

Legal Issues:

- Local Government Liability
 - Changes to the NFIP

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January 10, 2013

U.S. Takings Law

- Federal
 - **5th Amendment, U.S. Constitution** – “nor shall property be taken for public use without just compensation”
 - **Police power** – general authority of a government to protect the health, safety, and welfare of its citizens

U.S. Takings Law

- Early U.S. Supreme Court Interpretations
 - 1887 – Mugler v. Kansas – regulation of the use of a property (police power) was not a taking
 - 1922 – Pennsylvania Coal v. Mahon – regulation of the use of a property may be so burdensome that it amounts to a compensable taking.

Current Status of Federal Takings Law

- Permanent physical occupation is always a taking
- Economic value is diminished
 - Partially
 - Reasonable investment backed expectations
 - Character of the government action
 - Small reduction in value + legitimate public purpose = not a taking
 - Totally
 - Total ban on building structures is usually a taking
 - Exception – background property law
- Dedication and exaction conditions
 - Must substantially advance government purpose
 - Burden must be proportional to harm caused

State Takings Law

- Can be more protective of individual property rights.
- Louisiana Constitution
 - Requires no investment backed expectations
 - Compensates for “damaging” private property
- Flood protection measures are generally upheld against takings claims
- Compensation
 - Fair market value in hurricane protection and coastal restoration measures

Government Duty to Prevent/Warn?

- Planning and Zoning Authority
 - Liability if they fail to do so?
 - Liability for Failure to Control Risky Development?
- Foreseeable Consequences
 - Couched in terms of Reasonableness
- Government's Special Knowledge
 - NFIP is Not Enough
 - Community Rating System - Encourages more protective measures
 - Conditions Will Worsen

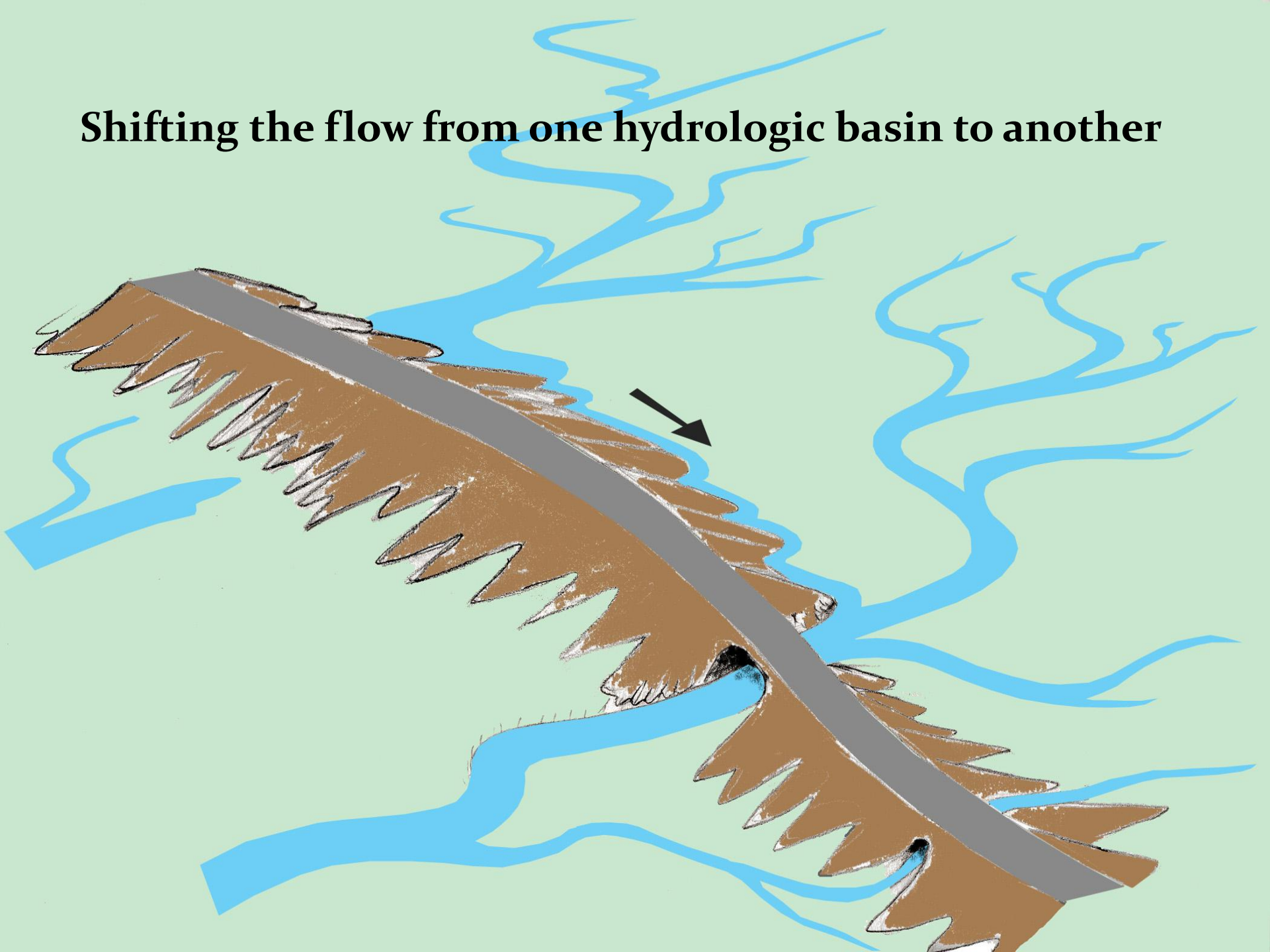
Duty/Knowledge=Sliding Scale?

