said, in a report, “If you build Parker Dam to a crest of 450.4 feet, the pool will cover the land described below. The effect of the flow of the river into the pool will be to form a delta which, within approximately three years will raise the bed and the surface of the river, will cause it to overflow its banks and will thus inundate the lands described below,” would the fact of that formal forewarning be a decisive fact in such a suit as this? Should the fact that the engineering study was not so complete as to include a prediction as to lands beyond the bed of the reservoir prevent a court from looking at the actual and natural consequence of the Government’s act?³³⁹

In *Cotton Land*, the Court of Claims looked to the law of torts when faced with a “remoteness of cause” defense raised by the government-defendant in a taking claim.³⁴⁰ The government-defendant erected a dam that set in motion a chain of events eventually resulting in the flooding of the plaintiff–property owner’s land.³⁴¹ The court found that although the harm was not the direct result of the government’s action, there was no intervening event breaking the chain of causation, and therefore the harm to the land was foreseeable and the flooding was the actual and natural consequence of the government’s act.³⁴² The *Cotton Land* analysis used a tort-like proximate-cause

³³⁵ *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924).

³³⁶ *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921) (noting that the movement of percolating waters is hidden and thus the harm produced from such waters is unforeseeable).

³³⁷ *See Cotton Land Co. v. United States*, 75 F. Supp. 232, 233 (Ct. Cl. 1948).

³³⁸ *Id.*

³³⁹ *Id.* at 233–34.

³⁴⁰ *Id.* at 233 (“In the law of torts, the remoteness is usually produced by some unforeseeable or so-called intervening cause, which is said to break the chain of legal connection between the defendant’s act and the plaintiff’s loss. By that test, the company’s loss in this case was not legally remote.”).

³⁴¹ *Id.* at 232–33. Specifically, the government built a dam that impounded the waters of a river and formed a lake. *Id.* Thereafter, the river began to deposit its sand at the point where it collided with still waters of the lake. *Id.* The sand deposit obstructed the “full and rapid flow of the river[, thus] filling up [] the bed of the river [and] rais[ing] the level of its water [so that the river] overflowed its banks” and flooded the plaintiff’s nearby land. *Id.*

³⁴² *Id.* at 233–35.

test and explicitly rejected any notion of subjective foreseeability in favor of (at least implicitly) an objective test.³⁴³

In support of its test, *Ridge Line* also cited to the Supreme Court's decision in *John Horstmann Co. v. United States*, which was issued at a time when the Supreme Court still used an implied contract approach to determine whether the Court of Claims had jurisdiction over a takings action.³⁴⁴ In *Horstmann*, the Court denied compensation to a plaintiff even though a government-defendant's action was a cause-in-fact of the alleged harm.³⁴⁵ The claim failed because the requirement of subjective, specific intent was not met—the harm, which was caused by the movement of hidden percolating underground waters, was unforeseeable.³⁴⁶

The requirement of subjective intent in *Horstmann* seems to contradict the analysis in *Cotton Land*, which used a more objective test to search for causation.³⁴⁷ This apparent contradiction may be one reason that the *Ridge Line* standard sometimes spurs controversy and has the potential to produce conflicting results.³⁴⁸ For example, in *Moden v. United States*, the litigants proposed different outcomes under the causation prong of the *Ridge Line* tort/takings distinction test because they construed the *Ridge Line* standard in different ways.³⁴⁹ The *Moden* court attempted to clarify the *Ridge Line* standard by focusing on the role of foreseeability.³⁵⁰ However, this approach was sharply criticized in another decision of that court, *Hansen v. United States*.³⁵¹ The *Hansen* decision claimed that the *Moden* court “misconstrue[d] and overemphasize[d] the role of foreseeability when applying the traditional tort-standard of causation to a takings claim.”³⁵²

In *Moden*, the plaintiff and the federal government offered contrasting versions of the *Ridge Line* “direct, natural, or probable result” standard.³⁵³ The government contended that the injury resulting from the act must be foreseeable, whereas the Modens contended that the government act need only be the “cause-in-fact” of the resulting injury.³⁵⁴ Under a pure cause-in-fact test, it does not matter if a result is intended, subjectively foreseen, or objectively foreseeable. What does matter is whether the harm would not have occurred but for the government's action. The Court of Claims' decision in *Moden* focused on the foreseeability feature of the *Ridge Line* analysis, however, requiring the Modens to show evidence that the harm was the foreseeable

³⁴³ *Id.* at 234–35.

³⁴⁴ 257 U.S. 138, 141 (1921).

³⁴⁵ *Id.* at 146.

³⁴⁶ *Id.*

³⁴⁷ See *Cotton Land Co.*, 75 F. Supp. at 233–34.

³⁴⁸ See *Hansen v. United States*, 65 Fed. Cl. 76, 112–15 (2005).

³⁴⁹ 60 Fed. Cl. 275, 282–83, 288–89 (2004).

³⁵⁰ *Id.* at 283–86, 289.

³⁵¹ 65 Fed. Cl. At 97.

³⁵² *Id.* (citation omitted).

³⁵³ *Moden*, 60 Fed. Cl. at 278–79.

³⁵⁴ *Id.*

or predictable *result* of the government defendant's action.³⁵⁵ The case was dismissed because the Modens failed to establish a genuine issue of material fact as to the foreseeability of the harm.³⁵⁶

In *Hansen*, the Court of Claims criticized the emphasis that the *Moden* decision placed on foreseeability when determining causation.³⁵⁷ The defendant in *Hansen* relied on the Court of Claims' decision in *Moden* for the proposition that subjective foreseeability was relevant when analyzing causation in a takings action:

Generally, the government argues that [it should not be liable because] its agents at the Forest Service . . . never contemplated that burying EDB [a toxic chemical] at the Work Center might cause groundwater contamination that would spread to the local water supply. Moreover, even if it was possible to foresee the likelihood of contamination, the government claims that the Forest Service had no knowledge at the time the EDB was buried that EDB was a dangerous contaminant that, once introduced to the local water supply, would cause the underground water to be unsafe for virtually any ordinary use.³⁵⁸

According to *Hansen*, the focus should not be placed on a requirement of foreseeability per se, but rather on the traditional tort-causation prong of the *Ridge Line* test under which "the role of subjective elements such as the government's intent or whether it actually foresaw the harm are obviated."³⁵⁹ The *Hansen* court further noted that the *Moden* decision incorrectly applied foreseeability "not to a determination of the predictability of whether the government's actions *caused* the harm in question, but, rather, to whether the government's agents did or should have known that their actions would *result* in harm."³⁶⁰ According to the *Hansen* court, the *Moden* analysis made the categorical mistake of equating foreseeability with specific intent and not causation.³⁶¹

Although *Hansen* had criticized *Moden*'s approach to the tort/takings distinction, *Moden* was nonetheless affirmed on appeal.³⁶² The appellate decision by the Federal Circuit Court of Appeals did, however, briefly note that the Court of Federal Claims' inquiry into the actual knowledge of the government defendant in *Moden* was "too

³⁵⁵ *Id.* at 289.

³⁵⁶ *Id.* at 289–90.

³⁵⁷ *Hansen*, 65 Fed. Cl. at 97.

³⁵⁸ *Id.* at 97–98.

³⁵⁹ *Id.* at 98.

³⁶⁰ *Id.* at 119 (emphasis added).

³⁶¹ *Id.*

³⁶² *Moden v. United States*, 404 F.3d 1335, 1346 (Fed. Cir. 2005).

strict a requirement since it is subjective and requires specific knowledge.”³⁶³ The Court of Appeals summarized the situation as follows: “[T]he government’s interpretation requires that the injury was the likely *result of the act*, whereas the Modens’ interpretation requires only that the act was the likely *cause of the injury*.”³⁶⁴ The government found support for its contention in *Ridge Line*, in which the standard set forth referred to a “‘direct, natural, or probable *result*,’ not a direct, natural, or probable *cause*.”³⁶⁵

Thus, the uneasy status of the tort/takings distinction in the Federal Circuit seems to hinge on a requirement of causation plus something more—an injury that is foreseeable.³⁶⁶ If the plaintiff’s injury is found to be the objectively foreseeable or predictable “result” of a government act, the act may be deemed a taking.³⁶⁷ But when the government’s act merely “caused the injury,” without more, the claim is instead a tort at most.³⁶⁸

C. State Tort/Takings Distinction Test(s)

On the state level, courts may have jurisdiction to decide takings claims as well as claims that sound in tort, but they must still distinguish between torts and takings when determining whether a reviewing court can address the merits of a claim for just compensation.³⁶⁹ In general, the tort/takings tests used by state courts resemble the federal formulations in which a taking requires the government to satisfy requirements of causation and/or intent.³⁷⁰ However, state courts do not always apply tests that are equivalent to the federal formulations. Some state courts hold that intent is a necessary prerequisite to finding a taking as opposed to a tort.³⁷¹ Some courts allow an inference of intent to be drawn from the government-defendant’s action if the natural and ordinary consequence of that action is a substantial interference of property rights.³⁷² Other state courts allow a takings claim to proceed even though the government act that allegedly resulted in the harm was only a substantial concurrent cause.³⁷³

³⁶³ *Id.* at 1344 n.3.

