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I. INTRODUCTION

While it is well known that the U.S. Constitution prohibits the government from taking private property for public use without fair compensation, few realize that potential claimants have six years from the date the taking accrues to file a claim for damages. A six-year time limit, even strictly applied, may seem sufficiently lenient on its face. However, in 1994 the U.S. Court of Appeals for the Federal Circuit recently ruled, in interpreting this time limit, that plaintiffs who suffered severe erosion damage from a government channeling and port project constructed in the early 1950s were not barred from filing suit in 1992–over forty years after the erosion began. In *Applegate v. United States*,[1] the court concluded that the date the governmental act became a permanent taking, or when the taking "accrued," was not the date the government "invaded" the plaintiffs' property, or the date the plaintiffs first noticed property damage.[2] Instead, the court used the date on which the government last pledged to repair the damage to determine whether the plaintiffs met the six-year statute of limitations. Because the government initiated plans to restore the damage as late as 1988, the court found that the statute of limitations had not run in 1992, the year the plaintiffs filed their claim.[3] The *Applegate* decision, therefore, permits courts to use one governmental act to determine whether the procedural time limit is met, and another to determine the substantive legal issue of whether a taking occurred. In light of the fact that courts must first consider the procedural time limit issue before reaching the merits of a particular claim, the *Applegate*

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1. 25 F.3d 1579 (Fed. Cir. 1994).
2. *Id.* at 1584.
3. *Id.*

decision will provide more opportunities to sue the government for a taking.

Although it may appear that the *Applegate* court stretched the six-year statute of limitations beyond its limits, this Note will demonstrate that the court's decision conforms with takings case law and upholds the principles of fairness that underlie statutes of limitations. This Note will also demonstrate that if the court had ruled that the statute of limitations barred the plaintiffs' claim, it would effectively relieve the federal government of its responsibility to repair government-caused damage or to compensate owners for taking their property, not only for the *Applegate* plaintiffs, but also for most other takings victims as well. Part II of this Note describes the procedure a property owner must follow to sue the government for taking her property, and the additional burdens coastal property owners face when they claim a government act caused flooding or erosion damage. Part III summarizes the *Applegate* decision. Part IV discusses the conflict between procedural time limits and the long periods that may elapse from the time of the governmental act to the time the act damages the property. Part V also describes methods courts have developed to ensure that time limits do not unjustly prevent a plaintiff from pursuing her claim in court. Part VI concludes that by requiring the government to consider the long-term impact of its acts on private property, the *Applegate* decision will help to preserve notions of individual justice and responsibility on the part of the government.

II. LEGAL BACKGROUND

A. Takings

The Fifth Amendment to the U.S. Constitution requires the federal government to compensate owners for permanently taking their property for public use.[4] The government may "take" private property by physically invading or regulating property to the point where the government essentially appropriates it.[5] When the government physically invades

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4. U.S. CONST. amend. V. The amendment was not intended to preclude the government from taking private property for public purposes, but to insure property owners are compensated in such events. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987). *See* U.S. v. Reynolds, Ky., 397 U.S. 14 (1961) for a description of how courts calculate just compensation.

5. *See generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

property, it may claim the property and compensate the owner before entering. Alternatively, it may refrain from claiming the property beforehand, in which case, the owner must wait until the invasion is permanent and then file a claim for damages.[6]

When the federal government chooses not to claim the property before entering, the Federal Tucker Act[7] provides the procedural framework for property owners to sue the federal government for damages. While most statutes are tailored to specific types of claims, the Tucker Act is a broad enabling statute governing all claims against the United States founded on "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."[8] Consequently, the Tucker Act also covers cases involving contracts, tax refunds, Indian treaties, and specific referrals from Congress.[9]

Among other restrictions, the Tucker Act denies a plaintiff the option of a jury trial[10] and the right to file his suit in state court.[11] More importantly, the Tucker Act does not allow a claimant to ask the court to prevent the government from destroying property. For example, the court is: (1) barred from issuing an injunction that stops the government from damaging property when the landowner can later sue for damages;[12] (2)

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6. United States v. Dow, 357 U.S. 17, 21 (1958).

7. 28 U.S.C. § 1491 (1994).

8. 28 U.S.C. § 1491(a)(1) (1994).

9. *See* James E. Ellsworth, *Suing the Sovereign*, UTAH B.J., Dec. 1990, at 8, 8, which describes the seven types of claims covered by the Tucker Act: (1) express or implied contracts; (2) tax refund claims; (3) fifth amendment takings claims; (4) civilian and military pay claims; (5) patent and copyright claims; (6) Indian claims; and (7) congressionally referred claims.

10. 28 U.S.C. § 2402 (1994) prohibits jury trials for Tucker Act claims. *See* Charter Fed. Savings Bank v. Office of Thrift Supervision, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1643 (1993), where the Supreme Court upheld the jury trial prohibition for Tucker Act claims filed in a federal district court.

11. The Federal Claims Court has original jurisdiction for suits filed under the Tucker Act and exclusive jurisdiction for claims exceeding $10,000. 28 U.S.C. § 1491(a)(2) (1994). Federal district courts have concurrent jurisdiction for suits not exceeding $10,000. 28 U.S.C. § 1346 (a)(2) (1994). Thus, a claimant is precluded altogether from filing a Tucker Act suit in a state court.

