

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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YANKTON COUNTY, SOUTH DAKOTA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Federal Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Generally, “a claim alleging a Fifth Amendment taking accrues when the act that constitutes the taking occurs.” *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009). In some circumstances, however, determining the time of accrual is not as simple as identifying the time when the subject Government action occurred. In the situation where the landowning party is unaware that its property is being taken, two doctrines may work to postpone accrual of the claim – the Accrual Suspension Rule and the Stabilization Doctrine. The Accrual Suspension Rule provides an argument for delay that is available to all inverse condemnation claimants. The Stabilization Doctrine, however, may only apply in cases where the taking arises out of a gradual physical process, such as erosion. Despite the doctrines’ separate and distinct elements, the courts below did not separately analyze or apply the two legal doctrines. Therefore, the question presented is:

In an inverse condemnation case in which the taking arose out of a gradual and continuous physical process put in motion by the Government, may the claimant postpone filing suit until the situation stabilizes as explained in *United States v. Dickinson*, 331 U.S. 745 (1947)?

**PARTIES TO THE PROCEEDING**

The Petitioner is a governmental entity organized under the State of South Dakota. The Respondent is the United States of America.

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**PETITION FOR A WRIT OF CERTIORARI**

Yankton County, South Dakota respectfully petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.



**OPINIONS BELOW**

The United States Court of Federal Claims opinion is reported as *Yankton County v. United States of America*, 135 Fed. Cl. 620 (2017).

The United States Court of Appeals for the Federal Circuit’s affirmation was not reported.



**JURISDICTION**

The United States Court of Appeals for the Federal Circuit entered judgment on February 8, 2019. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND  
STATUTORY PROVISIONS AT ISSUE**

The Fifth Amendment of the United States Constitution provides: “[N]or shall private property be taken for public use, without just compensation.”



28 U.S.C. § 2501 provides: “Every 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 such claim first accrues.”

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## STATEMENT OF THE CASE

### A. The Dams and Rivers

Behind the five federally-owned dams that have tamed the continent’s largest river for over a half century lies a string of devastating financial and environmental consequences. Those consequences are the direct result of power and revenue generating dams; however, the harm is born almost entirely by lesser local governments like Petitioner who border the federally manipulated river.

The river in this case is the Missouri, a geological wonder that stretches from its headwaters near Three Forks, Montana to its confluence with the Mississippi River at Saint Louis, Missouri and drains 1/6th of the United States. The five dams, Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point are located in the Dakotas, and serve many purposes including flood control, navigation, power generation, and recreation. The dams, conceived by the Pick-Sloan Plan and authorized by the Flood Control Act of 1944, are marvels of modern engineering and in many ways symbolize the strength, ingenuity, and sheer will of post-World War II America. They are as impressive today as they were when President Dwight Eisenhower dedicated

Garrison in 1947, Tom Brokaw welcomed Gavins Point's 20,000th visitor as a young tour guide in 1958, and President John F. Kennedy dedicated Oahe in 1962.

Taming an enormous wild river like the Missouri is a colossal engineering achievement, but an environmental catastrophe. In harmony with Newton's Third Law, the unnatural *action* of restricting the once free-flowing river has caused the river itself to *react* in unnatural ways. Water flowed uninhibited through the Missouri River since the end of the last glacial period approximately 11,700 years ago. With the water came millions of tons of sediment which was washed away from banks and riverbeds by the river's current, carried through the Missouri to the Mississippi River, and eventually ended up in a delta in the Gulf of Mexico. As a free-flowing river, the Missouri always stayed in equilibrium by naturally replenishing the sediment it washed away with more sediment from upstream.

Gavins Point Dam began holding back the Missouri River west of Yankton, South Dakota in July of 1955. The water being held back forms Lewis and Clark Reservoir. When a dam is constructed across a stream and a reservoir is formed, the flow of river slows down as it enters the reservoir causing the sediment carried by the current to settle to the bottom. The water that is eventually released through the dam's spillway or its power generating facility contains far less sediment than it had when it flowed into the reservoir. This "clean" water is problematic for the river

system below the Dam, which relies on the sediment from above to maintain its equilibrium.

