St. Bernard Parish Government v. United States: Post-Katrina Flooding Revisited Through a Takings Claim

I. OVERVIEW

As a result of an intense storm surge in the aftermath of Hurricane Katrina in 2005, the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPV) levees in the New Orleans area were breached by floodwaters, which resulted in catastrophic flooding in St. Bernard Parish and the Lower Ninth Ward.[1] The Mississippi River-Gulf Outlet (MRGO) navigation channel had been constructed in New Orleans decades ago to provide a direct connection between the Port of New Orleans and the Gulf of Mexico.[2] While the MRGO was still under construction, the LPV project was implemented to control flooding resulting from hurricanes.[3] The purpose of the LPV levee system was to reduce the risk of flooding in New Orleans, specifically along the banks of the MRGO.[4] Here, plaintiff property owners in St. Bernard Parish brought suit under the Tucker Act alleging a taking, claiming that the government was liable for the flood damage to their properties from Hurricane Katrina, as well as other hurricanes over the course of years.[5]

In 2011, the Claims Court held that a temporary taking had occurred, finding that a causal link existed between increased storm surge and the MRGO.[6] The Claims Court supported its finding by asserting that the "construction of, continued operation of, and failure to maintain or modify [the] MRGO caused erosion, increased salinity, wetlands loss, and a funnel effect, which in turn caused increased storm surge."[7] Therefore, according

1. St. Bernard Parish Gov't v. United States, 887 F.3d 1354, 1358 (Fed. Cir. 2018).
2. *Id.* at 1357.
3. *Id.* at 1358.
4. *Id.*
5. *Id.* at 1357.
6. *Id.* at 1359.
7. *Id.* at 1358.

to the Claims Court, the flooding of the Plaintiff's properties was a direct result of the U.S. Army Corps of Engineers' actions and inactions regarding the MRGO.[8] The Claims Court also determined that the environmental effects, such as wetlands loss, from MRGO-related actions and inactions were foreseeable.[9]

The government appealed the Claims Court's finding of liability and the compensation award, which was a total of $5.46 million based primarily upon "the cost of the improvements to the properties and the lost rental value during the temporary taking period."[10] The plaintiffs also cross-appealed the amount of the compensation award.[11] Ultimately, the United States Federal Circuit Court of Appeals *held* that the government's failure to properly maintain the MRGO could not be the basis of takings liability and the owners failed to establish that the government caused their injuries. *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1367-68 (Fed. Cir. 2018).

II. BACKGROUND

The Fifth Amendment forbids private property from being taken for public use without just compensation.[12] A landowner may recover, through inverse condemnation, just compensation for a physical taking of their property when condemnation proceedings have not been instituted.[13] There are various examples of inverse condemnation claims in which courts determined that no taking had occurred. In *Sanguinetti v. United States*, one of the original cases involving a government taking from flooding, the Supreme Court held that no taking occurred when a government-constructed canal overflowed onto the claimant's land.[14] Per *Sanguinetti*, "in order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."[15] When the injury was "in its nature indirect and

8. *Id.*
9. *Id.* at 1359.
10. *Id.*
11. *Id.*
12. U.S. CONST. amend. V.
13. United States v. Clarke, 445 U.S. 253, 257 (1980).
14. Sanguinetti v. United States, 264 U.S. 146, 150 (1924).
15. *Id.* at 149.

consequential," no implied obligation on the part of the government arose.[16] In *Sanguinetti*, the overflow was not shown to be the direct or necessary result of the structure, nor was it within the reasonable contemplation of the government.[17] The Supreme Court thereby recognized that, even if a government action increases flooding so as to invite greater injury than may have otherwise been the case, the government is not liable if the injury is "indirect."[18]

After *Sanguinetti*, the United States Court of Appeals for the Federal Circuit identified, in *Ridge Line v. United States*, a two-part analysis invoked by a claim for inverse condemnation.[19] The facts in *Ridge Line* provided an opportunity for the court to draw a line distinguishing a takings claim from a tort claim based upon this two-part analysis.[20] First, for it to be liable, "the government [must intend] to invade a protected property interest or the asserted invasion [must be] the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'"[21] Second, "an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value."[22] The court also held that a determination must be made whether the alleged injury was the predictable result of the government action.[23]

Moden v. United States, which concerned an alleged taking via pollution from an Air Force base, affirmed that the *Ridge Line* standard referred to a "direct, natural, or probable result" of the government action, not a "direct, natural, or probable cause" of an injury.[24] The *Moden* court also noted that the lower court "characterized the second part of the first prong as an inquiry into the foreseeability of the damage"—that is, it equated the "direct, natural, or probable" language with foreseeability.[25]

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16. *Id.* at 150.
17. *Id.* at 149-50.
18. *Id.* at 150.
19. Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355-1356 (Fed. Cir. 2003).
20. *Id.*
21. *Id.* at 1355 (citing Columbia Basin Orchard v. United States, 132 F. Supp. 707, 709 (Ct. Cl. 1955).
22. *Id.* at 1356.
23. *Id.*
24. Moden v. United States, 404 F.3d 1335, 1343 (Fed. Cir. 2005).
25. *See id.* at 1339.