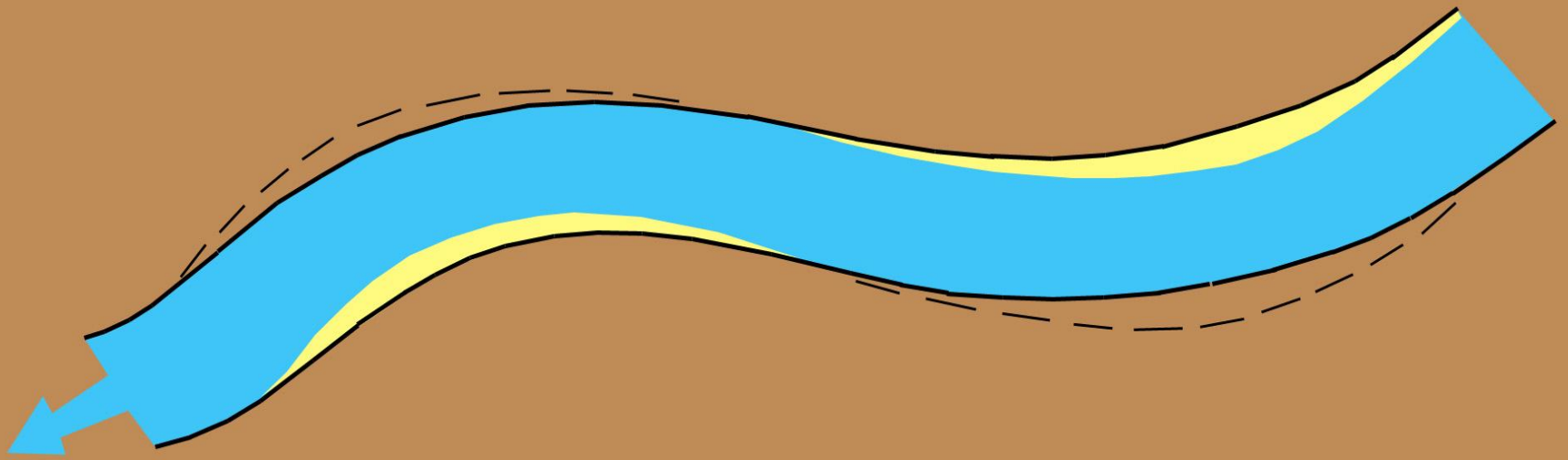
- Duty
 - Statutory Assumption of General Duty of Flood Control
 - Duty to Maintain Public Safety
- Knowledge
 - NFIP-probably underestimates risks
 - Who is in the best position to know?
 - Minimum responsibility-Informed consent?

