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# Graci v. United States, 456 F.2d 20 (1971)

Before JOHN R. BROWN, Chief Judge, and WISDOM and RONEY, Circuit Judges.

WISDOM, Circuit Judge:

In storm and fury “Betsy’s” winds and resulting high waters wrought destruction upon the plaintiffs’ property and that of many others living in 1965 in Louisiana near the Gulf of Mexico.

These three consolidated cases present the single question whether the immunity clause contained in § 3 of the federal Flood Control Act of 1928, 33 U.S.C. § 702c, applies to these actions under the Federal Tort Claims Act, 28 U.S.C. § \*222671 et seq., for floodwater damage allegedly caused by the negligence of the United States in the construction of the Mississippi River — Gulf Outlet, a navigation project that provided a short-cut from the Gulf of Mexico to New Orleans. We conclude that § 3 does not bar these suits and affirm the judgment of the district court denying the Government’s motion to dismiss. In doing so we rely heavily upon the anaylses and well documented opinions of District Judges Herbert C. Christenberry and Frederick J. R. Heebe.

I.

The Mississippi River — Gulf Outlet is a deep water channel constructed by the Corps of Engineers in the late 1950’s and early 1960’s at an estimated cost of $88,-000. 000. The channel is approximately 66 miles long, including 46 miles of “land cut,” and runs from the Gulf of Mexico through the parishes of St. Bernard and Plaquemines to New Orleans. The outlet enables ships from ports east of the Mississippi River to head north for New Orleans at Breton Sound, many miles east of the river mouth, at a saving of sixty miles. Ships thus pass from Breton Sound through the outlet into the Industrial Canal and then into the Mississippi River.

These cases began in September 1965 when Hurricane “Betsy” struck the southeastern Louisiana coast. The plaintiffs are owners of property in Orleans and St. Bernard parishes who suffered damage when hurricane-driven waters overflowed the outlet and flooded their properties. Shortly thereafter the plaintiffs filed these suits against the United States in the United States District Court for the Eastern District of Louisiana. Upon the suggestion of the United States, the district court consolidated the three cases for trial.

The complaints charged that before the construction of the outlet the plaintiffs’ properties had been free from hurricane-driven waters, but that as a direct and proximate result of the construction of the outlet the plaintiffs’ properties were exposed to the “effects and encroachments of the storm driven waters of Hurricane ‘Betsy.’ ” The plaintiffs alleged that the outlet had been negligently constructed and specifically pleaded the doctrine of *res ipsa loquitur.*In the alternative, and only in the event that the doctrine of *res ipsa loquitur*be held inapplicable, the plaintiffs alleged that the Government’s negligence consisted of constructing the outlet “without taking appropriate steps to impede and lead off rising hurricane waters before they reached the residential areas of the surrounding country, and without taking the appropriate steps to build retaining levees to protect the residential areas of the surrounding country from flooding due to hurricane driven waters.”

The United States moved to dismiss the complaints on several grounds, one of which was that § 3 of the Flood Control Act of 1928, 33 U.S.C. § 702c, barred suits against the United States for damages resulting from floods or flood waters.**1** The district court denied the motion. With respect to the § 3 ground, Judge Christenberry held that the Mississippi River — Gulf Outlet was not a flood control project but a navigation aid project and that § 3 did not bar suits against the United States for floodwater damage resulting from the Government’s negligence unconnected with flood control projects. The United States conceded that the outlet was a navigation aid project but argued that in any case § 3 afforded it immunity. On that ground the United States moved for a rehearing on the motion to dismiss.**2** \*23Later the docket in the Eastern District of Louisiana was reorganized and these cases were assigned to Judge Heebe. In June 1969 Judge Heebe wrote an opinion thoroughly discussing the Government’s § 3 contention. Concluding that Judge Christenberry had correctly denied the motion to dismiss, Judge Heebe denied the motion for a rehearing. *See*Graci v. United States, E.D.La.1969, 301 F.Supp. 947. This Court granted the Government leave to take an interlocutory appeal from that order.**3** *See*28 U.S.C. § 1292(b).