Clean water has been released through Gavins Point since 1955 and has eaten away at a stretch of the Missouri National Recreational River downstream. The river below the Dam was hungry because there was far less sediment in the water to replenish what was being washed away. As a result, the riverbed degraded significantly. When a riverbed lowers, the river's banks oversteepen, and eventually collapse into the river to maintain the proper angle of repose. This process caused the Missouri River to widen as its bed degraded lower into the earth.

The James River stretches over 700 miles across eastern North and South Dakota before it meets the Missouri fourteen miles downriver from Gavins Point. The river drains an area of over 20,000 square miles, and it drops only about five inches every mile. The James is widely regarded as the flattest navigable river in North America. The large drainage area coupled with the incredibly flat gradient makes the river susceptible to intense and prolonged flooding. In the early 1990's the James River Valley entered a cycle of above average precipitation which resulted in severe floods in sequential years.

## **B. The Bridges**

The Fleeg's Bridge has prematurely been made obsolete as a result of the Dam and is one of two bridges that are the subject of this lawsuit. The Fleeg's Bridge

is owned by Yankton County and spans the James River approximately 4 miles upstream from the confluence of the James and Missouri Rivers. App. 5 (see diagram).

The Bridge's structural integrity is constantly threatened by the Dam-induced degradation on the Missouri. The Missouri's elevation at its confluence is at least 8.5 feet lower today than it was in 1955. The James responds to the degradation on the Missouri by pushing sediment into the Missouri. This causes the James to degrade into the earth to meet the new, lower elevation of the Missouri through a process called headcutting. A headcut began at the confluence (also known as the "mouth" of the tributary) and slowly migrated up the James.

A 1994 inspection of the Fleeg's Bridge found that two of its supportive pilings had been exposed in the riverbed, creating urgent safety concerns. The Yankton County Commission sought the advice of the United States Army Corps of Engineers, the South Dakota Department of Transportation, and private contracted engineers.<sup>1</sup> All parties agreed that the proper course of action was to install large rocks known as rip-rap around the pilings for support and protection against the flowing James River. The County believed, as it was told by professional engineers, that a period of extreme and successive floods and the high flows that accompanied them was the cause of the exposed pilings. The County was not aware that the Government's Dam,

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<sup>1</sup> Yankton County does not employ an in-house engineer.

located on a different river almost twenty miles away, was actually undercutting the Bridge the County was working frantically to save.

Over the next seventeen years, the County would identify scouring around the Bridge's pilings on four occasions at the Fleeg's Bridge and two additional times at the Johnson Bridge, the next bridge upstream. Scouring and exposure were identified after every major James River flood. Each installation of rip-rap was approved by a Corps permit. In 2011 the County commissioned engineering firm Black and Veatch to study the hydraulic flows at the Fleeg's Bridge site. The report was delivered to the County on November 17, 2011. The report suggested that some of the problems plaguing the Fleeg's Bridge could be the result of a headcut stemming from the severely degraded Missouri River.

The County began investigating the correlation between Gavins Point Dam and the functional obsolescence of its Bridges after it received the November 17, 2011 report. A subsequent 2013 report from Black and Veatch informed the County that the rip-rap it had been installing was "not a long term fix, but only intended for use until the bridge can be rebuilt." The County finally learned definitively that its Bridges were being destroyed by the construction and operation of Gavins Point Dam over twenty river-miles away through the findings of Geomorphologist Dr. Reuben Heine, who it hired to investigate in 2016. Dr. Heine's report, which was issued on June 5, 2017, concluded that the river channel has degraded 8.42 feet at the Fleeg's Bridge site and 8.24 feet at the Johnson Bridge

site. Such degradation and the accompanying bank erosion are what has destroyed the County's infrastructure.