³⁶⁴ *Id.* at 1343 (emphasis added).

³⁶⁵ *Id.* (emphasis added).

³⁶⁶ The *Moden* court stated that “[i]n addition to causation, an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury.” *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 1345.

³⁶⁹ *See, e.g.,* *Dunn v. City of Milwaukie*, 250 P.3d 7, 8 (Or. Ct. App. 2011).

³⁷⁰ *See* *Doner v. Zody*, 958 N.E.2d 1235, 1248 (Ohio 2011) (applying the “two part inquiry” from *Ridge Line* to distinguish between a tort and a taking); *see also* *infra* note 374 and accompanying text.

³⁷¹ *MBP Corp. v. Bd. of Trs. Galveston Wharves*, 297 S.W.3d 483, 488 (Tex. Ct. App. 2009) (stating that a requisite intent is needed for a takings case).

³⁷² *See* *infra* note 376 and accompanying text.

³⁷³ *See* *infra* note 387 and accompanying text.

The government-defendant in *Dunn v. City of Milwaukie* argued that the plaintiff's cause of action did not satisfy the elements of a taking because it failed to set forth evidence that the government either intended to cause a taking, or substantially interfered with the plaintiff's private property.³⁷⁴ The government-defendant relied on a prior holding by the Oregon Supreme Court that "a claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property."³⁷⁵ However, the Oregon Supreme Court opinion noted that "[a] factfinder may infer the intent to take from the governmental defendant's action if . . . the natural and ordinary consequence of that action was the substantial interference with property rights."³⁷⁶ The causation issue in *Dunn* boiled down to whether the harm resulting from the city's routine hydrocleaning was sufficiently "unnatural" or "extraordinary" to defeat a takings claim, or if the harm was a "natural and ordinary consequence" of the government action and thus the claim could proceed.³⁷⁷

In *Struthers v. City of Seattle*,³⁷⁸ the Court of Appeals of Washington applied a "necessary incident" test to determine whether public interference with private lands amounted to a taking.³⁷⁹ The opinion quoted the Washington Supreme Court in holding that "not every government action that takes, damages, or destroys property is a taking."³⁸⁰ To establish a takings claim, the plaintiff was required to prove that the interference was "reasonably necessary" to the maintenance or operation of property devoted to a public use.³⁸¹ The court held that "where a municipality devotes property to public use and damage to the private property results from the negligent maintenance of the public property, an inverse condemnation claim may not exist."³⁸²

In *California State Automobile Association Inter-Insurance Bureau v. City of Palo Alto*,³⁸³ the California Court of Appeals was faced with the issue of how to apply a troubling conceptual premise for causation that had been set forth by the California Supreme Court: "A property owner may recover just compensation from a public entity for 'any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed . . . whether foreseeable or

³⁷⁴ 250 P.3d at 8.

³⁷⁵ *Id.* at 10 (quoting *Vokoun v. City of Lake Oswego*, 56 P.3d 396, 401 (Or. 2002)).

³⁷⁶ *Id.* (alteration in original).

³⁷⁷ *Id.* at 10–11.

³⁷⁸ *Struthers v. City of Seattle*, No. 63943-9-I, No. 65201-0-I, 2011 Wash. App. LEXIS 878, at *14 (Wash. Ct. App. Apr. 18, 2011) ("[I]n this case, damage allegedly caused by the government negligently failing to properly maintain an outfall facility constructed years ago gives rise to a tort claim, not an inverse condemnation claim.").

³⁷⁹ *Id.* at *9–10.

³⁸⁰ *Id.* at *9.

³⁸¹ *Id.* at *10.

³⁸² *Id.* at *11.

³⁸³ 41 Cal. Rptr. 3d 503 (Ct. App. 2006).

not.”³⁸⁴ A subsequent California Supreme Court decision identified the problem with its earlier articulation of proximate causation: “Our [prior] decision . . . contained the seeds of confusion through its combination of ‘proximate cause’ terminology with the elimination of foreseeability as an element of inverse condemnation.”³⁸⁵

The Court of Appeals tried to reconcile this inconsistency by holding that to establish the element of proximate causation for a claim of inverse condemnation, a plaintiff must prove “a ‘substantial cause-and-effect relationship which excludes the probability that other forces alone produced the injury.’”³⁸⁶ The cause-and-effect relationship may exist even when an independent force contributes to the injury as long as the injury occurred in substantial part because of the governmental act.³⁸⁷ In California, it appears that a takings claim may proceed against a government-defendant when (1) the government act is the substantial cause of the plaintiff’s injury, and (2) if other forces alone would not have caused this injury.³⁸⁸

IV. JUDICIAL DETERMINATION OF CAUSATION UNDER THE OTHER FOUR FACTUAL SETTINGS

The cases discussed in Part IV involve situations in which a government-defendant to a takings action argues that some other party, entity, or occurrence is the true cause of the plaintiff’s alleged harm. The state action doctrine may also be implicated when more than one party is involved in the setting that produces the harm to the plaintiff–property owner and one of those parties is not a government actor.³⁸⁹ For either situation, the threshold question for a takings action becomes: Is a third party, entity, or natural occurrence the cause of the harm, or does the government-defendant’s involvement in the harmful action justify a finding that it should be held responsible for providing just compensation?

A. Actions by Private Parties, Taken Pursuant to State or Federal Law, Damage Private Property

Sometimes, government authorization permits a private party to take action that may ultimately result in harm to another private party’s property.³⁹⁰ When a plaintiff attempts to sue a government-defendant for enacting a law or regulation that enables a private party to cause harm to the plaintiff’s property, a reviewing court must determine whether the action of the private party, taken pursuant to the law or regulation,

³⁸⁴ *Id.* at 506 (alteration in original) (citation omitted).

³⁸⁵ *Belair v. Riverside Cnty. Flood Control Dist.*, 764 P.2d 1070, 1074 (Cal. 1988).

³⁸⁶ *Id.* at 1074 (citation omitted).

³⁸⁷ *Id.* at 1075.

³⁸⁸ *Id.*

³⁸⁹ *See infra* Part IV.D.

³⁹⁰ *See infra* Part IV.A.1.

is the cause of the plaintiff's harm, or if the law itself is the cause of the harm.³⁹¹ If the private party's action is shown to be the true cause of the harm, the plaintiff's only remedy may be to bring a tort claim against the private party.³⁹²

If there is no "causal connection"³⁹³ between an authorizing statute and the consequence alleged to be a taking, the statute is not the cause of the possible Fifth Amendment violation.³⁹⁴ On the other hand, the government is the cause of the harm and a proper defendant in a takings action if: (1) the action by a private party that has harmed a private property owner was required by the government, (2) there is a sufficient nexus between the government action and the action of the private party, or (3) the harm is a foreseeable and inevitable consequence of the government action.³⁹⁵

1. Has Government Required the Private Action?

A government entity will be held responsible for a taking if it *requires* a property owner to engage in a physical occupation of another private property.³⁹⁶ The government's requirement of the plaintiff's submission is the key to this concept of physical occupation.³⁹⁷ The government's authorization of the "compelled physical taking" triggers the Takings Clause and subjects the government to liability.³⁹⁸

Courts traditionally look to the character of the government action to determine whether the action is a permanent physical occupation of property.³⁹⁹ For example, the analysis of the character of the government law or regulation was the test used to find a taking in *Loretto v. Teleprompter Manhattan CATV Corp.*⁴⁰⁰ There, a state regulation required landlords to permit a cable company to install cable cords on rental property.⁴⁰¹ That regulation satisfied the government action requirement for purposes of a takings claim.⁴⁰² Similarly, in *Pumpelly v. Green Bay Co.*,⁴⁰³ statutory authorization of a dam that caused flooding of private lands was sufficient to trigger a Takings Clause violation because the regulation compelled the building of the dam, which resulted in flooding—a physical occupation of private property.⁴⁰⁴

³⁹¹ See *infra* Part IV.A.1.

³⁹² See *infra* Part II.A.

³⁹³ See, e.g., *Abdullah v. Comm'r of Ins.*, 84 F.3d 18, 22 (1st Cir. 1996).