II.

On appeal the United States contends that § 3 of the Flood Control Act of 1928, 33 U.S.C. § 702c, affords the Government an absolute immunity from liability for floodwater damage regardless whether the negligence alleged was in connection with a flood control project or a navigation aid project. The United States argues also that the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., did not in any way repeal the immunity that § 3 grants.

…

Since the *National Manufacturing*and *Clark*decisions, several courts have extended the § 3 immunity to bar suits against the United States on the theory that a flood control project had been negligently designed, constructed, operated, or maintained. In Stover v. United States, 9 Cir. 1964, 332 F.2d 204, the Ninth Circuit itself said,

We hold that 33 U.S.C. § 702c is an immunity statute covering even ordinary negligent construction or maintenance of flood works and that to hold otherwise would be a repudiation of our Clark case. . . . Also, the leading case, National Manufacturing Co. v. United States, 8 Cir., 210 F.2d 263, holds § 702c to be an immunity statute. And, it is a well reasoned ease. We affirm on the ground, negligence or no negligence, § 702c precludes recovery.

332 F.2d at 206. See *also*McClaskey v. United States, 9 Cir. 1967, 386 F.2d 807, 808; Parks v. United States, 2 Cir. 1966, 370 F.2d 92, 93; B. Amusement Co. v. United States, 1960, 180 F.Supp. 386, 389-390, 148 Ct.Cl. 337; Villarreal v. United States, S.D.Tex.1959, 177 F.Supp. 879, 880.

These cases, and what little legislative history there is, strongly support the view that the purpose of § 3 was to place a limit on the amount of money that Congress would spend in connection with flood control programs. Congress undoubtedly realized that the cost of extensive flood control projects would be great and determined that those costs should not have added to them the floodwater damages that might occur in spite of federal flood control efforts. See National Manufacturing Co. v. United States, *supra;*Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., N.D.Cal.1954, 126 F.Supp. 406, 408.**7** As Judge Heebe \*26expressed it, the “immunity from liability for floodwater damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of nationwide flood control programs.” 301 F. Supp. at 952. *See also*Clark v. United States, *supra.*

The question then becomes whether it is reasonable to suppose that in exchange for its entry into flood control projects the United States demanded complete immunity from liability for the negligent and wrongful acts of its employees *unconnected with flood control projects.*Judge Heebe answered that it would not be reasonable so to conclude. 301 F.Supp. at 952. Our analysis of another group of § 3 cases leads us to agree.

In Peterson v. United States, 9 Cir. 1966, 367 F.2d 271, the plaintiffs brought suit against the United States under the Federal Tort Claims Act to recover for damages incurred when, without a warning of any kind to anyone, a group of engineers attached to the Ladd Air Force Base at Fairbanks, Alaska, dynamited an ice-jam that had accumulated from natural causes in a bend of the Chena River. The ice-jam was causing the river to overflow its banks and flood properties on the Base and in the Fairbanks area. To prevent further damage, the engineers dynamited the ice-jam, which had the effect of discharging a large accumulation of ice and water downstream. The rushing ice and water severely damaged the plaintiffs’ property. The district court granted the Government’s motion to dismiss on the ground that § 3 was a complete defense to the action. The Ninth Circuit reversed.

The reasoning of the Ninth Circuit is instructive. The Court began by recognizing that Congress intended § 3 to be an integral part of a plan or policy on the part of the Government to embark on a vast construction program to prevent or minimize the incidences of loss occurring from floods and flood waters by the building of dikes, dams, levees, and related works, and to keep the Government entirely free from liability for damages when loss occurs, notwithstanding the works undertaken by the Government to minimize it. 367 F.2d at 275-276. Nevertheless, the court believed that the District Court, in the situation presented by the record before us, painted with too broad a brush in its conclusion that Section 702c applies to all floods and flood waters which result in whole or in part from unusual or extraordinary climatic conditions. . In our view the District Court erred in its application of Section 702c to this case. *Id.*at 276.