### **C. The Taking**

The County filed a Fifth Amendment takings case in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), on April 6, 2017, approximately 5 ½ years from receiving the November 17, 2011 Black and Veatch Report and two months prior to receiving a written report from Dr. Heine. The County alleged that the construction and operation of Gavins Point Dam set in motion a gradual physical process that eventually caused the taking of the land supporting the Fleeg's and Johnson Bridges and the ultimate obsolescence of the Bridges themselves.<sup>2</sup>

In lieu of an Answer, the United States moved to dismiss the County's Complaint as falling outside the applicable six-year statute of limitations. The County submitted the sworn statement of its Highway Superintendent that it was not aware of any causal connection between Gavins Point and its bridges until sometime after November 17, 2011, and posited that pursuant to *United States v. Dickinson*, 331 U.S. 745 (1947), it was permitted to delay filing suit against the Federal Government until the gradual physical process put in motion by the Government had stabilized

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<sup>2</sup> Aerial images depicting the gradual erosion of the land supporting the Fleeg's Bridge is included at App. 28.

such that it had become clear to Yankton County that a permanent taking had occurred.

A hearing on the Government's Motion was held in Washington, D.C. on December 19, 2018. On December 21, 2018 the Court of Federal Claims dismissed the case. App. 3. The court held that the County had a duty to start investigating its claim by March 28, 2011; the claim would have been timely if the court would have concluded accrual occurred after April 6, 2011.

Gavins Point Dam has been unnaturally altering the Missouri River and its tributaries for over 63 years. The river in its new, unnatural state continues at this moment to pull Yankton County's bridges toward collapse. The Court of Federal Claims was charged with selecting when, during the previous 63 years, it should have become clear to the County that its land was being permanently washed away by the construction and operation of the Dam. The court capriciously selected a date that rendered the County's claim eight days late. The Court's decision controverts *Dickinson* and prevailing Fifth Amendment jurisprudence which demand justice, fairness, and leniency. The Federal Circuit's affirmation of this injustice must be corrected for the sake of all local governments who are sacrificing their property without just compensation in violation of the Fifth Amendment.



**ARGUMENT****REASONS FOR GRANTING THE WRIT**

- A. When a claim for inverse condemnation accrues in cases where the taking arises out of a gradual physical process is an important federal question that has not been addressed by this Court since 1947.**

Like the land supporting Yankton County's bridges, the decisions below in this case erode the Stabilization Doctrine and the protections it affords to landowners whose property is taken by a gradual physical process put in motion by the Government. The Stabilization Doctrine was set forth in *United States v. Dickinson*, 331 U.S. 745 (1947). The Doctrine demands leniency in the application of accrual principles in gradual physical takings and instructs to avoid procedural rigidities in such cases. The decisions below can only be interpreted as an abandonment of the Stabilization Doctrine in favor of a stricter knowledge standard borrowed from the Accrual Suspension Rule. The comingling of these two separate and distinct doctrines creates a nearly impossible burden for a landowner whose property has been taken within the meaning of the Fifth Amendment by a gradual physical process. The Court has not discussed the Stabilization Doctrine in significant detail since its inception, and it is imperative for the Court to do so before its original intent is abolished by the Court of Federal Claims and the Federal Circuit.



**I. The Stabilization Doctrine was intended to forbid strict application of accrual principles in Fifth Amendment cases arising out of gradual physical processes put in motion by the Government.**

The Fifth Amendment ensures that the United States does not take private property for public use without just compensation. U.S. Const. amend. V. The Amendment recognizes both the Federal Government's right to take private property for public uses and a property owner's right to just compensation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987). "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

When the United States does not provide compensation through eminent domain procedures, the Tucker Act, 28 U.S.C. § 1491, operates to enforce landowner's compensatory right through a cause of action entitled inverse condemnation. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11–12, (1990). While there is no set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the Government, this Court has previously held that Government-caused erosion of private property constitutes a compensable

taking. See *United States v. Dickinson*, 331 U.S. 745, 747 (1947).