³⁹⁴ *Id.*

³⁹⁵ LAITOS, *supra* note 33, at 10-48.8.

³⁹⁶ *Id.* at 10-48.9.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

⁴⁰⁰ *Id.* at 441.

⁴⁰¹ *Id.* at 421.

⁴⁰² *Id.*

⁴⁰³ 80 U.S. 166 (1872).

⁴⁰⁴ *Id.* at 177-80.

In *Abdullah v. Commissioner of Insurance*,⁴⁰⁵ the plaintiff claimed that a statute caused a taking because it resulted in higher insurance rates.⁴⁰⁶ The statute required plaintiff's insurance carrier to analyze certain risk factors when setting insurance rates or premiums.⁴⁰⁷ However, the plaintiff was unable to show that the risk assessment would necessarily result in confiscatory rates.⁴⁰⁸ Because the statute did not result in the particular harm suffered by the plaintiff per se, there was no causal connection between the statute and the rates claimed to be confiscatory.⁴⁰⁹

Although "the legislature may legalize what would otherwise be a public nuisance, it may not confer immunity from action for a private nuisance" if such immunity ultimately results in a taking of private property for public use.⁴¹⁰ In *Richards v. Washington Terminal Co.*, Congress had authorized the defendant, a private railroad operating company, to construct a tunnel in the middle of an inhabited portion of the city.⁴¹¹ The tunnel had a portal that allowed gasses and smoke generated by the engines of the trains to escape.⁴¹² The gas and smoke caused special and peculiar damage to the plaintiff's property, which was located in close proximity to the portal.⁴¹³ The Court found that the damage caused by the escaping gas and smoke was a necessary consequence of the portal, and thus Congress could not authorize the imposition of the burden on the plaintiff's property without providing just compensation.⁴¹⁴ The Court distinguished between the damage attributable to the gases and smoke from the engines in the tunnel, which was actionable as a taking, and the smoke emitted from the engines on the tracks adjacent to private lands, for which there was no right of action.⁴¹⁵

A taking will not be found when the government only regulates the consequences that may occur after one private party voluntarily permits occupation by another private party.⁴¹⁶ When the required acquiescence is missing, and is instead replaced by government regulation after-the-fact, the regulation alone cannot constitute sufficient government action to trigger the Takings Clause.⁴¹⁷ In cases in which the private property owner invites the use being made of the property by another private party, the Supreme Court has held that this kind of government involvement is insufficient to activate the Takings Clause.⁴¹⁸ When no one is being forced to submit to another's

⁴⁰⁵ 84 F.3d 18 (1st Cir. 1996).

⁴⁰⁶ *Id.* at 19.

⁴⁰⁷ *Id.* at 20.

⁴⁰⁸ *Id.* at 22.

⁴⁰⁹ *Id.*

⁴¹⁰ *Richard v. Wash. Terminal Co.*, 233 U.S. 546, 553 (1914).

⁴¹¹ *Id.* at 557.

⁴¹² *Id.* at 549.

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 557.

⁴¹⁵ *Id.* at 557–58.

⁴¹⁶ *See, e.g., Yee v. Escondido*, 503 U.S. 519, 530–31 (1992).

⁴¹⁷ *See, e.g., FCC v. Fla. Power Corp.*, 480 U.S. 245, 251–52 (1987).

⁴¹⁸ *See, e.g., Yee*, 503 U.S. at 530–31.

invasion, but rather the invasion is by invitation and the government is simply regulating the effects of the invitation, the Constitution is not implicated.⁴¹⁹

2. Is There a Sufficient Nexus Between the Government Action and a Third Party's Action?

The Fifth Amendment may mandate that a government-defendant to a takings claim provide just compensation for injuries caused by the actions of a private party when: (1) the government approves conduct of a private party that causes harm to the plaintiff, (2) the plaintiff's harm is a likely result of the government's approval, and (3) a close relationship or nexus exists between the government and the private party whose actions produce the plaintiff's harm.⁴²⁰ Courts seem most interested in whether there is a close relationship or nexus to the private party, and this element may be proven by the existence of certain facts.⁴²¹ For example, liability may be attributed to the government if the approved conduct of government contractors causes harm to a plaintiff's property.⁴²² A sufficient nexus may be found when a public entity engages a third party to create a public improvement.⁴²³ Government-defendants will also generally be held responsible for a taking when they not only approve third-party action, but also authorize and allow the third party's action for a public purpose.⁴²⁴

State-approved private action may be transmuted into government action when the government does not require submission to a physical invasion, but instead encourages a private party to take action that harms another private party's property.⁴²⁵ For example, in *Perkins v. Board of Supervisors*,⁴²⁶ a threshold issue was whether the action of a private agricultural association taken pursuant to a zoning amendment by the local zoning board constituted government action.⁴²⁷ By amending a zoning ordinance, the zoning board permitted the association to conduct figure-eight automobile racing for five days during a local fair.⁴²⁸ The racing allegedly harmed the plaintiff's private property.⁴²⁹ The reviewing court reasoned that although the conduct was at the direction of the association, the "reality of the actions of the local zoning board" should not be ignored.⁴³⁰ The action of the private association was in effect the action

⁴¹⁹ See generally *id.* at 530–31; *Fla. Power Corp.*, 480 U.S. at 251–52.

⁴²⁰ LAITOS, *supra* note 33, at 10–48.9.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ 636 N.W.2d 58 (Iowa 2001).

⁴²⁷ *Id.* at 70.

⁴²⁸ *Id.* at 62–63.

⁴²⁹ *Id.* at 69.

⁴³⁰ *Id.* at 70.

of the zoning board, which constituted government action.⁴³¹ “The issue then [became] whether the [board’s] activity [rose] to the level of a compensable taking.”⁴³²

3. Is the Harm to the Plaintiff–Property Owner a Foreseeable and Inevitable Consequence of the Third Party Action that was Authorized by Government?

Action taken pursuant to government regulation may be sufficient to trigger the Takings Clause when physical invasion of private property is a foreseeable and inevitable consequence of the actions of the local governments.⁴³³ However, if the physical harm is due to a private party, the property owner will not be able to look to the Takings Clause for protection.⁴³⁴ In general, courts use the “state action doctrine” to determine if some alleged harm can be attributed to a government-defendant.⁴³⁵

[S]tate action requires both an alleged constitutional deprivation [such as an uncompensated taking] “caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,” and [a finding] that “the party charged with the deprivation [is] a person who may fairly be said to be a state actor.”⁴³⁶

Takings jurisprudence incorporates the state actor requirement and provides that a party may recover just compensation from a government whose approval of private action “necessarily results” in a taking of another’s private property.⁴³⁷

The necessary result test holds that government action will not be found when a government actor authorizes the third party’s action, but the action that harms the other private party is not a necessary consequence of the authorization.⁴³⁸ For example, in *Navajo Nation v. United States*,⁴³⁹ the Navajo tribe contended that the Hopi tribe was acting as an agent of the United States when the Hopi tribe imposed a moratorium on

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ LAITOS, *supra* note 33, at 10-48.8.

⁴³⁴ *Id.*

⁴³⁵ *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

⁴³⁶ *Id.* at 50 (alteration in original) (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)).

⁴³⁷ *See, e.g.*, *Trinity Broad. of Denver, Inc. v. Westminster*, 848 P.2d 916, 921–22 (Colo. 1993); *Kite v. Westworth Vill.*, 853 S.W.2d 200, 201–02 (Tex. Ct. App. 1993); *see also Harris Cnty. Flood Control Dist. v. Adam*, 56 S.W.3d 665, 670 (Tex. Ct. App. 2001) (holding that State had control of highway and inability to properly control design of highway could result in a taking).

⁴³⁸ LAITOS, *supra* note 33, at 10-48.11.

⁴³⁹ 631 F.3d 1268 (Fed. Cir. 2011).