Government Responsibilities and Liabilities

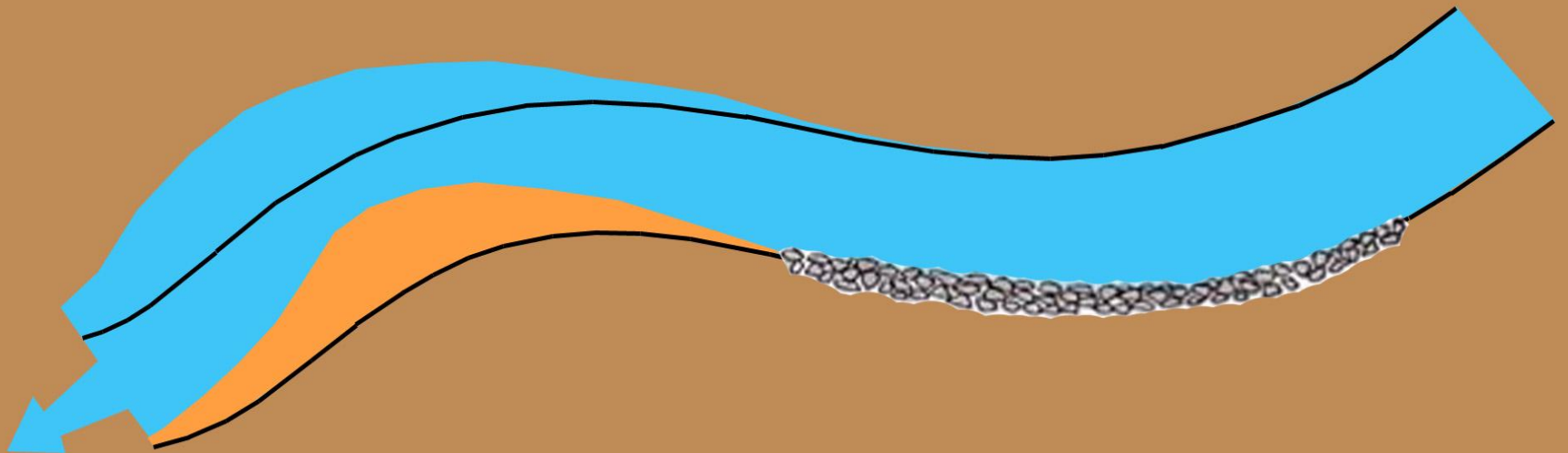
- Types of Government Action
 - Direct Government Action (Public Works projects)
 - Licenses and permits
- Results of Government Action
 - Causing or exacerbating flooding

Shifting the flow from one hydrologic basin to another





Altering the course of a waterway, thereby flooding riparian property



Allowing development in a flood hazard area that causes or exacerbates flooding









Government Responsibilities and Liabilities

- Issues – do governments imply areas are safe when they permit development or provide infrastructure and services to an area and don't warn against hazards?
- Can a duty to warn or protect against all known preventable hazards be implied when a government enforces minimum standards such as the NFIP?

Precedent For Government Liability

- No Adverse Impact (NAI) Report-Association of State Floodplain Managers
 - www.floods.org - NAI and the Courts: Protecting the Property Rights of All
- Local Governments Have Been Found Liable When Their Actions Cause or Exacerbate Flooding
 - Public Works projects
 - Allowing unwise private development that increases flooding in existing development
- Other Flooding?
 - *Hutcheson v. City of Keizer* (Oregon)

Government Defenses

- Sovereign Immunity
 - Waiver-total or partial
 - Local governments may not have it
- Discretionary Function Immunity
 - May be difficult to overcome in some jurisdictions
 - Does deference decrease as knowledge increases?
 - Known hazardous conditions

Switching Gears: Changes to the NFIP

- Biggert-Waters Flood Insurance Reform Act of 2012
 - Signed into law on July 6, 2012
- Makes a number of changes to the NFIP, including
 - Authority for the NFIP is extended for 5 years until September 30, 2017.
 - Allows for premium payments either annually or more frequently.
 - Allows mortgage holders to purchase flood insurance from a private insurance company to meet the mortgage requirements.
 - Removes subsidized rates for Pre-FIRM and Post-FIRM subsidized properties.