Despite the axiom that just compensation is constitutionally guaranteed, the present state of the law requires the abrogation of sovereign immunity for an aggrieved landowner to exercise their Fifth Amendment rights against the Government. Congress abrogated sovereign immunity for this purpose through the Tucker Act, 28 U.S.C. § 1491(a)(1), which confers jurisdiction over these cases to the Court of Federal Claims. Congress has also directed that cases brought pursuant to the Tucker Act be filed within six years of accrual. 28 U.S.C. § 2501. The apparent contradiction between sovereign immunity and constitutionally guaranteed rights is not the subject of this Petition; however, it does follow that procedural rigidities should be avoided in cases that involve citizens exercising their self-executing rights against the Government.

This Court recognized in *United States v. Dickinson*, 331 U.S. 745 (1947) that selecting the date of accrual is particularly difficult in cases where a Fifth Amendment taking has arisen out of a gradual physical process put in motion by the Federal Government rather than by a discrete event. The Court developed the Stabilization Doctrine to assist landowners who have had the onus of determining at what point in the process a taking has occurred put on their shoulders and to protect owners in a way that incorporates the Fifth Amendment's expression of fairness. *Dickinson*, 331 U.S. 745 (1947).

*Dickinson* arose out of the construction of a dam on the Kanawha River in West Virginia in order to pool water and improve navigation in the channel above the dam. 331 U.S. at 746. Abutting landowners were given notice of the increased water elevation on July 1, 1936, the dam began impounding water on August 20, 1937, and the river reached its new permanent level on September 22, 1938. Two abutting landowners filed suits to recover for the flowage easements that were taken as well as the land that was eroded by the new permanent water levels on April 1, 1943. The United States asserted that the actions were filed outside the applicable six-year statute of limitations and therefore time-barred. This Court disagreed and held as follows:

Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. **The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die.** We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought,

lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. **The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.** An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

**When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided.** All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really ‘taken.’ *United States v. Dickinson*, 331 U.S. 745, 748–49 (1947). (Emphasis Supplied).

The Court of Federal Claims was interpreting this law when it ruled Yankton County’s Complaint was filed eight days late. The Court’s decision was not

based on a discrete event which would have or should have put the County on notice that the United States was inversely condemning the land supporting the bridges. Instead, upon the urging of the Government, the Court concluded that the County's claim was not "inherently unknowable" prior to the last date by which a timely complaint could be filed. App. 14. Although no study existed which drew a connection between the Dam and the Bridge's demise, the Court interpreted the limited record to conclude that the evidence which "collectively indicated the permanence of the erosion" was available to the Plaintiff by March 28, 2011, a date that "a photograph of the James River was taken" by the engineering firm charged with investigating flows at the Bridge site. App. 14. In other words, the Court ruled that because it was *not* impossible for the County to know of its claim, it could not invoke stabilization. The Court of Federal Claims determination is simply incompatible with this Court's instruction to avoid procedural rigidities in Fifth Amendment cases arising out of continuing physical processes put in motion by the Government. *Dickinson*, 331 U.S. at 749.

This Court has discussed the Stabilization Doctrine in only one other case since *Dickinson*, *United States v. Dow*, 357 U.S. 17 (1958). Although *Dow* was not a gradual physical takings case, the claimant attempted to invoke the Stabilization Doctrine. The Court rejected that attempt and noted: "[t]he expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act

for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated for public use.” 357 U.S. at 27. The decisions below demonstrate the desperate need for guidance on this issue.