The *Moden* court ultimately agreed with the lower court that the plaintiffs' claims lacked merit, noting that the plaintiffs failed to establish suitable evidence that the claimed injuries were foreseeable.[26] Under *Moden*, it is the claimant's duty to "identify a genuine issue of material fact supporting the conclusion that the government should have foreseen [the injury]."[27]

In *Arkansas Game & Fish Commission v. United States*, the plaintiff state agency claimed that the federal government had instituted a taking via a particular U.S. Army Corps of Engineers seasonal flooding schedule.[28] The appeals court had relied upon the *Sanguinetti* holding in determining that, in essence, flooding cases were fundamentally different from other takings claims because they required flooding that was "permanent or inevitably recurring."[29] The Supreme Court noted in this regard that no decision of the Court had created a particular carve-out for takings via flooding, such that "government-induced flooding of limited duration may be compensable."[30]

In clarifying that non-permanent flooding could constitute a taking, the Supreme Court in *Arkansas Game* necessarily revisited some of its major takings jurisprudence, including *Pumpelly v. Green Bay Co*.[31] In *Pumpelly*, the Court recognized for the first time that government-induced flooding could constitute a taking.[32] The Court further noted that its holding in *United States v. Cress* "recognized that seasonally recurring flooding could constitute a taking."[33] Despite holding that flooding of limited duration could be compensable, the Court in *Arkansas Game* nonetheless stated, "When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking."[34]

In addition to case law on inverse condemnation cases, there is also legislation that considers government liability in flooding cases. The 1928

26. *Id.* at 1345-46.
27. *Id*. at 1346.
28. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 27-28 (2012) (citing Sanguinetti v. United States, 264 U.S. 146, 150 (1924)).
29. *Id.* at 30-31.
30. *Id.* at 34.
31. *Id.* at 31-32 (citing, *e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872)).
32. *Id.* at 32 (citing *Pumpelly*, 80 U.S. (13 Wall.) 166).
33. *Id.* (citing United States v. Cress, 243 U.S. 316 (1917)).
34. *Id.* at 38.

Flood Control Act (FCA) provided that the United States is generally not liable for damages from floods or flood waters, with certain caveats pertaining to the Mississippi River.[35] The FCA was the product of "a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of the various [flood-control] projects."[36] Under this reading, Congress may have wanted to impose broad flood-specific immunity for the government: "Undoubtedly, that absolute freedom of the government from liability for flood damages is, and has been, a factor of the greatest importance in the extent to which Congress has been, and is, willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damage."[37]

III. THE COURT'S DECISION

In the noted case, the United States Court of Appeals for the Federal Circuit held that government inaction could not form the basis for a takings claim, and that the plaintiffs failed to suitably demonstrate that the government caused their injuries, including a total disregard for any mitigation attributable to the LPV project.[38] Initially, the court framed the noted case as an inverse condemnation issue based on a taking of a flowage easement.[39] The particular issue presented was whether increased flooding from the MRGO constituted a temporary taking.[40] Importantly, the court noted that the lower court's finding of liability was predicated "in large part on the failure of the government to take action."[41] Specifically, the government's alleged inaction centered upon putative maintenance or modification measures it could have taken with regard to the MRGO channel.[42]

Early in the opinion, the court drew broadly upon *Sanguinetti* and *Ridge Line* in distinguishing takings claims from tort claims, noting that the plaintiffs here "may state a tort claim, [but do] not state a takings claim."[43] Specifically, a valid takings claim requires an affirmative

35. 33 U.S.C. § 702c (2018).
36. United States v. James, 478 U.S. 597, 607 (1986).
37. Nat'l Mfg. Co. v. United States, 210 F.2d 263, 271 (8th Cir. 1954).
38. St. Bernard Parish Gov't v. United States, 887 F.3d 1354, 1367-68 (Fed. Cir. 2018).
39. *Id.* at 1359.
40. *Id.*
41. *Id.* at 1360.
42. *Id.*
43. *Id.* (citations omitted).

government action, not mere inaction.[44] In keeping with this opinion, the court drew upon *Moden* and *Ridge Line* in stating that takings liability "arises from an 'authorized activity.'"[45] More specifically, "Proof of such a claim requires the plaintiffs to establish that government action caused the injury to their properties—that the invasion was the 'direct, natural, or probable result of an authorized activity.'"[46] Applying this precedent to the matter at hand, the court determined that the claims largely rested upon allegations of government inaction, particularly inactivity with regard to fortifying the MRGO, so as to be mostly devoid of the requisite affirmative actions.[47]

