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**EMINENT DOMAIN - INDIANA**

## Town of Linden v. Birge

**Supreme Court of Indiana - March 7, 2023 - N.E.3d - 2023 WL 2383795**

Property owners brought action against county and town after modifications to a town drainage system caused flooding on their property, asserting claims for nuisance, civil conspiracy, and inverse condemnation.

The Circuit Court granted town's motion to dismiss, and property owners appealed. The Court of Appeals reversed. On remand, the Circuit Court concluded that a taking had occurred and set the matter for a determination of damages. County and town filed interlocutory appeal, and the Court of Appeals reversed. The Supreme Court granted petition to transfer.

The Supreme Court held that

- Floodings were to be analyzed as a per se taking;
- Whether flooding resulted in substantial damage, and thus amounted to a permanent physical invasion, required remand; and
- Statute exempting county for liability for entry on private property for drain "reconstruction or maintenance" did not insulate it from liability.

Floodings of farmland property following county's and town's drainage improvement plan were repetitive and of indefinite duration and thus were to be analyzed as a per se taking; drain reconstruction project resulted in repeated flooding events on the property due to increased pressurization at water pipe transfer point during every heavy rainfall, and while flooding was intermittent, overflows inevitably recurred if the property sustained heavy rainfall.

Whether intermittent but inevitable flooding of farm owners' property following county's and town's drainage reconstruction project resulted in substantial damage, and thus amounted to a permanent physical invasion, required remand for additional fact-finding; while farm owners presented evidence of the flooding's interference with their use of the property, including testimony by tenant farmer that property was "almost always" wet, creating "root issues" for the crops and preventing him in some years from farming it "at all without getting equipment stuck," and by delaying the annual planting season by up to a month, preventing tenant from ever attaining the "maximum yield," trial court only found that the flooding made farming "more difficult" than before.

Statute giving county a "right of entry over and upon land" lying within 75 feet of a regulated drain and exempting it from liability for any necessary drain "reconstruction or maintenance" that results in damage to crops grown within that right of way did not exempt county from liability for a taking of farm owners' property following drainage reconstruction project which resulted in intermittent but inevitable flooding of farm property; property intrusions contemplated by the statute were merely incidental, minimal, and infrequent, and would permit a farmer to continue to use the land, while the complete destruction of crops from intermittent yet inevitably recurring flooding did not.

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