A Closer Look: Removal of Subsidies

- People who should be most attentive: in a special flood hazard area, below the current BFE, and in one of these categories
 - Pre-FIRM – built before 1975 or before there was a flood insurance rate map
 - Post-FIRM – Properties paying rates based on maps that have been updated and now show higher flood risk at that property
 - Actuarial rate to be phased in over a five year period at a rate of 20% per year.
 - Will begin August 2014

Pre-FIRM Details

- Rate increases began January 1, 2013, on second homes
- Rate increases begin August 1, 2013, for businesses, as well as primary residences that no longer qualify for Pre-FIRM rate
- Increase will be implemented at a rate of 25% per year until the actuarial rate is reached.

Pre-FIRM Details

- Loss of Pre-FIRM rate occurs when:
 - Policy holder lets the policy lapse
 - Property is sold
 - If, after July 6, 2012, the property is substantially improved (30% threshold)
 - If, after July 6, 2012, the property is substantially damaged (50% threshold)
 - If the flood insurance claims history shows:
 - Total NFIP claims paid for flood-related building damage exceeded the fair market value of the building
 - If the property is a severe repetitive loss property
 - Single Family
 - Four or more claims > \$5000 or
 - Two claims that together exceed the value of the insured building
 - If the owner of a repetitive loss structure refuses an offer of mitigation assistance, including the Hazard Mitigation Grant Program

A Closer Look: Deductibles & Premiums

- Minimum annual deductibles increased
 - Pre-FIRM Properties
 - Up to \$100,000 in coverage = \$1500 deductible
 - Over \$100,000 in coverage = \$2000 deductible
 - Post-FIRM Properties
 - Up to \$100,000 in coverage = \$1000 deductible
 - Over \$100,000 in coverage = \$1250 deductible
- Rates must be set to cover the average historical loss year
 - INCLUDES catastrophic loss years

A Closer Look: Mapping

- Committee formed to develop recommendations within 1 year for future conditions mapping, including impacts of sea level rise and future development on flood risk.
 - FEMA is required to incorporate the recommendations into the ongoing review and updating of flood maps.
- Requires that flood maps show 100-year and 500-year floodplains for
 - all populated areas
 - areas of possible population growth
 - areas with residual risk behind levees or below dams

A Closer Look: Mapping

- Also requires:
 - Mapping the level of protection provided by flood control structures.
 - New flood maps must use the most accurate topography and elevation data available.
 - Acquisition of new ground elevation data required when necessary.
 - Flood data must be developed on a watershed basis.
- Removes prior 50% limitation on state contributions to updated mapping.

Combat Rising Rates: CRS

- The Community Rating System can be used to combat rising rates of flood insurance.
 - Voluntary incentive program that recognizes and encourages community floodplain management activities that exceed minimum NFIP requirements.
 - Communities that are involved see flood insurance premium rates discounted to reflect reduced flood risk.
 - Options to earn points fall under three main goals:
 - Reduce flood damage to insurable property
 - Strengthen and support the insurance aspects of the NFIP
 - Encourage a comprehensive approach to floodplain management

How are Flood Insurance Premium Discounts Calculated?

Credit Points	Class	Premium Reduction in SFHA	Premium Reduction in Non-SFHA
4,500+	1	45%	10%
4,000 - 4,499	2	40%	10%
3,500 - 3,999	3	35%	10%
3,000 - 3,499	4	30%	10%
2,500 - 2,999	5	25%	10%
2,000 - 2,499	6	20%	10%
1,500 - 1,999	7	15%	5%
1,000 - 1,499	8	10%	5%
500 - 999	9	5%	5%
0 - 499	10	0%	0%

Questions?

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