Navajo construction activities pursuant to a federally imposed requirement of mutual consent between the tribes for development of the region.⁴⁴⁰ In *Navajo Nation*, the government-defendant authorized the Hopi tribe's action, but the authorization did not necessarily lead to a physical invasion of the Navajo tribe's property and there was no acceptance by the government of the Hopi action.⁴⁴¹ In other words, the harm was not a foreseeable and inevitable consequence of the United States' authorization of the mutual consent requirement.⁴⁴² The government may not be successfully sued for a taking for the unintended, unforeseeable consequences of private action.⁴⁴³

By contrast, in *National Food & Beverage Co. v. United States*,⁴⁴⁴ the federal government was the responsible party when the plaintiff's land was commandeered by a state-run third party pursuant to federal authorization.⁴⁴⁵ The court reviewed the actions taken by the state, the state-run third party, and the federal government.⁴⁴⁶ These actions included a federal-private mutual cooperation agreement, a simultaneous commandeering of the plaintiff's property after the Army Corps of Engineers received authorization to enter it, and the physical removal of clay by the Corps.⁴⁴⁷ These actions illustrated that the federal government and the third party's actions were "two coordinate and coordinated parts of the same undertaking."⁴⁴⁸ As such, the "undertaking was overwhelmingly an effort of the federal government, in which the [state] had a very limited role."⁴⁴⁹

The general rule is that a government actor will be held to have intended the *foreseeable* consequences of its actions.⁴⁵⁰ For example, local governments occasionally permit private parties to build on the surface of land, although the mineral rights to the land have been severed and belong to another private party.⁴⁵¹ In such situations, the government's permission reverses the traditional dominance of the mineral estate.⁴⁵² This consequence is not unforeseeable; harm to the owner of the mineral estates is a natural and inevitable consequence of the government action.⁴⁵³ The government will

⁴⁴⁰ *Id.* at 1270, 1275.

⁴⁴¹ *Id.* at 1276.

⁴⁴² *Id.*

⁴⁴³ LAITOS, *supra* note 33, at 10-48.8.

⁴⁴⁴ 96 Fed. Cl. 258 (2010).

⁴⁴⁵ *Id.* at 260, 265-66.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 260.

⁴⁴⁸ *Id.* at 266 (citation omitted).

⁴⁴⁹ *Id.* The court also found that even though the state had authority to act on its own initiative in commandeering the property, "[i]t is no defense to a charge of authorizing someone to violate another's rights that the perpetrator might have done so on his own." *Id.*

⁴⁵⁰ *See, e.g.,* Vokoun v. City of Lake Oswego, 56 P.3d 396, 402 (Or. 2002).

⁴⁵¹ LAITOS, *supra* note 33, at 10-48.10 to .11. *See generally* Del-Rio Drilling Programs, Inc. v. United States, 46 Fed. Cl. 683, 689-90 (2000).

⁴⁵² *Id.*

⁴⁵³ *Id.*

then bear constitutional responsibility for any harm to the mineral owner's estate that is caused by the interference of the private surface owner.⁴⁵⁴

A variation of the foreseeable and inevitable consequence test occurs when courts consider whether the "link" between the harm to the property owner and the government action is substantial enough to constitute causation.⁴⁵⁵ This test looks for a causal connection between a government action and a plaintiff's harm when there is an intermediate step or unfulfilled condition precedent in between.⁴⁵⁶

The causal chain between government action and harm to a property owner can be broken when there are intermediate steps or conditions precedent to the occurrence of the harm.⁴⁵⁷ For example, in *Batten v. United States*, a federal court denied a takings claim which had alleged harm caused by dust, noise, and smoke from military aircraft.⁴⁵⁸ The court noted the absence of any physical invasion and reiterated that "damage alone gives courts no power to require compensation."⁴⁵⁹ Similarly, a fear of future harm to a property owner cannot support a takings challenge if the fear does not induce a present injury.⁴⁶⁰

A "plaintiff can establish adequate linkage between the government-defendant's actions and the harm incurred if the government defendant [(1)] authorized the act that brought about the taking, and [(2)] the taking was the natural consequence, or cause of, the government-approved acts."⁴⁶¹ Conversely, government authorization does not give rise to inverse condemnation when the permission does not compel the private acts that produce the harm.⁴⁶² "For example, when a municipality approved a subdivision plot and the landowner subsequently built a home, the city was not responsible for the fact that the landowner's lot frequently flooded because it was built in a swale that gathered storm water."⁴⁶³ The government's authorization did not require the landowner to build in the swale, and the landowner's decision to build was not the natural consequence of the permission that had been granted.⁴⁶⁴

"Where the government action alleged to have caused the harm exceeds valid statutory authority, courts will generally refuse to find the requisite causal connection between the government-defendant and the harm incurred, and the takings claim will fail."⁴⁶⁵ The determination of causation, then, involves an inquiry into whether

⁴⁵⁴ *Id.*

⁴⁵⁵ LAITOS, *supra* note 33, at 10-48.4.

⁴⁵⁶ *See id.* at 10-48.11.

⁴⁵⁷ *Id.* at 10-48.12 (footnotes omitted).

⁴⁵⁸ *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962).

⁴⁵⁹ *Id.* at 583.

⁴⁶⁰ *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

⁴⁶¹ LAITOS, *supra* note 33, at 10-48.13.

⁴⁶² *Id.*

⁴⁶³ *Id.* (citing *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 372-73 (Mo. 2008)).

⁴⁶⁴ *City of Blue Springs*, 250 S.W.3d at 371.

⁴⁶⁵ *Id.* (citing *Bd. Mach., Inc. v. United States*, 49 Fed. Cl. 325, 328 (2001) (holding no regulatory taking occurred when FDA regulates restricted locations of cigarette machines));

the individual government agents who approved the allegedly harmful action were authorized to empower the private acts in the first place.⁴⁶⁶ If the action by the agents was unauthorized, it may not be attributable to the government-defendant.⁴⁶⁷ In *Americopters, L.L.C. v. United States*,⁴⁶⁸ the plaintiff brought a takings claim against the Federal Aviation Administration.⁴⁶⁹ The question presented was whether a taking occurs when “the action allegedly causing the taking is within the agency’s authority but where . . . the individual employees performing the action were not authorized to act.”⁴⁷⁰ This differs from cases involving direct action by government officials because here the action was not within the scope of the actor’s duties as a government agent.⁴⁷¹

When an individual employee of a government agency acts in a way that harms private property, the fact that other officials were authorized to take the same actions does not bind the agency.⁴⁷² Thus, the inquiry becomes: “[W]ere *those particular individual government agents* acting within the scope of their authority?”⁴⁷³ This test is similar to one that might apply in disputes in which individuals are contracting with the government and unauthorized promises or representations made by a government official are not binding on the government.⁴⁷⁴

A court will review the substantive merits of the plaintiff’s taking claim only (1) if the government-defendant is unable to prove that the actor’s conduct, taken on behalf of the government, was unauthorized,⁴⁷⁵ (2) if the harm was caused by third party actions not under the control of the defendant,⁴⁷⁶ or (3) if the government’s actions were not a substantial cause of the plaintiff’s harm.⁴⁷⁷ Although proof of a causal

A-1 Cigarette Vending, Inc. v. United States, 49 Fed. Cl. 345, 351 (2001) (holding that no valid takings claim arose simply because the FDA’s regulation of cigarette vending machines exceeded valid statutory authority); *A-1 Amusement Co. v. United States*, 48 Fed. Cl. 63, 65–66 (2000) (same).

⁴⁶⁶ LAITOS, *supra* note 33, at 10-48.

⁴⁶⁷ *Id.*

⁴⁶⁸ 95 Fed. Cl. 224 (2010).

⁴⁶⁹ *Id.* at 225.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 232–33.

⁴⁷² *See, e.g., id.* at 231.

⁴⁷³ *Id.*

⁴⁷⁴ The court stated: “In takings, as in contracts, a necessary prerequisite is that the government itself has acted.” *Id.* at 232 (citation omitted).

⁴⁷⁵ *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) (holding that a takings claim could be heard on the merits when federal officials were acting within the scope of their statutorily authorized duties).

⁴⁷⁶ *See supra* notes 420–32 and accompanying text.

⁴⁷⁷ *See LAITOS, supra* note 33, at 10-48.3 & n.26 (citing *Fruman v. Detroit*, 1 F. Supp. 2d 665, 679 (E.D. Mich. 1998) (holding that a decline in market value was caused by government appraisal of property)); *see also Boling v. United States*, 41 Fed. Cl. 674, 680 (1998) (“[I]n evaluating a takings claim, the actions of the defendant cannot be characterized as unauthorized merely because they may have been ‘mistaken, imprudent or wrongful’ or even because they are later found to be ‘contrary to law.’” (citations omitted)); *Boling v. United States*, 38 Fed.

link between the government and the plaintiff's injury permits a reviewing court to consider whether the defendant's actions constitute an uncompensated taking, establishing this link does not mean that a court will necessarily find that the actions violate the Takings Clause.⁴⁷⁸ "A causative link between the harm and defendant means only that the plaintiff has sued the correct defendant; it does not mean that the defendant has acted unconstitutionally."⁴⁷⁹

B. Takings Caused by the Property Owner

A government-defendant to a takings action may point to the plaintiff–property owner as the true cause of the harm by alleging either that the owner's actions placed the property in jeopardy of being taken or that the owner failed to take actions that would have preserved the property interest.⁴⁸⁰ If the property owner's actions are determined to be the cause of the harm, the takings case against the government-defendant ends.⁴⁸¹

In *Rocket Oil & Gas Co. v. Donabar*,⁴⁸² an Oklahoma court quieted title to the minerals underlying a certain property in favor of an oil and gas company pursuant to Oklahoma's Marketable Record Title Act.⁴⁸³ The Act required the trustee's predecessor in interest to demonstrate an intention to retain minerals by either filing notice

Cl. 705, 709–10 (1997) (holding that Corps of Engineers was the proper defendant because it constructed a waterway pursuant to a federal statute which resulted in erosion of plaintiff's land); *Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994) (holding that the court will address the merits of a takings claim after the federal government-defendant is unable to show that diminution in value of the plaintiff's property was caused by the state of Texas or deed restrictions).