**II. The decisions below meld the Stabilization Doctrine with the Accrual Suspension rule, effectively rendering the Stabilization Doctrine meaningless.**

The Court of Federal Claims’ (“CFC”) decision as affirmed by the Federal Circuit inserted an additional element into the Stabilization Doctrine. The CFC required Yankton County to establish that its claim was “inherently unknowable” until at least six years prior to the lawsuit being filed in order to survive the United States’ threshold challenge. “In essence, plaintiff’s argument that the report ‘was the first time Plaintiff learned of the Gavins Point Dam’s potential impact on the bridges,’ Pl.’s Resp. 17, invokes the ‘inherently unknowable’ prong of the accrual suspension rule.” App. 13. Ultimately the court concluded that the County did not meet that burden. “The Court is compelled to agree with defendant that ‘[p]laintiff’s taking claim was not “inherently unknowable” prior to plaintiff receiving the Black and Veatch Report.’” App. 14. Inherent unknowability is not an element of the Stabilization Doctrine and applying it to such an analysis is irreconcilable with the plain language and spirit of the Doctrine.

The CFC in its decision wrote without citation “[t]he stabilization doctrine is a manifestation of the accrual suspension rule.” App. 13. However, *Dickinson* does not discuss accrual suspension, rather the Court created a separate and distinct doctrine to control under “diverse circumstances” such as these. 331 U.S. at 749. Unlike the forgiving Stabilization Doctrine, the Accrual Suspension Rule is “strictly and narrowly applied.” Under the Accrual Suspension Rule, the accrual date of a cause of action will be suspended in only two circumstances: “[the plaintiff] must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was ‘**inherently unknowable**’” at the time the cause of action accrued. *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003).

The standards that apply in analyzing a claimant’s knowledge differ depending on whether the Accrual Suspension Rule or the Stabilization Doctrine are invoked. Inserting the inherently unknowable element into a Stabilization Doctrine heightens the threshold a claimant must overcome to bring a timely claim. Here, the CFC quoted an Accrual Suspension case and held “[a]ny matter of public record is by definition knowable. A party will be charged with knowing any facts that are discoverable in public records, and ignorance of one’s legal rights arising from those facts is not a sufficient excuse to justify’ suspending the accrual of the claim.” App. 14, citing *Central Pines Land Co. v. United States*, 61 Fed. Cl. 527, 534 (2004). The CFC applied this standard to conclude that

Petitioner's claim was untimely because the evidence that could collectively prove a permanent taking had occurred was a matter of public record prior to the last lawful accrual date. It would be appropriate to hold Petitioner to such a high knowledge standard if Petitioner was required to prove its claim was inherently unknowable; however, this is too high of a burden to apply under the Stabilization Doctrine.

Under *Dow's* interpretation of *Dickinson*, "the statute of limitations did not bar an action under the Tucker Act for a taking by [gradual physical process] when it was uncertain at what stage in the [gradual physical process] the land had become appropriated for public use." 357 U.S. at 27. Thus, Petitioner was allowed to wait to file suit until it was certain that a taking had occurred. The CFC did not afford Petitioner this protection. Under the objective standard that ordinarily applies in Fifth Amendment cases, there must be an analysis of the evidence's impact on a reasonable and prudent landowner. *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (Generally, a Fifth Amendment "takings claim accrues 'when [1] all events which fix the government's alleged liability have occurred and [2] the plaintiff was or should have been aware of their existence.'"). The inclusion of an inherently unknowable requirement eliminates a truly objective analysis because the focus of the inquiry is "access to the facts" available in the public record, not whether the existence of those facts would make clear to a reasonable and prudent owner that their property is being condemned. App. 21. This harsh



interpretation of accrual principles is wholly inconsistent with the Stabilization Doctrine and the Fifth Amendment's expression of fairness.

The Stabilization Doctrine is meant to provide leniency to a landowner who has been saddled with "the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy." 331 U.S. 745, 748 (1947). Jumbling the Stabilization Doctrine with the Accrual Suspension Rule is not supported by any decision of this Court. The addition of an "inherently unknowable" element places an affirmative duty on landowners to remain vigilantly aware of what data is being gathered by other entities such as the Corps, what actions the Corps is taking to regulate certain waterways, and what consequences those actions may have on property, or else risk forfeiting their constitutional right to just compensation. No such duty is supported by *Dickinson*.