12. *See* Dugan v. Rank, 372 U.S. 609 (1963) (takings claim against the federal government may only be brought under the Tucker Act and injunctive relief is not proper); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) ("[E]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized

generally prohibited from ordering the government to keep a promise or a contract to repair damage;[13] and (3) precluded from awarding damages that are "temporary" in nature.[14]

The Tucker Act gives the Federal Claims Court original, and in most cases, exclusive jurisdiction to decide the types of claims described above.[15] Furthermore, the rules governing the Federal Claims Court present another significant procedural hurdle for takings claims, particularly claims based on long-term flooding and erosion damage, in the form of its statute of limitations. If a plaintiff does not file a petition within six years after the claim accrues, the plaintiff loses her legal right to sue the government for damages.[16] Thus, if a claimant files her petition more than six years after the governmental act, it is likely that the government will claim that the time limit for filing a claim has passed. The plaintiff then bears the burden of proving that the statute of limitations has not run, or the court will dismiss her suit before it reaches the substance of the

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by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."); Werner v. U.S. Department of Interior, Fish & Wildlife Services, Bureau of Sport Fisheries & Wildlife, 581 F.2d 168 (8th Cir. 1978) (where damages are only incidental to a claim seeking injunctive relief, the district court has no jurisdiction under the Tucker Act to grant the equitable relief sought).

13. To require the government to perform under a contract, the court would need to order "specific performance," a form of equitable relief. Because the Tucker Act only allows monetary damages, a plaintiff must wait until the government breaches the contract and then sue afterward for damages. Additionally, damages for breaching implied contracts, that is, unwritten informal agreements, are only available for situations where the government has a motive to contract, intends to be bound, and where there is "offer and acceptance" by both parties. Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478, 1483 (Fed. Cir. 1994).

14. While the Supreme Court has ruled that a government intrusion, no matter how minute, may be a "physical invasion," a minute intrusion must be permanent to constitute a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). If the government act merely amounts to a temporary trespass, the claimant may recover damages under the Federal Tort Claims Act, incorporated in 28 U.S.C. §§ 2671-2680 (1994). If the government imposes a regulation that is later found to be a taking, the government must compensate the landowner for the time in which the regulation was in force. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal., 482 U.S. 304 (1987). However, property owners cannot sue for a temporary regulatory taking until the regulation has been withdrawn. *Id.* at 321. Additionally, an erosion claim, unlike government intrusions and regulations that may be withdrawn or flooding that may recede, involves damage that is permanent by its very nature.

15. *See supra* note 11.

16. Actions under the Tucker Act "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994).

claim.[17] Because of the importance of this threshold question, courts have spent considerable time interpreting the word "accrues," especially in the context of claims involving gradual flooding or erosion damage.

In 1947, in *United States v. Dickinson*,[18] the Supreme Court ruled for the first time that the Tucker Act's statute of limitations does not automatically bar a claim for flood damage that is filed more than six years after a governmental act. In *Dickinson*, a government dam caused the water level of a river to rise until it permanently flooded the claimant's land. The landowner sued eight years after the dam began to impound water, but less than six years after the water reached its ultimate or stabilized level. Categorizing the flooding as a "continuous and gradual" process, the Court ruled the claimant acted appropriately by "postponing the suit until the situation stabilized" when he could make a "final account" of the damage to the property.[19]

Although the *Dickinson* decision provides some flexibility about the timing of damage claims, the Claims Court has not interpreted *Dickinson* to mean that the statute of limitations begins to accrue when there is no possibility of further damage.[20] The court has concluded that "certainty, definiteness, or foreseeability of flooding or erosion . . . defines the taking and triggers the limitations period."[21] In *Cooper v. United States*,[22] the court defined "certainty" as the point at which the extent of the destruction is ascertainable. Cooper had filed a claim more than six years after

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17. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the defendant has the burden of asserting that the statute of limitations bars the claim. However, if the plaintiff filed the claim in question more than six years after the initial governmental act, the government faces almost no difficulty in claiming the time limit has passed. The burden then shifts to the plaintiff who must provide sufficient evidence so that the court is willing to continue hearing the case. Thus, the plaintiff effectively bears the burden of proving her case before the court even reaches the substantive issues of the takings claim. *See* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1394, at 778 (2d ed. 1990).

18. 331 U.S. 745 (1947).

19. *Id.* at 749.

20. *See, e.g.*, Columbia Basin Orchard v. United States, 88 F. Supp. 738, 739 (Ct. Cl. 1950), where the court dismissed a takings claim filed more than six years after the government purified a contaminated well that had destroyed the plaintiff's trees. The court stated, "we do not think the Supreme Court, in the Dickinson case, meant to hold that plaintiff was entitled to wait until any possibility of further damage had been removed." *Id.* at 739.

21. Applegate v. United States, 28 Fed. Cl. 554, 561 (1993), *rev'd and remanded*, 25 F.3d 1579 (Fed. Cir. 1994).

22. 827 F.2d 762, 764 (Fed. Cir. 1987).

a government waterway flooded his property, and five years after he had first noticed the flooding had damaged his orchard. The *Cooper* court concluded that the plaintiff was not aware of the extent of the damage until the trees died, which was the same year he filed suit.[23] In *Barnes v. United States*,[24] the court ruled that intermittent flooding amounted to a taking four years after the first flood when "it first became clearly apparent . . . that the intermittent flooding was of a permanent [(definite)] nature."[25] Finally, in *Nadler Foundry & Machine Co. v. United States*,[26] the court found that the situation had "stabilized" the same year that a one-time dredging operation caused the first extensive cave-in of the plaintiff's riverfront property. Although the claimant argued that the situation had not stabilized until many years later, after a second cave-in totally destroyed the property, the court disagreed, stating that the ultimate destruction of the land was a "foreseeable future event" after the first cave-in.[27]

Even when a waterfront property owner proves that she has filed a timely claim, the first substantive legal challenge she may face in court is to demonstrate that the damaged property is not subject to a dominant government easement. This easement, called the navigation servitude,[28]

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23. Applying *Dickinson's* stabilization doctrine, the court reasoned that the critical question was "when did the destruction of trees become sufficiently stabilized so that the owner could determine the amount of timber taken?" *Id.*

24. 538 F.2d 865 (Ct. Cl. 1976).