⁴⁷⁸ See *Barbian v. Panagis*, 694 F.2d 476, 485–86 (7th Cir. 1982) (holding that the city's decisions to (1) rezone a strip of land in the residential area to enable large trucks to access the warehouse, and (2) grant variance from the municipal noise ordinance did not constitute a taking of abutting the residential landowners' property that would entitle the landowners to compensation when the landowners' home bordered the industrial area).

⁴⁷⁹ *LAITOS*, *supra* note 33, at 10–48.13 to .14 (citing *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995) (holding that there was no taking of the plaintiff's property, even though the court conceded that the plaintiff's harm was linked to the federal government, because the government's assessment of liability against a bank had caused the bank's insolvency, which in turn had harmed the plaintiff (the trustee of the bank))); see also *A Tumbling-T v. Flood Control Dist. of Maricopa*, 217 P.3d 1220, 1231 (Ariz. Ct. App. 2009) (holding that even though the negligence claim was successful against the district in showing damage from flooding due to the district's clearing of land, there was no "substantial interference" with the property rights of the farmers to constitute a taking).

⁴⁸⁰ *FDIC v. Griffin*, 935 F.2d 691, 699 (5th Cir. 1991) ("This is not a taking that deserves compensation because the taking is a consequence of his own failure to have his agreements written and part of the bank records.").

⁴⁸¹ *Id.* at 699.

⁴⁸² 127 P.3d 625 (Okla. Civ. App. 2005).

⁴⁸³ *Id.* at 634; see OKLA. STAT. ANN. tit. 16, § 71 (West 2001).

or being in continuous possession within a reasonable time.⁴⁸⁴ The defendant-trustee failed to take such action and, after losing interest in the property, claimed that the Act constituted a taking by the government because it deprived the trustee of a vested estate.⁴⁸⁵ After noting that “persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property,” the court held that “[i]t [was] the owner’s failure to make any use of the property—and not the action of the State—that cause[d] the lapse of the property right; there [was] no ‘taking’ that require[d] compensation.”⁴⁸⁶

In *Connolly v. Pension Benefit Guaranty Corp.*,⁴⁸⁷ there was no taking because the plaintiff assumed the risk of future regulation.⁴⁸⁸ When employers voluntarily negotiated and maintained pension plans within the strictures of the Employee Retirement Income Security Act, the imposition of withdrawal liability as a part of an overall statutory scheme to safeguard the solvency of private pension plans was not considered a taking.⁴⁸⁹ The Court stated:

But appellants’ submission—that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment—if accepted, would prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.⁴⁹⁰

Under an assumption of risk theory, a regulation that confirms preexisting limitations on an owner’s property does not necessarily constitute a taking.⁴⁹¹ However, if the regulation imposes restrictions on the land that were not in place when the plaintiff–property owner received its interest in the property, the government may be required

⁴⁸⁴ *Rocket Oil & Gas*, 127 P.3d at 635, 637–38.

⁴⁸⁵ *Id.* at 637.

⁴⁸⁶ *Id.* at 636; *accord* *United States v. Locke*, 471 U.S. 84, 103–10 (1985).

⁴⁸⁷ 475 U.S. 211 (1986).

⁴⁸⁸ *Id.* at 224.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 222–23.

⁴⁹¹ *See* *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994) (“If the regulation prevents what would or legally could have been a nuisance, then no taking occurred. The state merely acted to protect the public under its inherent police powers.”).

to compensate the property owner.⁴⁹² The Supreme Court emphasized this principle in *Lucas v. South Carolina Coastal Council*.⁴⁹³ The plaintiff in *Lucas* purchased two residential lots on which he planned to build homes.⁴⁹⁴ When the state imposed restrictions on the land that prohibited the plaintiff from building any permanent residential structures, the plaintiff initiated a claim for just compensation.⁴⁹⁵ The Court noted that an acceptable defense for a government-defendant in a takings case is to point to common law principles that would have prevented the construction of homes on the plaintiff's land as a matter of state law.⁴⁹⁶ To defeat a takings claim, the government-defendant "must identify background principles of nuisance and property law that prohibit the uses [plaintiff] now intends in the circumstances in which the property is presently found."⁴⁹⁷ Conversely, if a state transforms private property into public property, it may not avoid paying just compensation by merely "proffer[ing] the legislature's declaration that the uses [plaintiff] desires are inconsistent with the public interest."⁴⁹⁸

C. Takings Caused by Acts of Nature or Normal Market Forces

Sometimes the harm to a plaintiff–property owner is not attributable to the government-defendant, and is instead due to acts of nature or the market. In such cases, courts consider whether the government actor is the proximate cause of the harm.⁴⁹⁹ The proximate cause inquiry is similar to the issue raised in the Federal Circuit regarding whether there is sufficient causative connection for an act to be considered a taking.⁵⁰⁰ Proximate cause will be found if there is a natural, continuous, uninterrupted sequence between the government-defendant's actions and the harm to the plaintiff's property.⁵⁰¹ Difficulties may arise when the plaintiff's damages are due to a combination of government acts and natural or market forces. In such cases, some courts require a plaintiff–property owner to show that the government-defendant's action was a "substantial concurring cause" of the harm.⁵⁰² However, when the

⁴⁹² See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992).

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 1006–07.

⁴⁹⁵ *Id.* at 1007–09.

⁴⁹⁶ *Id.* at 1031.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Owen v. United States*, 851 F.2d 1404, 1407–08, 1413–14 (Fed. Cir. 1988); *Smith v. United States*, 28 Fed. Cl. 430, 436, 439–40 (1988). "The . . . issue is whether plaintiff has satisfied the burden of proving by a preponderance of the evidence that the Smithland Locks and Dam is the direct and proximate cause of the erosion damage on Smith's property." *Smith*, 28 Fed. Cl. at 436.

⁵⁰⁰ See *supra* notes 318–68 and accompanying text.

⁵⁰¹ *Smith*, 28 Fed. Cl. at 436, 439.

⁵⁰² See *Aikens v. Cnty. of Ventura*, No. B221992, 2011 Cal. App. Unpub. LEXIS 4986, at *4–5 (Ct. App. June 30, 2011).

government is only an indirect cause of the harm, the plaintiff risks a court characterizing such an action not as a taking but as, at most, a tort.⁵⁰³

The question of whether the government can be held liable for a taking in the context of a natural catastrophe arose in *Teegarden v. United States*,⁵⁰⁴ in which federal officials responded to a raging forest fire.⁵⁰⁵ In just a few hours, the fire consumed over 1,000 acres of land despite federal suppression efforts.⁵⁰⁶ Timber and other environmental resources on the plaintiffs' property were destroyed, and the plaintiffs brought a takings action against the United States to recover compensation for their loss.⁵⁰⁷ The plaintiffs claimed that "the concentration of fire suppression manpower and equipment in areas of high priority [which did not include plaintiffs' land] manifested 'an intent on the part of the defendant to do an act the natural consequence of which was to take [plaintiffs'] property.'"⁵⁰⁸ They also argued that the spread of the fire was a "direct, probable, and foreseeable consequence" of the government's action.⁵⁰⁹ However, the court pointed out that it was the fire, not the federal officials, that caused the destruction of plaintiffs' property.⁵¹⁰ "In the context of a claim for inverse condemnation, damages resulting from 'a random event induced more by an extraordinary natural phenomenon than by Government interference' cannot rise to the level of a compensable taking, 'even if there is permanent damage to property partially attributable to Government activity.'"⁵¹¹

D. Takings Caused by a Third Party

The state action doctrine requires that a plaintiff bringing a constitutional claim must sue a government actor.⁵¹² When a government-defendant to a takings action alleges that the taking was caused not by a government actor, but by a private third party, the reviewing court must undertake what is in effect a state action analysis to determine whether the claim can proceed.⁵¹³ By contrast, if the government-defendant alleges that the taking was caused by a different government actor, the court must consider which of the two government entities was responsible for the harm to the plaintiff-property owner.⁵¹⁴ When a government-defendant points to another government actor, the courts

⁵⁰³ See *Teegarden v. United States*, 42 Fed. Cl. 252, 256 (1998).