Petitioner is not asking this Court to review a mere misapplication of the law. The CFC's decision as affirmed by the Federal Circuit represents a fundamental alteration to the Stabilization Doctrine as established by *Dickinson*. This alteration to the law will affect future litigants who are subjected to gradual physical takings, and it is critical that the Court save this wise Doctrine from eradication by the lower courts.

### **III. The lower courts have slowly eroded the impact of the Stabilization Doctrine over time.**

This is not the lower courts' first attempt to limit the applicability of the Stabilization Doctrine. The United States Court of Claims, the predecessor to the CFC, took the first swipe at *Dickinson* in 1950. In *Columbia Basin Orchard v. United States*, 88 F. Supp. 738, 739 (Ct. Cl. 1950), the Court of Claims considered the newly delineated Stabilization Doctrine and concluded: "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." *Columbia Basin Orchard v. United States*, 88 F. Supp. 738, 739 (Ct. Cl. 1950). This language has been relied upon in several Court of Claims, CFC, and Federal Circuit cases over the ensuing decades.

More recently the Federal Circuit dealt the Doctrine another significant blow. In *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000), the court held:

Stabilization occurs when it becomes clear that the gradual process set into motion by the government has effected a permanent taking. . . .

Properly understood, stabilization as discussed in *Dickinson* is not deferred until the progressive environmental damage stops, but occurs when the environmental forces have substantially and permanently invaded the

private property such that the permanent nature of the taking is evident and the extent of the damage is reasonably foreseeable. *Boling v. United States*, 220 F.3d 1365, 1370–71 (Fed. Cir. 2000).

*Boling* limits *Dickinson*'s broad instruction. Under *Boling*, a taking must be evident for stabilization to occur and the extent of the damage must be reasonably foreseeable. These elements reasonably define when a claim should be pursued. However, the additional element imposed by the courts below in the present case unreasonably limits the applicability of the Stabilization Doctrine to instances in which the Corps has actively concealed or denied the existence of the taking. The additional element transforms a Doctrine designed to protect landowners who have had their property taken within the meaning of the Fifth Amendment into a doctrine that protects the Constitutionally liable Federal Government. The courts' most recent actions are one step shy of granting the Corps full immunity.

The CFC and Federal Circuit's limitation of the Stabilization Doctrine is inconsistent with this Court's jurisprudence and incompatible with the Fifth Amendment's expression of justice and fairness. This Court should reject the addition of an inherently unknowable prong into a Stabilization Doctrine analysis and provide guidance to the lower courts on the applicability of the Doctrine.

**B. This case presents the best opportunity for the Court to address this important issue.**

Fifth Amendment cases most commonly arise out of the filing of a condemnation petition by the Government notifying the landowner that their land is about to be condemned and they have a right to just compensation. “While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.” *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 316 (1987). Even rarer than a typical claim for inverse condemnation are “unique cases involving Fifth Amendment takings by continuous physical processes.” *Nw. La. Fish & Game Pres. Comm’n v. United States*, 446 F.3d 1285, 1291 (Fed. Cir. 2006) (citing *United States v. Dickinson*, 331 U.S. 745, 749 (1947)).

This case presents the unique factual scenario where a gradual physical process put in motion by a Government act eventually invades property such that a taking has occurred within the meaning of the Fifth Amendment. Cases which arise out of such “diverse circumstances” as these are rare. *Dickinson*, 331 U.S. at 749. The Stabilization Doctrine has been manipulated by the lower courts to the point it no longer acts as a protection for a Constitutionally violated landowner. This case offers an exceptional opportunity for this Court to issue guidance on a legal doctrine that

hasn't been visited in a meaningful way in over seventy years, and is now in peril.