25. *Id.* at 873. In *Barnes*, the government released dammed waters to control the flow of the Missouri River and to eliminate sediment that had been deposited from earlier damming actions. Although government engineering studies showed that the dam would flood and deposit sediments on nearby farm lands, the government continued its operations. The plaintiff farmers filed suit, claiming that the government actions caused periodic and intermittent flooding that eventually destroyed their crops. After concluding that "[a]dopting a date of taking must often be done in a somewhat imprecise manner," the court ruled that "the date the Government completed taking its flowage easement cannot be prior to when, through passage of time, the permanent character of intermittent flooding could fairly be perceived." *Id.* Thus, the court decided that the taking was "definite" when the final flood occurred, a date four years after the government first flooded the property.

26. 164 F. Supp. 249, 251 (Ct. Cl. 1958). In finding that "the plaintiff would carry the Dickinson doctrine too far[,]" the court dismissed a claim for damages that was filed more than twenty years after the one-time dredging operation caused an extensive cave-in, but less than six years after a second cave-in totally destroyed the property. *Id.* at 251.

27. *Id.*

28. The federal navigation servitude is based on the principle that the federal government's power to regulate navigable waters is not only superior to state common law

exempts the government from compensating landowners for taking their property when the government acts to improve navigation. In general, the easement extends to the high water mark of navigable waterways.[29] In cases involving flood damage, if the governmental act raises the level of water above the high water mark, the government must compensate the owner for any damage.[30] However, most erosion damage results from governmental acts which interfere with normal water velocities or currents but that do not raise the level of the water above the high water mark. For this reason, courts have historically ruled that erosion damage was incidental, and noncompensable, under the government's authority to improve navigation.[31]

One of the decisions finding that the navigation servitude barred a claim for erosion damages was *Pitman v. United States*,[32] a 1972 erosion claim that arose from the same Army Corps of Engineers (Corps) project in *Applegate*. Following the traditional reasoning, the *Pitman* court found no evidence that the Corps physically invaded the plaintiff's property during construction of the project or that the project raised the level of the water above the high water mark. The court reasoned that the plaintiff was actually claiming compensation for land that now lay under navigable waters—land subject to the navigation servitude.[33]

In 1988, however, the Court of Appeals for the Federal Circuit overruled *Pitman* and the earlier decisions by finding that, as with

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property rights, but also "superior" to the Constitutional requirement that the government must compensate a property owner when it confiscates his property for public use. Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249-50 (1954).

29. *Id.* at 249.

30. *See, e.g.*, Coates v. United States, 117 Ct. Cl. 795 (1950) (government act to improve navigation by raising the level of the Missouri River above the high water mark required compensation); United States v. Willow River Power Co., 324 U.S. 499, 509 (1945) ("[H]igh-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid.").

31. *See, e.g.*, Franklin v. United States, 101 F.2d 459 (6th Cir.), *aff'd*, 308 U.S. 516 (1939) (interruption of the southerly littoral flow of sand by an Army Corps of Engineers' project constructing jetties at the entrance of a harbor was not a direct invasion or appropriation of the plaintiff's property; any damage above the high water mark was noncompensable damage incidental to the government's right to improve navigation).

32. 457 F.2d 975 (Ct. Cl. 1972).

33. The *Pitman* court held that the interruption of the southerly littoral flow of sand which nourished the plaintiffs' beach was "consequential damage for which no recovery may be had[,]" even assuming that erosion was reasonably foreseeable, where there was no evidence that entry was made on land by the Corps of Engineers in the course of construction or maintenance of the project. *Id.* at 977.

flooding claims, the government must compensate landowners for erosion damage above the high water mark. In *Owen v. United States*,[34] an upriver dredging project increased the water velocity of a river, which eventually caused the plaintiff's house to topple into the water. Finding that there must be a limit to the navigation servitude or it "would extend infinitely in all directions and swallow up any claim for just compensation," the court concluded that claims for erosion damage above the high water mark cannot be dismissed as falling under the navigation servitude.[35] Having established that an upstream government act could amount to a compensable taking for downstream erosion, the stage was set for *Applegate*.

B. Statutes of Limitations

To appreciate the impact that statutes of limitations can have on takings claims, it is important to first explore the evidentiary burden upon a plaintiff attempting to prove that the government "took" property.

For a successful erosion takings claim, a plaintiff must prove that an otherwise legitimate governmental act caused permanent and significant damage to property that is free from public encumbrances.[36] Stated another way, the damage cannot result from a negligent or illegal govern-

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34. 851 F.2d 1404 (Fed. Cir. 1988).

35. *Id.* at 1410. The Federal Court of Appeals indicated that while the lower court could find that sand which had been below the high water mark before the government act was subject to the navigation servitude, the lower court had "improperly extended that same logic to prevent compensation for erosion loss of land located above the ocean's high-water mark." *Id.* at 1413.

36. In *Sanguinetti v. United States*, 264 U.S. 146 (1924), the Supreme Court rejected the plaintiff's claim for flooding damage caused by a government levee that unintentionally acted as a dam. The Court concluded that the government act must "constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." *Id.* at 149. *See also* United States v. Cress 243 U.S. 316, 328 (1917) (intermittent flooding must produce "substantial" damage).

ment act,[37] must not be temporary[38] or insignificant,[39] and the property must not be subject to the federal navigation servitude.[40]

The requirement that the governmental act "cause permanent and significant damage," plays an important part in a takings claim. The Supreme Court has interpreted "cause" to mean that the damage would not have occurred "but for" the governmental act.[41] This burden is

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37. In fact, the Tucker Act only allows claims "not sounding in tort." 28 U.S.C. § 1491(a)(1) (1994). Federal courts have interpreted this provision to mean "a taking occurs, and compensation as allowed by the Fifth Amendment must be paid, when there has been a legal action by the government. Illegal government actions do not result in takings." Catellus Development Corp. v. United States, 31 Fed. Cl. 399, 408 n.9 (1994) (dismissing a takings claim for property that was contaminated with Army dud ordinances illegally placed on the land).