⁵⁰⁴ *Id.* at 256–57.

⁵⁰⁵ *Id.* at 253–54.

⁵⁰⁶ *Id.* at 253.

⁵⁰⁷ *Id.* at 254.

⁵⁰⁸ *Id.* at 257.

⁵⁰⁹ *Id.* at 256.

⁵¹⁰ *Id.* at 257.

⁵¹¹ *Id.*

⁵¹² See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *Cary v. United States*, 79 Fed. Cl. 145, 148 (2007).

⁵¹³ *Halverson v. Skagit Cnty.*, 983 P.2d 643, 647–50 (Wash. 1999).

⁵¹⁴ See *Cary*, 79 Fed. Cl. at 147.

tend to adopt the same proximate cause test used when deciding if acts of nature or market forces are responsible—the inquiry becomes, which government actor is the proximate cause of the harm?⁵¹⁵

For example, the Supreme Court of Washington found that the government defendant in *Halverson v. Skagit County*⁵¹⁶ did not effect a taking, because it was not the proximate cause of the plaintiffs' alleged harm.⁵¹⁷ In *Halverson*, levees constructed by a diking district—an independent corporation separate and distinct from the county—caused flooding of the plaintiffs' land.⁵¹⁸ Plaintiffs sought compensation from the county because the county had provided assistance with the maintenance, repair, and improvement of the levee system.⁵¹⁹ However, the flooding was caused by the levees constructed by the district, which meant that the county's action was not the actual or proximate cause of the flooding.⁵²⁰ The court also rejected the plaintiffs' attempt to hold the county liable under a theory of joint and several liability.⁵²¹

V. A PROPOSED COHERENT FRAMEWORK WHEN CHOOSING A DEFENDANT IN TAKINGS CASES

A. Towards a More Predictable Causation Test

Although the purposes underlying the tort system and the takings clause differ in many respects, tort and takings claims do share some significant characteristics. One of the primary purposes of common law tort theory is to ensure that an injuring party will repair or compensate for the losses caused by the party's wrongful conduct.⁵²² Similarly, one of the aims of the Takings Clause is to prevent state actors from avoiding constitutional liability for just compensation for their actions when the police power is being exercised to advance the public interest.⁵²³ Both tort and takings claims are methods to provide economic relief to parties injured by the actions of others.⁵²⁴ Each can be used to prevent the choices of government or market actors from being forced

⁵¹⁵ *Halverson*, 983 P.2d at 650; *see also* *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1195–96 (Fed. Cir. 2004) (holding that federal officials were not the cause of harm resulting from state-imposed restrictions on intrastate sales).

⁵¹⁶ 983 P.2d at 649–50.

⁵¹⁷ *Id.* at 648–49 (“Plaintiffs’ theory of the case is fatally flawed by the total lack of evidence of proximate cause.”).

⁵¹⁸ *Id.* at 646.

⁵¹⁹ *Id.*

⁵²⁰ *Id.* at 650.

⁵²¹ *Id.* at 649–50.

⁵²² *See, e.g., Ayers v. Twp. of Jackson*, 525 A.2d 287, 319 (N.J. 1987).

⁵²³ 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1053 (Leon Friedman et al. eds., 1971).

⁵²⁴ *See United States v. Burke*, 504 U.S. 229, 234–35 (1992); *Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16, 27–28 (1984).

upon unwilling individuals. Another purpose that tort theory and takings jurisprudence have in common is to discourage conduct that society deems wrongful.⁵²⁵

The law of takings and the law of property torts also share a common origin—the English common law of property.⁵²⁶ Judges deciding causation issues in takings actions often highlight this historical connection between torts and takings.⁵²⁷ Tort concepts such as trespass and nuisance are frequently used to define the scope of property rights that are protected by the takings clause.⁵²⁸

This relatedness between tort and takings has been recognized by reviewing courts, which acknowledge that the same set of facts can give rise to both a taking *and* one or more causes of action sounding in tort.⁵²⁹ The Claims Court has noted that “[w]hile not all torts are takings, every taking that involves invasion or destruction of property is by definition tortious.”⁵³⁰ The Court of Claims has also surmised that the same encroachment on property that constitutes a taking if committed by the government, constitutes a tort if committed by a private party.⁵³¹ In *Beverly v. United States*,⁵³² which involved the trespass of a helicopter over plaintiffs’ land,⁵³³ the Court of Claims noted:

Granted, it is possible that these facts could, upon election, separately support *both* a taking and a negligence claim; nevertheless, the mere fact that Congress decided to lodge jurisdiction over such claims in different courts does not necessarily mean that they are separate claims to the extent of overcoming an allegation of *res judicata*.⁵³⁴

The similar purposes and common origin underlying tort law and the Takings Clause support the inference that factual and proximate causation, which are required

⁵²⁵ For a typology of tort theories, see IZHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* 1–83 (1993).

⁵²⁶ See *Hansen v. United States*, 65 Fed. Cl. 76, 98 (2005) (citing MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 74 (1977) (“‘With almost complete unanimity,’ American courts before the Civil War echo Blackstone on property.”)); C.G. TIEDEMANN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* ch. x (Da Capo Press 1971) (1886).

⁵²⁷ See, e.g., *Hansen*, 65 Fed. Cl. at 98–102 (discussing how takings jurisprudence shares common roots with traditional tort concepts).

⁵²⁸ *Id.* at 79–80.

⁵²⁹ *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1352–54 (Fed. Cir. 2004) (“That the complaint suggests the United States may have acted tortuously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims.”); *Hansen*, 65 Fed. Cl. at 101; *Clark v. United States*, 19 Cl. Ct. 220, 222–23 (1990).

⁵³⁰ *Hansen*, 65 Fed. Cl. at 101.

⁵³¹ *Id.*

⁵³² 24 Cl. Ct. 197, 201 (1991).

⁵³³ *Id.* at 198.

⁵³⁴ *Id.* at 201 (first emphasis added).

to prove a tort claim, are also necessary for takings claims.⁵³⁵ Factual causation asks whether a particular harm would have occurred but for a party's actions, or in a case involving more than one potential cause, whether a party's actions were a substantial factor in causing a particular harm.⁵³⁶ Proximate causation asks whether a particular harm is too remote from a party's actions—too far down the chain of factual causation—to justify imposing liability.⁵³⁷ By ensuring that a defendant will be held liable for harm that its wrongful conduct causes, courts have discouraged conduct that society deems wrongful.⁵³⁸

However, factual causation alone is not enough to establish liability under either a tort or a takings claim.⁵³⁹ The policies that support imposing legal limits on factual causation in tort law also apply under the Takings Clause; liability should be triggered only when the harm is foreseeable; otherwise, the scope of factual causation would be limitless.⁵⁴⁰ If, in an action alleging either a tort or a taking, a particular defendant is not the factual and proximate cause of the plaintiff's harm, then a court cannot justifiably hold that defendant responsible for the harm.⁵⁴¹ Moreover, the principle that every taking is, by definition, tortious necessarily implies that at least the minimum standard of causation that suffices to support a tort claim should be required to prove a taking.⁵⁴²

A multitude of different approaches to causation may be witnessed in the judicial decisions involving takings claims arising under all five factual variations discussed above.⁵⁴³ Yet, these different approaches to causation are all just different ways of implementing the same policy: a government-defendant should be liable for harm that is caused by its actions but should not have to provide just compensation under the Takings Clause, or damages pursuant to a tort claim, for either the unforeseeable results or the foreseeable but merely incidental or consequential results of its actions.⁵⁴⁴

This principle, requiring both foreseeability and non-incidental injury, is reflected in two cases from the Federal Circuit. In *Arkansas Game & Fish Commission v. United States*,⁵⁴⁵ for example, there was no taking when a dam built by the government led to flooding of the plaintiff's land.⁵⁴⁶ The flooding eventually resulted in the destruction of valuable trees on the land.⁵⁴⁷ Although it was conceivably foreseeable that a flood might cause damage to trees on the flooded land, the injury was only indirect

⁵³⁵ See *id.* at 96.

⁵³⁶ *Id.* at 102.

⁵³⁷ *Id.*

⁵³⁸ See, e.g., *Ayers v. Twp. of Jackson*, 525 A.2d 287, 309 (N.J. 1987).

⁵³⁹ *Hansen v. United States*, 65 Fed. Cl. 76, 104 (2005).

⁵⁴⁰ *Id.* at 110.