Moving beyond the requirement of affirmative action, the court noted that the plaintiffs also had the burden of proving but-for causation.[48] Crucially in this regard, the court found the evidence of causation sorely lacking because it failed to consider at all the impact of the LPV project.[49] Accordingly, the court found that the plaintiffs were unable to compare the flood damage that actually occurred to the flood damage that would have occurred if the government had not acted at all.[50] That is, per the court, the plaintiffs essentially ignored any mitigating impact the LPV project may have had.[51]

In this same vein, the court noted a previous case in which the plaintiffs had been admonished for "cherry-picking" parts of federal government policy pertaining to wildfires while ignoring others.[52] Here, the plaintiffs argued that the government could not, in essence, misdirect from injuries putatively caused by the MRGO by pointing to counteracting

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44. *See id.*

45. *Id.* (citing Moden v. United States, 404 F.3d 1335, 1338 (Fed. Cir. 2005) (citing Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003))).

46. *Id.* at 1359-60 (citing *Ridge Line*, 346 F.3d at 1355).

47. *Id.* at 1360 ("In particular, the Claims Court noted that [the] MRGO's lack of armoring or foreshore protection contributed to erosion along the banks.").

48. *Id.* at 1362 ("In order to establish causation, a plaintiff must show that, in the ordinary course of events, absent government action, plaintiffs would not have suffered the injury.").

49. *Id.* at 1363 ("The plaintiffs' proof of causation rested entirely on the premise that . . . injury would not have occurred absent . . . the MRGO channel . . . without taking account of the impact of the LPV flood control project.").

50. *Id.*

51. *Id.* at 1363-64 ("[P]laintiffs failed to take account of . . . a vast system of levees to protect against hurricane damage—that mitigated the impact of [the] MRGO and may well have placed the plaintiffs in a better position than if the government had taken no action at all.").

52. *Id.* at 1365 (citing Cary v. United States, 552 F.3d 1373, 1377 (Fed. Cir. 2009)).

benefits stemming from the LPV system.[53] The court, however, held that the government could, and should, do precisely that, because the "LPV project was directed to decreasing the very flood risk that the plaintiffs allege was increased by the MRGO project."[54] In other words, the MRGO and LPV project were related in that the LPV system sought to decrease the flood risk that was ostensibly increased by the MRGO channel.[55] The court maintained that this necessary relatedness (between the MRGO and LPV) was bolstered by the fact that the flooding from the MRGO was what caused the breaches in the levees.[56]

Per the court, "When the government takes actions that are directly related to preventing the same type of injury on the same property where the damage occurred, such action must be taken into account even if the two actions were not the result of the same project."[57] In rejecting the plaintiffs' argument claiming that mitigating government actions must be part of the same project, the court noted that the plaintiffs' reliance on certain sources was misplaced because that precedent concerned assessment of injury and compensation *rather than causation*.[58] Even further, the court noted that the plaintiffs themselves relied upon projects other than the MRGO—namely, a new risk-reducing levee system, completed in 2011—in determining that the alleged taking (via flooding risk) enabled by the MRGO had effectively ended.[59]

Therefore, in sum, while the appeals court in the noted case found that the pleadings fundamentally alleged that a course of government inaction had caused their injuries such that the claims were tort in nature rather than takings,[60] its reversal was particularly emphatic in rejecting the plaintiffs' causation arguments.[61]

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53. *Id.*
54. *Id.*
55. *Id.* at 1365-66.
56. *Id.*
57. *Id.* at 1366.
58. *Id.* ("[P]laintiffs rely on authorities not directed to causation, but rather concerned with the extent of the economic injury . . . .").
59. *Id.* at 1367.
60. *Id.* at 1360.
61. *See, e.g.*, *id.* at 1364 ("The plaintiffs' approach to causation is simply inconsistent with governing Supreme Court and Federal Circuit authority, particularly in flooding cases."); *id.* at 1367 ("Under the correct legal standard, plaintiffs failed to establish that government action . . . caused their injury.").