In addition, a serious injustice will have occurred if the rushed dismissal of the County's claim remains law. The County acted prudently in this case. While the Federal Government benefited financially through the Dams' power generation, Petitioner invested its limited resources in installing rip-rap to keep its bridge safe – unaware the rug was being pulled out from beneath its feet by the very agency granting the permits to install the rip-rap.

Only after thorough investigation and contemplation did the small-rural County decide to file its lawsuit against the United States. *Dickinson* instructs “[t]he Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding ‘causes of action’—when they are born, whether they proliferate, and when they die.” 331 U.S. at 748. This Constitutional case was dismissed on a technicality in direct defiance of *Dickinson*. The Court is presented with an opportunity to correct the unconstitutional conclusions of the two lower courts.

**C. Climate change and our nation's failing infrastructure create an urgent need for the Court to provide guidance on when accrual occurs.**

The facts of this case lie at the intersection of two important issues currently facing our nation, climate

change and our aging infrastructure. More extreme weather patterns coupled with the need to replace aging infrastructure including bridges will increase the frequency of gradual physical taking cases. Injured local governments will be met with the inequalities of the decision below unless this Court corrects them.

According to the National Climate Assessment completed by the United States Global Change Research Program, a Federal program mandated by Congress to coordinate research on climate change, winter and spring precipitation have increased over the past half-century and are going to continue to do so in the Missouri River Basin. Extreme weather events including heavy downpours and flooding will also continue to become more frequent. The fact that our climate is changing and extreme weather events are becoming more common will exacerbate the gradual physical processes described above. More water moving through the river systems will magnify the degradation taking place below dams which in turn will increase headcutting.

Extreme climate events are on full display in the Dakotas this spring. The James is currently at record flood stage and Missouri is out of its banks for only the second time since the Dams were constructed. The only other time was in 2011 when the river experienced a once in “500-year” flood event. The Dams were designed to control 1881 hydrology, the year of the last flood prior to 2011, and it appears they are not able

to keep up with the earth's changing climate. At this moment, the Corps of Engineers is utilizing the flood control features of the five Pick-Sloan Dams to their full capacity to lessen the impact of the flooding taking place along the Missouri River. The Corps is actively weighing whether to hold water back at Gavins Point Dam, risking its failure, or open the gates and pour more water on already flood ravaged areas in Nebraska and Iowa. These decisions impact the river itself, the river's tributaries, and the abutting infrastructure owned by local governments.

Bridges are critical to the economic and social vitality of our country. Despite their immense importance, over 54,000 bridges in America are rated as "deficient" or "functionally obsolete" by the Federal Highway Administration in 2016. This problem disproportionately affects rural states such as South Dakota, where nearly 19% of the bridges fall within this category. Rural states have lower population densities to shoulder the burden of maintenance and construction costs, but they often have a large number of bridges because of their physical size.

The States themselves receive federal dollars for construction and maintenance of bridges on larger state highways. However, bridges that connect smaller, lesser-trafficked roads maintained by local governments are the responsibility of that smaller governmental entity. The obligation to maintain bridges which sometimes span large, navigable waterways places great financial stress on rural local governments. Local governments with the added burden of

replacing bridges that are made prematurely obsolete by gradual physical processes put in motion by the Government may not be able to keep up with their financial obligations. Those who seek just compensation through the Court of Federal Claims will be met with the decision below and have a high likelihood of experiencing an unjust result.

Extreme climate events are likely to exacerbate the unnatural physical processes put in motion by the Government and will lead to more cases like this one. Local government budgets are already stretched thin due to aging infrastructure, and governments forced to shoulder the burden of inversely condemned property may not be able to keep up. The presence of these two circumstances creates an urgent need for the Court to address the mistakes below and provide clarification on the Stabilization Doctrine.





**CONCLUSION**

For all the reasons expressed, it is urged that the petition for writ of certiorari be granted.

Respectfully submitted this 9th day of May, 2019.

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