38. *See supra* text accompanying note 14. *See also* Barnes v. United States, 538 F.2d at 873, where the court ruled that a taking occurs only when damage becomes "permanent."

39. The Court of Claims interpreted the term "insignificant" in *National By-Products, Inc. v. United States,* 405 F.2d 1256, 1275 (Ct. Cl. 1969) by finding, "[i]t is a long settled principle that a taking is not affected by the extent of the benefit to the Government, but solely by the amount of injury to the landowner. . . . [Even] the Government's foreknowledge [of the consequences of its act] will not convert an otherwise *insufficient* injury into a taking." (emphasis added). *Id.* at 1275.

40. *See supra* note 28. The navigation servitude presents barriers for erosion claims not found in flooding cases. First, because the government act never raises the water level above the high water mark, it is more difficult for the landowner to prove that the government act, and not an act of nature, caused the erosion. Second, even if the government act destroys property above the high water mark, under some circumstances, the government may still be exempt from paying compensation. The Supreme Court has ruled that upland property destroyed by a project designed to preserve navigable water in a channel, or to restore the natural flow of a river, falls under the navigation servitude. Bedford v. United States, 192 U.S. 217, 225 (1904) (rejecting takings claim by Mississippi River landowners because the government revetments that caused the erosion were built to preserve navigability of the river). One court has also ruled that a noncompensable taking occurs where property is destroyed as a result of dam construction during a natural disaster. Dudley v. Orange County, 137 So. 2d 859, 863 (Fla. 2d DCA 1962) (government not required to compensate where dams constructed during a natural disaster increased the degree of flooding). Thus, if the *Applegate* plaintiffs argued that the taking occurred solely from the additional dredging and jetty work, they would need to prove that the additional work did not result from an effort to preserve navigable water, or as a result of an emergency. Otherwise, the destruction of property would be a noncompensable taking.

41. In *Owen v. United States,* 20 Cl. Ct. 574 (1990), the Claims Court ruled, on remand from the United States Court of Appeals, that a property owner failed to establish that dredging activities caused her home to collapse in a river. The Claims Court found the "issue is whether the plaintiff has demonstrated that, *but for* the dredging . . . the

particularly cumbersome for coastal landowners whose property is subject to seasonal flooding or currents that alter the shoreline by carrying and depositing sand.[42] In fact, courts have historically denied takings claims in situations where pre-project flooding or natural erosion occurs, finding that additional damage from the government act is inconsequential and incidental to the damage caused by nature.[43] To be "permanent and significant," the act may be "inevitably recurring"[44] and does not have to last forever, but it must cause damage that "rises above a temporary, incidental injury—in the nature of a tort."[45]

In practical terms, to succeed with a takings claim, a plaintiff must: (1) determine and demonstrate the historical effects of natural flooding and longshore currents on her property; (2) prove the government act caused damage that would not have occurred "but for" the act; and (3) establish that the government-caused erosion severely and permanently damaged her property. By their very nature, gradual and continuous erosion claims require knowing the long-term effects of a government project in order to prove the "but for" and "permanency" elements of a taking. Thus, any strictly applied time limit on the filing of a claim may interfere with, or possibly deny, a plaintiff's opportunity to prove her claim.

Statutes of limitations are merely legislatively established time limits for bringing particular actions.[46] Because each state has the authority to

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property would have been undamaged." (emphasis added) *Id.* at 584.

42. *See, e.g.*, Laughlin v. United States, 22 Cl. Ct. 85 (1990), where the court denied a takings claim when a flood control project increased the groundwater level of a marsh, on the grounds that the land had always been subject to the risk of successive periodic overflows from floodwater.

43. *Id.* at 102. "To attach liability to the [government] . . . every time . . . groundwater invaded the root zone . . . would make a government agency responsible for whatever climatic conditions nature chooses to deliver." *Id. See also* Miller v. United States, 583 F.2d 857, 864 (6th Cir. 1978), *dism'd on remand*, 480 F. Supp. 612 (E.D. Mich. 1979) (noting that even if a government structure increased or prolonged flooding, the plaintiffs could not show "direct appropriation" of the land because natural factors had historically caused fluctuations in the levels of the lake).

44. *See, e.g.*, United States v. Cress, 243 U.S. 316 (1917) (government act may constitute a taking when flooding is subject to "intermittent, but inevitably recurring" inundation of water caused by government act); Fromme v. United States, 412 F.2d 1192, 1196-97 (Cl. Ct. 1969) (permanent, intermittent flooding which amounts to a taking must be frequent).

45. National By-Products v. United States, 405 F.2d at 1275.

46. *See* Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454 (1993), for a discussion of the history and nature of federal statute of limitations, and the problems associated with federal courts

establish its own statutes of limitations, time limits vary not only from state to state, but also based on the type of action.[47] Additionally, state statutes of limitations frequently differ from the federal time limits for similar types of action.[48] Although the Supreme Court has described statutes of limitations as "arbitrary by definition,"[49] they are supposed to reflect a underlying principle of fairness by balancing: the interests of a plaintiff to be heard and fully litigate a claim; a defendant's need for finality and peace of mind; and efficiency interests of the judicial system.[50] This subjective balancing act results in time limits that reflect a legislature's "value judgment" concerning the point at which "the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[51] Statutes of limitations breed

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borrowing state established time limits.