IV. ANALYSIS

The Federal Circuit's holding in the noted case was sound, particularly because of its causation analysis.[62] In aggregate, the decision in the noted case was facially consistent with key precedent, perhaps most notably *United States v. Sponenbarger*, which held that the government could not be held liable under the Fifth Amendment for widely failing to protect landowners from flooding.[63] While, given *Arkansas Game*,[64] as well as the FCA and its tradition of widely shielding federal flood-control efforts from broad liability,[65] there is some sliver of ambiguity surrounding the extent to which flooding may be singular relative to takings jurisprudence, it is evident that a valid takings claim, whether or not related to flooding, must meet a high evidentiary burden in showing causation.[66]

Here, while it seemed that government inaction or action pertaining to the MRGO channel may well have contributed to intensified flooding,[67] the plaintiffs were possibly quite remiss in entirely ignoring any mitigating impacts the LPV project may have had on the magnitude of flooding.[68] By simply failing to incorporate the impact of the LPV, the plaintiffs necessarily neglected to address the counterfactual necessary for establishing causation (i.e., what would have happened without *any* government action).[69] Further, by relying on the completion of a more recent levee system to determine the termination of their MRGO-driven claims, the plaintiffs seemed to undermine their own relatedness argument.[70] Because of the plaintiffs' failure to robustly address causation, the court did not even need to reach the issue of foreseeability.[71] Overall,

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62. *See id*. at 1362-66.

63. *Id.* at 1361 (citing United States v. Sponenbarger, 308 U.S. 256 (1939)).

64. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38 (2012) ("We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.").

65. *See* 33 U.S.C. § 702c (2018).

66. *See, e.g.*, *St. Bernard Parish Gov't*, 887 F.3d at 1362 ("It is well established that a takings plaintiff bears the burden of proof to establish that the government act caused the injury. Causation requires a showing of 'what would have occurred' if the government had not acted." (citation omitted)).

67. *See id.* at 1358-59 (noting the lower court's finding that the MRGO had contributed to a variety of damages).

68. *See id*. at 1363-64 ("The plaintiffs' approach to causation is simply inconsistent with governing Supreme Court and Federal Circuit authority . . . .").

69. *See id.* at 1363.

70. *See id.* at 1367 ("Indeed, the plaintiffs themselves admit that other unrelated projects have to be considered in the causation analysis.").

71. *See id.* at 1360 (noting the requirement of intent or foreseeability but, ultimately, not needing to reach analysis thereof).

one is left to wonder in this regard whether the plaintiffs strategically chose to disregard the LPV's effects, simply got the law wrong,[72] or relied on something credible that was not made evident in the opinion.

Based upon the opinion in the noted case, the biggest question here may well concern how the lower court got it so wrong in the eyes of the appeals court.[73] After years of litigation and, presumably, the submission of large amounts of evidence, it is not evident from the opinion whether, for example, the Claims Court, like the plaintiffs, misapplied the law regarding causation, somehow committed clear error as a result of various evidentiary or procedural steps not evident here, or relied upon some credible argument not evident in this opinion.[74] There is also the issue of action versus inaction and whether a valid takings claim was stated in the first place.[75] Regardless, after substantial litigation in the lower court, its decision was roundly reversed here.[76] The plaintiffs filed a petition for certiorari, which was docketed on September 19, 2018.[77] While it is, of course, not impossible that the Supreme Court would grant the petition, it is exceptionally unlikely given that the case seems to rest largely upon well-settled law.

As a general policy matter, the Federal Circuit's ruling allows for the government to continue to implement, in particular, federal flood-control projects with reduced fear of liability. If the Federal Circuit Court of Appeals were to decide here in favor of the St. Bernard Parish property owners, such projects may face greater implementation costs and challenges. Without these projects, many communities could potentially be at risk for even worse property damage from flooding.

V. CONCLUSION

The reasoning employed by the Federal Circuit Court of Appeals in the noted case was consistent with well-established law. The court correctly applied the standards set by precedent and properly held that the government was not liable for flood damages in St. Bernard Parish

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72. *See id.* at 1363 ("Plaintiffs on appeal are clear that, in their view, the LPV levees cannot be considered in the causation analysis.").

73. *See, e.g.*, *id.* at 1368 (reversing the lower court's decision in full).

74. *See, e.g.*, *id.*; *id.* at 1359 (stating that the standard of review with regard to legal determinations was *de novo* and, for findings of fact, clear error).

75. *See id.* at 1362 ("The failure of the government to properly maintain the MRGO channel or to modify the channel cannot be the basis of takings liability. Plaintiffs' sole remedy for these inactions, if any, lies in tort.").

76. *Id.* at 1368.

77. Docketing Petition for Cert., No. 18-359 (Sept. 19, 2018).

stemming from Hurricane Katrina and other hurricanes. While the decision here must be an extremely bitter pill for the plaintiffs to swallow given what they endured, it is nonetheless the correct holding given the clear requirement of affirmative action in a takings claim and, especially, the need for causal analysis that incorporates all relevant government actions relative to the alleged risks and injuries. That is, while it is clear that the government does not enjoy immunity from takings claims based upon flooding (whether permanent or temporary), the government must be allowed to defend itself through a complete accounting of its pertinent actions.

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