⁵⁴¹ See *id.* at 104.

⁵⁴² See *id.* at 102–03.

⁵⁴³ See *supra* notes 166–253 and accompanying text.

⁵⁴⁴ *Hansen*, 65 Fed. Cl. at 110, 119–20.

⁵⁴⁵ 637 F.3d 1366 (Fed. Cir. 2011).

⁵⁴⁶ *Id.* at 1367.

⁵⁴⁷ *Id.*

and consequential and was therefore not compensable under the Fifth Amendment.⁵⁴⁸ Likewise, in *George Family Trust v. United States*,⁵⁴⁹ a landowner failed to show that the flooding of its crop-land was the direct, natural, probable, or foreseeable result of the operation of upstream dams by the Army Corps of Engineers.⁵⁵⁰ The landowner could only prove incidental or consequential injury from the government's action, which did not rise to the level of a taking caused by a federal defendant.⁵⁵¹

Federal and state courts generally accept the concept that tort-like causation is required to hold a government-defendant liable for a taking.⁵⁵² However, courts continue to struggle with the role that foreseeability and predictability should play in that causation analysis.⁵⁵³ Some courts apply a standard of causation for takings that focuses on factual causation while disregarding foreseeability of harm.⁵⁵⁴ The absence of foreseeability almost invokes concepts of strict liability.⁵⁵⁵ On the other hand, as the *Hansen* court suggested, foreseeability is sometimes “misappli[ed] . . . in a causation analysis . . . [because of] the proximity of subjective foreseeability and intent in the implied contract analysis that prevailed in the Court of Claims for so long.”⁵⁵⁶ A causation analysis then becomes confused with ascertaining the subjective state of mind of the government-defendant.⁵⁵⁷ A better test permits a reviewing court to consider the specific knowledge of the government-defendant while not requiring subjective foresight of injury.

The *Ridge Line* test, which applies when government action allegedly causes harm to a plaintiff, requires a plaintiff's harm to be the “predictable result” of the government action.⁵⁵⁸ The Court of Appeals for the Federal Circuit points out the subtle distinction that *Ridge Line* makes between a predictable *cause* and a predictable *result*: “[C]ausation must be shown. . . . However, 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.”⁵⁵⁹

⁵⁴⁸ *Id.* at 1374–75.

⁵⁴⁹ 97 Fed. Cl. 625 (2011).

⁵⁵⁰ *Id.* at 635.

⁵⁵¹ *Id.*

⁵⁵² *Ark. Game & Fish Comm'n*, 637 F.3d at 1376.

⁵⁵³ *See supra* notes 347–68, 383–88 and accompanying text.

⁵⁵⁴ *See* Cal. State Auto. Ass'n Inter-Ins. Bureau v. City of Palo Alto, 41 Cal. Rptr. 3d 503, 509 (Ct. App. 2006) (“[W]hether or not the [harm] was foreseeable is completely irrelevant in determining if the City is liable under a theory of inverse condemnation.”).

⁵⁵⁵ *See, e.g.,* Carter v. Johns-Manville Sales Corp., 557 F. Supp. 1317, 1319 (E.D. Tex. 1983).

⁵⁵⁶ Hansen v. United States, 65 Fed. Cl. 76, 115 (2005).

⁵⁵⁷ *See id.*

⁵⁵⁸ *Id.* at 117 (citations omitted).

⁵⁵⁹ *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005); *see also* Banks v. United States, 69 Fed. Cl. 206, 212 (2006) (citing *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003)).

It should not be enough for the government action to be a factual cause of the plaintiff's harm. The harm should also have to be a *direct result* of the government's action, and it must have in some way been *foreseeable* by the government defendant. The foreseeable or predictable result standard from *Ridge Line* requires that:

[A] property owner must prove that the asserted government invasion of property interests allegedly effecting a taking "was the predictable result of the government action," either because it was the "direct or necessary result" of the act or because it was "within contemplation of or reasonably to be anticipated by the government."⁵⁶⁰

Foreseeability is a more easily measured objective standard, whereas subjective foresight of injury is difficult, if not impossible, to prove and should not be required.⁵⁶¹ The foreseeability test should be applied as it is in tort—an injury that amounts to a taking may not be foreseeable if an intervening cause breaks the chain of causation.⁵⁶² Intervening causes are also more easily identifiable by government-defendants, who may then offer evidence to a court of their existence as part of an argument refuting foreseeability.⁵⁶³

B. A New Two-Part Analytical Framework for Deciding if the Defendant Is Responsible for the Taking

Judges and litigants will benefit from a new approach to deciding defendant-causation issues in takings claims that separates the causation analysis from the tort/takings analysis. Such a framework applies the *Ridge Line* standard that begins with an independent consideration of causation,⁵⁶⁴ and only when that inquiry is satisfied does it consider the question of whether the claim should lie in tort or as a taking.⁵⁶⁵ A takings claim may fail because the government-defendant in the lawsuit does not meet either the causation requirement⁵⁶⁶ or the heightened "predictable result" standard of the tort/takings distinction test.⁵⁶⁷ However, it may be possible for a tort claim to exist when factual and proximate causation are satisfied, but the "predictable result" standard is not.⁵⁶⁸ This test for deciding causation and tort/takings distinction issues

⁵⁶⁰ *Vaizburd v. United States*, 384 F.3d 1278, 1282–83 (Fed. Cir. 2004) (citations omitted).

⁵⁶¹ *See Cotton Land Co. v. United States*, 75 F. Supp. 232, 235 (Ct. Cl. 1948).

⁵⁶² *See Nicholson v. United States*, 77 Fed. Cl. 605, 617–18 (2007).

⁵⁶³ *Id.* (discussing the unforeseeability of Hurricane Katrina's devastation).

⁵⁶⁴ *Id.* at 617.

⁵⁶⁵ *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

⁵⁶⁶ *Nicholson*, 77 Fed. Cl. at 618.

⁵⁶⁷ *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005).

⁵⁶⁸ *See Ridge Line*, 346 F.3d at 1356.

can be applied in all of the factual variants that commonly give rise to causation issues in takings claims.

First, a reviewing court should determine whether the government-defendant is the factual and proximate cause of the plaintiff's alleged harm. Addressing this threshold causation standard before turning to the tort/takings issue will avoid needless litigation, resolve the state action issue, and ensure that the plaintiff has in fact sued the correct defendant. It also prevents a court from mistakenly misapplying the foreseeability requirement in an inappropriately subjective manner, because traditional proximate causation analysis does not consider a defendant's actual knowledge. To satisfy this first prong, the plaintiff is required to show that but for the defendant's wrongful action, the harm would not have occurred. The plaintiff must also prove that the harm was an objectively foreseeable consequence of the initial act that eventually resulted in the harm.⁵⁶⁹ Proof of this class of causation alone will not ensure that the government entity will ultimately be found to have effectuated a taking, but if it is not proved the claim will be dismissed.

Only if causation is established will the court turn to the second issue—whether the government-defendant is responsible for a taking or whether the claim should instead be brought as a tort. To establish a claim against a government actor for just compensation under the Takings Clause, a plaintiff will have to show that the harm caused by the government-defendant was the predictable result of the allegedly wrongful action and not the incidental or consequential injury inflicted by the action.⁵⁷⁰ This requirement is essentially the “direct, natural, or probable result” standard from *Ridge Line*.⁵⁷¹ To prove that the harm was a predictable result of the government-defendant's action, a plaintiff must establish at least one of the following factors: (1) the government-defendant intended to cause the harm, or (2) the action adversely affecting the plaintiff was within the contemplation of—or should have been anticipated by—the government and was not an incidental or mere consequential injury brought about by the initial government action.⁵⁷² If the harm was a direct or necessary result of the government-defendant's act, then it satisfies the second prong of the two-pronged test. If a plaintiff is unable to prove either of the two factors under the predictable result test, then the reviewing court may not consider the substantive merits of the takings claim. In this situation, the plaintiff must decide whether the facts give rise to a claim sounding in tort.

If a plaintiff is able to establish causation and show that its harm was a foreseeable result of the government-defendant's action, then the court will consider the underlying

⁵⁶⁹ See *Nicholson*, 77 Fed. Cl. at 617.

⁵⁷⁰ See *Ridge Line*, 346 F.3d at 1355.