47. In *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839), the Supreme Court ruled that a statute of limitations is a procedural law, and the forum hearing a particular case may apply its own time limits even when the substantive law governing the case is from another jurisdiction with a different statute of limitations. *See also* Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19 (1989), which describes the disparity of time limits among states and types of claims. For example, New Hampshire has a general statute of limitations that requires claims to be filed within three years of the act, while Mississippi has a six year time limit. *Id.* at 28-33. Even within the federal legal system, time limits vary depending on the type of claim. For example, U.S. veterans have twelve\years to apply for vocational rehabilitation benefits, yet only one year to apply for disability compensation. *See Federal Statutes of Limitations*, 20 SW. U. L. REV. 495, 944-47 (1991) (listing statutes of limitations for federal statutory causes of action and other procedural time limits).

48. For example, New Hampshire has a three year time limit for filing tort claims. N.H. REV. STAT. ANN. § 508:4 (1988 & Supp. 1990). The Federal Tort Claims Act has a two year statute of limitations. 28 U.S.C. §§ 2671-80 (1994).

49. In *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945), the Supreme Court maintained that "[s]tatutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary." *Id.* at 314.

50. Statutes of limitations preclude the prosecution of stale claims where "evidence has been lost, memories have faded, and witnesses have disappeared." R.R. Tel. v. Railway Express Agency, 321 U.S. 342, 349 (1944). *See also* James M. Fischer, *The Limits of Statutes of Limitations*, 16 SW. U.L. REV. 1 (1986), which discusses the factors that society uses to set time limits, including: (1) preventing the perpetrations of fraud by stale claims; (2) enhancing commercial transactions by freeing individuals from the distraction of litigation; and (3) discouraging courts from reaching difficult decisions based on stale evidence.

51. Sun Oil v. Wortman, 486 U.S. 717, 736 (1988). In *Sun Oil*, Justice Brennan described the balance of interests as follows:

The statute of limitations a State enacts represents a balance between, on one

inevitable conflicts between fixed time limits, which bar claims based on presumed prejudice rather than actual prejudice, and the duty of the court to provide individualized justice. Legislatures and courts have recognized that generic statutory time limits may not provide just and fair results in all cases. Congress has excepted minors, insane individuals, and those out to sea at the expiration of the six-year time limit from the Tucker Act.[52] The courts have exempted certain types of racial discrimination claims and Indian treaty disputes from statutes of limitations altogether.[53]

Courts have ruled that a statute of limitations must be reasonable and have a fair and substantial relation to the object of the legislation.[54] The Supreme Court has invalidated short and strict time limits on the grounds that they violate due process and equal protection rights.[55] Additionally, courts have used a "continuing claims" theory to extend the statute of limitations by finding that a new claim accrues for subsequent government

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> hand, its substantive interest in vindicating substantive claims, and on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.

Id.

52. Under federal statute, "persons under legal disability or beyond the seas at the time the claim accrues may file a claim within three years after the disability ceases." 28 U.S.C. § 2501.

53. In *Occidental Life Insurance Company v. EEOC*, 432 U.S. 355 (1977), the Supreme Court held that no time limit applies to actions brought by the Equal Employment Opportunity Commission (EEOC) for enforcement actions under the 1964 Civil Rights Act. The Court reasoned that because EEOC regulations require plaintiffs to pursue internal remedies at the workplace, the employer knows he is being accused. Furthermore, placing a time limit on enforcement claims would put undue pressure on EEOC's administrative officers. In *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Court allowed the Oneida Indian Nation to use the Trade and Intercourse Act of 1793 to overcome the government's argument that the statute of limitations barred the plaintiffs from claiming that New York State owed them rent for Indian lands. *See also* Patrick M. McDowell, *Limitation Periods for Federal Causes of Action After the Judicial Improvement Act of 1990*, 44 VAND. L. REV. 1355 (1991), for a discussion of various types of federal claims and the respective statutes of limitations governing them.

54. Clark v. Singer, 298 S.E.2d 484, 485-486 (Ga. 1983).

55. In *Mills v. Habluetzel*, 456 U.S. 91 (1982), the Supreme Court ruled that a Texas statute which imposed a strict, one-year period for bringing paternity actions was unconstitutional, in part, because the short time limit was not substantially related to the state's interest of avoiding stale claims. The Court later applied the *Mills* principles in *Pickett v. Brown*, 462 U.S. 1 (1983), to rule that Tennessee's more flexible two-year time limit was also unconstitutional.

acts, even if the original act occurred more than six years ago; and courts have also ruled that a new claim accrues when the government restores a property owner's expectation that he will be able to use or develop his property.[56] For example, in *Creppel v. United States*,[57] the Court of Appeals accepted the plaintiff's takings claim, filed more than six years after an Environmental Protection Agency order halted the plaintiff's land reclamation project, because a subsequent—although later overturned—district court order allowed the project to continue. The court reasoned that the court order "restored some potential expectation of completion of the Project and thus some measure of the property's value."[58] Furthermore, at least one court has allowed a takings claim that was filed after the statutory time limit, on the ground that the longer time limit allowed by an adverse possession statute applied to the claim.[59]

In addition to extending the six-year time limit, the courts have suspended statutes of limitations under the doctrine of "equitable tolling" when a plaintiff could not reasonably determine that an injury exists, or when a defendant withholds facts or deceives a plaintiff into not filing suit until after the statute of limitations runs.[60] In a case decided after the

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56. The courts generally apply the "continuing claims" theory in employment and contract disputes when there are no disputed facts and the court may resolve the case by interpreting the law and regulations as they existed at the time of the original act. Roberts v. United States, 151 Ct. Cl. 360 (1960). However, courts have used the "continuing claims" theory to decide that a new claim accrues each time the government restores a property owner's expectation that he will be able to use or develop his property. Townsend v. State of New Mexico State Highway Department, 871 P.2d 958 (N.M. 1994) (a new cause of action arose each time the state highway department changed the character of the rocks on the landowner's property by blasting, and each time the highway department truck left the property loaded with sand and gravel).