⁵⁷¹ *Id.*

⁵⁷² Generally, a “consequential injury” is a loss that results other than in the ordinary course of events. A direct injury is one that is the direct, natural, or probable result of the *initial* act, as opposed to an injury that stems from the harm caused by the initial act. Section 454 of the Restatement 2nd of Torts defines consequential injury as “[t]he harm additional to that which is necessary to make the actor's negligence actionable” RESTATEMENT (SECOND) OF TORTS § 454 (1965).

substantive issue of a takings claim—whether the nature and magnitude of the government action is substantial enough to warrant a lawsuit under the Constitution for just compensation. This inquiry triggers the tests announced by the Supreme Court when a plaintiff has satisfied all the threshold conditions to reaching the merits of whether the government-defendant has violated the Takings Clause.⁵⁷³

C. Applying the New Framework

This proposal for a new two-tier approach to causation issues in takings actions not only enables courts to separate the causation analysis from the predictable result analysis, but also promotes a takings jurisprudence that is consistent with prior judicial decisions under each of the five factual situations considered above.⁵⁷⁴ When the issue is whether government action was involved in the plaintiff's injury to an extent sufficient to establish a taking, the two-tier framework provides a predictable and coherent approach to the court's causation analysis. The new framework consolidates a multitude of varying considerations into one streamlined test.

For example, in *Dunn v. City of Milwaukee*,⁵⁷⁵ intent was required to establish liability for inverse condemnation.⁵⁷⁶ The government-defendant focused on disproving intent and argued that the plaintiff's harm was an unusual and extraordinary result of the government act.⁵⁷⁷ However, the court had to infer intent after first finding that the plaintiff's harm was a necessary result of the government's actions.⁵⁷⁸ Under the proposed framework, the court would have reached the same conclusion with one less step—regardless of intent, there would be a taking because the plaintiff's harm was a necessary, and thus predictable, result of the defendant's action.

In cases involving potential multiple causes, the court's analysis must differ slightly. When a third party is involved, the analysis begins with a consideration of whether the government-defendant's act caused the act of the third party, which ultimately resulted in the harm.⁵⁷⁹ This inquiry requires a dual consideration under the first tier of the proposed framework: first, whether the government-defendant caused the third party's action, and second, whether the third party's action in turn caused the plaintiff's harm. If the government-defendant did cause the third party's action, then the state action doctrine is presumably satisfied⁵⁸⁰ and the plaintiff has chosen to sue the proper defendant.⁵⁸¹ However, the plaintiff must still show that the government's

⁵⁷³ See *supra* notes 48–83 and accompanying text.

⁵⁷⁴ See *supra* notes 166–267 and accompanying text.

⁵⁷⁵ 250 P.3d 7 (Or. Ct. App. 2011).

⁵⁷⁶ *Id.* at 9.

⁵⁷⁷ *Id.* at 9–11.

⁵⁷⁸ *Id.* at 10–11.

⁵⁷⁹ See, e.g., *Abdullah v. Comm'r of Ins.*, 84 F.3d 18, 22 (1st Cir. 1996).

⁵⁸⁰ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

⁵⁸¹ See *supra* notes 268, 393–94 and accompanying text.

initial action was a proximate cause of the harm.⁵⁸² Then, even if the plaintiff establishes that the initial government act caused the harm, tier two of the proposed framework would require a showing that the harm was the predictable, foreseeable result of the government's action.

When a private party acting pursuant to state or federal law allegedly causes harm to a plaintiff–property owner, courts look to the relationship between the harm, the private party, and the law to determine causation.⁵⁸³ Under tort theory, the actions of a third party are a superseding cause, removing liability from the original tortfeasor, but only if the actions of the third party were not foreseeable.⁵⁸⁴ However, every possible action that a private party might make without exceeding the scope of the government permission is not automatically considered foreseeable.⁵⁸⁵ Consider *Navajo Nation*,⁵⁸⁶ in which congressional regulation enabled the Hopi tribe to impose a moratorium on development of the plaintiff's land but the actions of the Hopi tribe were not compelled by government.⁵⁸⁷ The court declined to hold the government responsible simply because the Hopi's actions were within the authority empowering them to affect the plaintiff's land.⁵⁸⁸

On the other hand, when the government acts with the conduct of the third party specifically in mind, those actions are foreseeable and would not be treated as a superseding cause excusing the government from takings liability.⁵⁸⁹ If the law compelled the private party's action, or if the law or regulation was passed contemplating the precise private action that occurred, the private action may be imputed to the government actor and the government-defendant could then be treated as having taken the action itself. This outcome, however, does not imply that the resulting harm was sufficiently predictable enough to confer liability for a taking. It would simply mean that in these cases a takings claim could not be defeated for lack of a state actor, and the takings analysis on the merits would continue.

Courts already apply a proximate cause test when deciding cases in which the government-defendant argues that the plaintiff's harm was caused by nature, market forces, or a third party.⁵⁹⁰ The suggested analytical framework incorporates this analysis into the first tier causation inquiry. Once a court finds that a government action is a cause of the plaintiff's harm, it must next turn to the second tier of our proposed framework, which requires a tort/takings inquiry.

⁵⁸² Hansen v. United States, 65 Fed. Cl. 76, 80–81 (2005).

⁵⁸³ See Casa DeCambio Comdiv S.A. de C.V. v. United States, 48 Fed. Cl. 137, 141–42 (2008).

⁵⁸⁴ See, e.g., Townsend v. Westside Dodge, Inc., 642 So.2d 49, 50 (Fla. Dist. Ct. App. 1994).

⁵⁸⁵ Navajo Nation v. United States, 631 F.3d 1268, 1276–77 (Fed. Cir. 2011).

⁵⁸⁶ *Id.*

⁵⁸⁷ See *id.* at 1276.

⁵⁸⁸ See *id.*

⁵⁸⁹ See, e.g., Coles v. Jenkins, 34 F. Supp. 2d 381, 387 (W.D. Va. 1998).

⁵⁹⁰ See Halverson v. Skagit Cnty., 983 P.2d 643, 648–49 (Wash. 1999).

CONCLUSION

Causation is a commonly litigated threshold issue to takings claims.⁵⁹¹ When addressing causation issues in takings actions, the question for a reviewing court becomes: did the government-defendant actually cause the harm to the plaintiff-property owner, or should some other party be held responsible for the plaintiff's injury?⁵⁹² Although a finding of causation will settle the issue of whether the plaintiff has sued the correct defendant,⁵⁹³ before turning to the merits of the takings claim, a reviewing court must also address the question of whether the facts give rise to a taking, or rather to a tort.⁵⁹⁴

Unlike the familiar threshold issues that often command so much attention from commentators of the Takings Clause—such as ripeness⁵⁹⁵ and federal court jurisdiction⁵⁹⁶—causation issues are still in flux, with multiple tests for different settings.⁵⁹⁷ The Takings Clause of the Fifth Amendment does not explicitly set forth any particular standard for establishing a causative link between the government-defendant and the plaintiff's injury.⁵⁹⁸ The fact that torts and takings share common characteristics suggests that a similar standard for causation should apply to both types of claims. However, the inherent differences between torts and takings suggest that a test must be developed for distinguishing between the two different causes of action.

Reviewing courts have struggled to find an appropriate standard for analyzing threshold causation issues⁵⁹⁹ and tort/takings distinctions.⁶⁰⁰ This Article is a summary of the current confused state of the law, and offers a practical, predictable alternative to provide some coherence to the initial question of whether the plaintiff has sued the correct defendant and has chosen, as between takings and tort law, the appropriate cause of action. The proposed new framework streamlines the conflicting causal standards into one test that may be applied consistently to each of the factual settings giving rise to takings actions.

⁵⁹¹ See, e.g., *Hansen v. United States*, 65 Fed. Cl. 76, 96 (2005).

⁵⁹² *Halverson*, 983 P.2d at 648–49.

⁵⁹³ See *Dunn v. City of Milwaukie*, 250 P.3d 7, 8 (Or. Ct. App. 2011).

⁵⁹⁴ *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1373–74 (Fed. Cir. 2011).

⁵⁹⁵ See, e.g., *Greenbrier v. United States*, 193 F.3d 1348, 1358–59 (Fed. Cir. 1999).

⁵⁹⁶ See, e.g., *Duszak v. United States*, 58 Fed. Cl. 518, 519–20 (2008).

⁵⁹⁷ See *Hansen v. United States*, 65 Fed. Cl. 76, 96–102 (2005) (discussing the various tort-taking distinctions the courts have made).

⁵⁹⁸ U.S. CONST. amend. V; see also *Hansen*, 65 Fed. Cl. at 96–97.

⁵⁹⁹ See, e.g., *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011) (holding that the plaintiff in a takings case may present evidence that it was objectively reasonable for it to view a statutory prohibition on prepaying a mortgage as the “primary or ‘but for’” cause of its investment strategies which had forced it to continue it to operate its property as low income housing).

⁶⁰⁰ See *Hansen*, 65 Fed. Cl. at 96–102.