57. 41 F.3d 627 (Fed. Cir. 1994).

58. *Id.* at 634. It is interesting to note that by initiating plans to restore the *Applegate* beach, the Corps conceivably "restored expectations" that the plaintiffs would regain use of their property.

59. White Pine Lumber Company v. City of Reno, 801 P.2d 1370 (Nev. 1990). The Nevada Supreme Court held that the fifteen-year statute of limitations applicable to adverse possession claims applied to the plaintiff's takings claim. The decision reversed a lower court ruling that dismissed the plaintiff's claim, which was filed nine years after the government act, and five years after the statute of limitations had run. *Id.*

60. *See, e.g.*, Costello v. Unarco Industries, 490 N.E.2d 675 (Ill. 1984) (permitting a claim in 1981 for exposure to asbestos which occurred in the 1940s, even though the Illinois legislature had enacted an eight year time limit for product liability cases); Kensinger v. Abbott Laboratories, 171 Cal. App. 3d 376 (1985) (allowing claim for second generation "DES" plaintiff).

Applegate appeal, the Supreme Court concluded that equitable tolling applies to claims against the federal government[61] and used the doctrine to uphold a takings claim filed almost forty years after the government seized the plaintiff's property.[62]

Recognizing that the principles of fairness underlying a statute of limitations apply to defendants as well as plaintiffs, the courts have developed a "middle ground" approach to balance the interests of both parties.[63] This approach requires that a plaintiff make a diligent attempt to discover damage that a "reasonable and prudent" property owner would have discovered under the same circumstances, and prevents a claimant from waiting until "the last grain of sand" is gone before filing a claim.[64] Courts have used this approach to dismiss claims where a plaintiff did not use "due diligence" to discover the damage until after the statute of limitations had run.[65] The approach alerts the accused, yet

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61. In *Irwin v. Dep't of Veteran's Affairs*, 498 U.S. 89 (1990), the Supreme Court held that, as a rebuttable presumption, the doctrine of equitable tolling is applicable to claims brought against the United States.

62. In *United States v. Hohri*, 482 U.S. 64 (1987), the Supreme Court upheld a decision allowing a 1983 claim filed by Japanese-Americans whose property had been seized by the government during World War II. The lower court ruled that the government had deceitfully withheld evidence that the claimants may have been able to use to prove that no military emergency existed at the time the government seized their property. Without a military emergency, the government would have been precluded from seizing the plaintiffs' property without compensation. Similarly, although the *Applegate* court did not mention the equitable tolling theory in its decision, the fact that the government developed three separate proposals to replace the lost sands may have "deceived" the plaintiffs into not filing a takings claim earlier.

63. In denying a takings claim filed more than six years after a government dam reduced the water flow of a river the plaintiffs had used for irrigation, the U.S. Court of Claims said, "[t]here must be a *middle ground* between the open-end application of the *Dickinson* doctrine for which plaintiffs contend and premature foreclosure by *res judicata* to which the *Dickinson* opinion refers." Gustine Land & Cattle Co. v. United States, 174 Ct. Cl. 556, 657 (1966) (first emphasis added).

64. *See, e.g.*, Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (a cause of action first accrues when "all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence"); Fallini v. United States, 56 F.3d 1378, 1380 (Fed. Cir. 1995) ("a plaintiff does not have to possess actual knowledge of all relevant facts in order for the cause of action to accrue").

65. In *Alaska v. United States*, 32 Fed. Cl. 689 (1995), the court that ruled the statute of limitations barred the State's claim that the federal government restrictions on the export of Alaskan crude oil was a compensable taking. The court decided that because the regulation had been in effect for some years, Alaska should have discovered its adverse

discourages a claimant from filing an untimely claim merely because she has "nothing to lose and everything to gain."[66]

In *Dickinson*, the Supreme Court reasoned that "there is nothing in legal doctrine, to preclude the law from . . . postponing suit until the situation becomes stabilized . . . [so] that a final account may be struck."[67] Given the legislative and judicial exceptions to arbitrary and subjective statute of limitations periods, it is fair and reasonable for the courts to recognize that the term "accrues" may be a date other than the date of the government act. In fact, for takings cases, the Supreme Court has concluded the act accrues "when all events have occurred that fix the alleged liability of the United States and entitle the claimant to institute an action."[68] This determination is "somewhat imprecise" and poses question of fact "in the nature of a jury verdict"[69] that "depends on the facts of each case."[70] Thus, the stabilization doctrine developed in *Dickinson* is merely a mechanism that the court applies to the facts of an individual case to determine when the plaintiff should have reasonably known that the situation had reached the point where she could, and should, file a takings claim.

III. SUBJECT CASE: *APPLEGATE V. UNITED STATES*

In 1992, a class of 271 landowners including the Applegates, filed a complaint in the U.S. Court of Federal Claims alleging a taking.[71] The claim was based on erosion damage caused by an Army Corps of Engineers project that was designed to create a deepwater harbor for Cape Canaveral. This project involved building two jetties and dredging a thirty-six foot deep, 400 foot wide, six mile long channel.[72] The channel

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financial impacts several years before the State filed suit.

66. *See* Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, 135 MIL. L. REV. 1, 17 (1992), in which the author argues that tort law suffers from time limit exceptions such as equitable tolling because it allows plaintiffs to file untimely claims. Thus, for tort claims, there is no "middle ground" balancing of interests.

67. United States v. Dickinson, 331 U.S. 745, 749 (1947).

68. Japanese War Notes Claimants Ass'n v. United States, 373 F.2d 356, 358 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 971 (1967).

69. Barnes v. United States, 538 F.2d 865, 873 (Ct. Cl. 1976).

70. *Id.*

71. Applegate v. U.S., 25 F.3d at 1580.

72. Pitman v. United States, 457 F.2d at 976.

cut through two shallow tidal lagoons and a barrier beach that had provided a natural shelter against winds and storms. Following the initial construction, the Corps returned on at least five occasions to further dredge the channel or to extend the jetties.[73]

The *Applegate* plaintiffs claimed, and the government did not dispute, that the project eroded up to 400 feet of beachfront property along a forty-one mile beach and threatened to destroy homes.[74] Although Congress had authorized $5.0 million to construct a sand transfer plant as early as 1962, the Corps repeatedly initiated, and subsequently delayed, plans for the plant. As late as 1988, only four years before the plaintiffs filed their claim, the Corps issued its latest proposal to construct the transfer plant.[75] However, at the time of trial, the Corps had not acted.[76]

The Court of Federal Claims relied on *Nadler*[77] to find that the *Applegate* plaintiffs should have "foreseen" the erosion, and on *Barnes* to conclude that they knew the erosion was "permanent" decades before

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73. Every eighteen months since 1955, the Corps dredged the channel for maintenance purposes. The Corps made several additional improvements that: deepened and widened the port in 1956 and 1957; extended the north jetty in 1958; deepened the channel in 1961 and 1975; and enlarged the port in 1986. Applegate v. United States, 28 Fed. Cl. at 556.

74. *Id.* at 557.

75. Applegate v. United States, 25 F.3d at 1580. The following timeline describes activities after Congress authorized the sand transfer plant in 1962:

(1) In 1967, the Corps presented a $1.3 million plan to restore the beaches and build a sand transfer plant;

(2) In 1968, the Senate Public Works Committee and the Florida Department of Natural Resources approved the plan;

(3) In 1971, after letting out bids, the Corps indefinitely delayed the transfer plant to conduct further research and development but proposed an interim beach renourishment plan. (In 1972, the court dismissed the *Pitman* case);

(4) In 1975, in response to a Congressional inquiry, the Corps indicated that it would use sand it removed during construction of a Trident submarine base to restore the beach;

(5) In 1985, in response to a Congressional inquiry, the Corps repeated its intention to use the sand from the submarine base to restore the beach despite having already dumped some of the available sand miles offshore;

(6) In 1988, the Corps proposed a $5.0 million plan to construct a sand transfer facility system.

Applegate v. United States, 25 F.3d at 1580; Applegate v. United States, 28 Fed. Cl. 554, 557 (1993), *rev'd and remanded*, 25 F.3d 1579 (Fed. Cir. 1994).

76. Applegate v. United States, 28 Fed. Cl. at 1580.

77. *See supra* note 26 and accompanying text.

they filed their claim.[78] Therefore, the court held that the six-year statute of limitations applicable to Tucker Act claims barred the plaintiffs' 1992 claim for erosion damage that was caused by a project constructed in the 1950s. However, the Court of Appeals for the Federal Circuit reversed this decision.[79]

The federal circuit distinguished *Nadler* on the grounds that it involved a one-time act that destroyed property in a single cave-in, while *Applegate* involved gradual and continuous flooding.[80] The federal circuit found *Barnes* inapplicable because the only question in *Barnes* was when intermittent flooding became permanent, whereas, in *Applegate*, the permanency of the erosion depended on whether the government followed through with its plans to renourish the beach.[81] The court concluded that the *Applegate* situation was similar to *Dickinson*, in that the matter involved continual and gradual flooding, and *Cooper*, where the plaintiffs needed to determine the extent of the damage with some "certainty" before filing their claim.[82] Because the erosion had not stabilized, and because the government had initiated its latest plan to construct a sand transfer plant as late as 1988, the Applegates could not have been expected to calculate the damage with any "certainty" before 1988. Therefore, the statute of limitations did not bar the Applegate's suit. On

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78. Applegate v. United States, 28 Fed. Cl. at 560-62.

79. Applegate v. United States, 28 Fed. Cl. 554 (1993), *rev'd and remanded,* 25 F.3d 1579 (Fed. Cir. 1994).

80. Applegate v. United States, 25 F.3d at 1583. The court of appeals concluded:

> *Nadler* did not feature the uncertainties present in this case [(*Applegate*)]. . . . [T]here were no promises to correct the situation. . . . [and] the Government had in 1934 flatly rejected Nadler's demands for construction of protection against subsidence. In sum, the *Nadler* taking situation had stabilized in 1934 [(when the government performed its one-time dredging operation and the first major cave-in occurred)].

Id.

81. Referring to the question of permanency posed in *Barnes*, the Court of Appeals stated that "[i]n this case, precisely because of the Government's promises to build a sand transfer plant, the landowners remain justifiably uncertain about the permanency of the erosion." *Id.*

82. In noting the similarities between *Applegate, Dickinson,* and *Cooper*, the Court of Appeals indicated, "the almost imperceptible physical process has delayed detection of the full extent of the destruction – a necessary precondition of striking a final account." *Id.* at 1582.

remand, the lower court had to proceed to the substantive issue of whether a taking had occurred.[83]

IV. DISCUSSION

Before considering how a strictly applied six-year time limit would have interfered with the ability of the Applegates to prove their takings claim, it is important to note that other provisions of the Tucker Act preclude plaintiffs such as the Applegates from asking the court to: 1) order the government to condemn their property before constructing the port; 2) halt construction of the port, the further dredging of the channel, or the extension of the jetties; 3) order the government to build the sand transfer plant; or 4) award damages for temporarily taking their beachfront property.[84] The only recourse for such plaintiffs is to wait until the government permanently takes their property and then to file a claim for damages. Thus, the timing of a takings claim is a major consideration for *Applegate*-type plaintiffs.

In the instant case, if the Applegates filed prematurely, they might not have been able to determine the full extent of the damage. Alternatively, the court might have ruled that the damage was not sufficiently significant or permanent as to amount to a taking. Moreover, the Corps could have argued that the claim was not ripe, or that the damage was only temporary because the government planned to restore the beach. However, if the Applegates waited too long, as the government alleged, the Tucker Act's six-year time limit would have barred their claim. These procedural and substantive hurdles, which are faced by plaintiffs like the Applegates,

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83. *Id.* at 1584. On remand, the case grew to more than 300 plaintiffs. Applegate v. United States, 35 Fed. Cl. 406, 410 (1996). Together these plaintiffs claimed a total of $100,000,000 in damages. Civil Docket for Case #: 92-CV-832, at 1, Applegate v. United States, 35 Fed. Cl. 406 (1996) (No. 92-CV-932) (as of Sept. 18, 1995). After scores of motions, answers and status reports spanning almost 18 months, the Court of Federal Claims dismissed summary judgment requests by both parties. The court found that there were genuine issues of material fact that must be heard before the court rules for or against either party. However, the court did hold that the government must compensate the owners for any flooding or erosion damage to the property—above the high water mark—that occurred after the plaintiff purchased the land, provided that the plaintiffs are able to demonstrate the amount of beachfront property lost to erosion and flooding. The court scheduled a pretrial conference for mid-July to establish trial dates. Thus, more than two years will have elapsed between the date of the remand and the date on which the actual trial begins. Applegate v. United States, 35 Fed. Cl. at 425 (1996).

84. *See supra* notes 12-14.

provide a great incentive for the government not to compensate landowners before taking their property. Given these barriers, it was appropriate for the court to allow the Applegates to delay filing suit until they could demonstrate that "but for" the government port project their property would not have been damaged, and additionally, that "but for" the Corps' repeated plans to restore the beach, the damage would have been permanent. Because there were two acts that "caused" the taking—one that created the damage and a second that made the damage permanent—it was also reasonable for the court to consider both "acts" to determine if the statute of limitations was met. Considering both acts, the court reasoned that while the damage element of the claim depended on the government construction of the port, the time limit element depended on when the situation stabilized or when the damage became permanent. Furthermore, because the erosion situation never stabilized, the statute of limitations question hinged on when the erosion became permanent. The court concluded that the erosion was not permanent until the Applegates were reasonably certain that the government was not going to restore the beach; and when this event occurred, the plaintiffs properly filed suit.

Because both the port project and the plans to restore the beach were substantive and factual elements of the Applegates' claim, it was appropriate for the court to consider them both to determine the applicability of the statute of limitations. In extending, tolling or even invalidating statutes of limitations, the relevant case law demonstrates the courts' resolve to allow substantive claims to overcome technical, procedural defenses, such as time limits. The *Applegate* court recognized the importance of not only permitting plaintiffs to show a cause of action but also providing them with an effective remedy.

V. CONCLUSION

For future erosion victims, *Applegate* signifies that courts are not limited to using the date that the government act causes the damage to determine the date when the statute of limitations accrues. Courts are free to combine different events to answer the threshold questions of "cause," "permanency" and "accrual." In other words, courts may combine several actions, or even inactions, to determine the substantive and the procedural elements of a takings claim.

Critics may argue that not adhering to established time limits results in increased litigation, calendar congestion, transaction costs and stale

claims.[85] However, adhering to strict time limits may actually result in even more legal actions, because plaintiffs will resort to the "premature and piecemeal litigation" that the *Dickinson* court struggled to avoid.[86] Furthermore, the courts have established safeguards to avoid stale claims, and for those cases that make it to trial, the plaintiff still bears the burden of proving the cause and permanency elements of a takings claim.

The *Applegate* decision merely removes an arbitrary, and subjective procedural hurdle that promotes short-sighted planning on the part of the government. In fact, the Congressional authorization of funds to build a sand transfer plant, and subsequent government plans to restore the lost sands, were major factors in the court's decision to allow this case to go forward. Absent the specific government plans to repair the damage, it is not clear that the court would have concluded that the statute of limitations did not bar the plaintiffs' suit. However, given the government's action, it is evident that if the court had barred the Applegates' claim, the government could effectively avoid liability for future takings; by physically invading property without confiscation and then by promising for a six-year period, to repair any government-caused damage, after which a plaintiff would be barred from filing suit. This would create situations where claimants who do not get their "day in court" would further clamor about the inequities of the judicial system. It would also give their legislative representatives additional fodder for enacting generic takings legislation which would, ironically, be similar to the one-size-fits-all generic statute of limitations. By not permitting the government to abuse what is, in most cases, a legitimate procedural time limit for filing takings claims, the court has sent a message that the government must take responsibility for its actions.

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85. Parker, *supra* note 66.

86. Furthermore, the current practice of allowing claimants to return to court to seek additional damages when subsequent government acts result in further damage, creates subsequent trials that are both timely and costly to all parties and the court system. *See also* Slattery Company v. United States, 231 F.2d 37 (5th Cir. 1956), which describes the conditions in which a plaintiff may return to court to sue for additional damages, and how this option is generally limited to "structural changes" to the government facility that resulted in the taking.