The court reviewed the decisions relied on by the United States and the district court — principally National Manufacturing Co. v. United States, *supra-,*Stover v. United States, supra; and Clark v. United States, *supra*— -and concluded that each of them was “clearly distinguishable on the facts” from the instant case. 367 F.2d at 276. The difference between those cases and *Peterson*was that the decision to dynamite the ice-jam — the alleged act of negligence — was “wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization.” *Id.*at 275.

Later eases reiterated this distinction. In Parks v. United States, 2 Cir. 1966, 370 F.2d 92, the Second Circuit affirmed a judgment of the district court dismissing on § 3 grounds a complaint that the United States had negligently constructed, maintained, and operated a flood control project and thus damaged the plaintiff’s property. That result is of course entirely consistent with the *National Manufacturing*and *Stover*cases and indeed with the view we take of § 3 here. The court went on to say, however, that

Peterson v. United States, 367 F.2d 271, 275 (9 Cir. 1966) is distinguish\*27able on its facts since in that ease flood damage was caused by Air Force personnel pursuant to instructions of engineering officers at the local base and “was wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control”.

370 F.2d at 92. By drawing that distinction, the Second Circuit seems to have agreed with our review and that of the Ninth Circuit that § 3 is not a bar to claims for floodwater damage caused by the negligence of the Government unconnected with flood control projects.

In McClaskey v. United States, 9 Cir. 1967, 386 F.2d 807, the Ninth Circuit repeated the distinction it drew in *Peterson.*Concluding that § 3 barred a claim for negligent construction of a flood control project, the court cautioned,

It does not follow that the mere happening of a flood insulates the Government from all damage claims flowing from it. In Peterson v. United States, 367 F.2d 271 (9th Cir. 1966), we denied immunity to the Government when its employees dynamited an ice jam in attempting to protect an air force base, causing a release of water that destroyed vessels moored downstream. We read § 702c in its statutory context, noting that it is contained in the Flood Control Act of May 15, 1928, and found that the decision to dynamite the ice jam was “wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization.” 367 F.2d at 275., 386 F.2d at 808, n. 1.

Indeed, in Valley Cattle Co. v. United States, D.Hawaii 1966, 258 F.Supp. 12, the court allowed recovery against the United States for floodwater damage caused by the Government’s negligent maintenance of a stream and culverts. Concluding that § 3 did not bar the action, the court anticipated the reasoning of the Ninth Circuit in *Peterson:*

The stream was straightened and the culverts built, not for any flood control purposes but solely for and as part of the construction of the airfield. The court will take judicial notice that the appropriations for the same did not come out of funds appropriated by Congress for flood control purposes. A reading of the Act and the cases interpreting it all show that the negation of liability of the United States contained in § 702c for flood damage was aimed at flooding oecur-ing in areas involved in actual or potential flood control projects. . 258 F.Supp. at 16.

Judge Heebe concluded that § 3 should not be construed to be a wholesale immunization of the Government from all liability for floodwater damage unconnected with flood control projects. 301 F.Supp. at 951. Based on our reading of the Act, its scant legislative history, and the *Peterson, Parks, McClaskey,*and *Valley Cattle*cases, we are constrained to agree. In Judge Heebe’s words, it is simply impossible to accept this immunity provision, reasonably related to government involvement in flood control programs, as an absolute insulation from liability for all wrongful acts in other situations, contrary to the express policy of the Federal Tort Claims Act that the government should be held liable for the wrongful acts of its employees in the same respect as private persons. 301 F.Supp. at 954. Thus when, as here, the plaintiffs allege that they have suffered floodwater damage as a result of the negligence of the United States unconnected with any flood control project, § 3 of the Flood Control Act of 1928 does not bar an action against the United States under the Federal Tort Claims Act.

Since we have concluded that the immunity clause of § 3 is not applicable to the facts to this case, we need not reach \*28the question whether the Federal Tort Claims Act effectively repealed that section.

In the district court the United States also argued that, independent of § 3, a line of cases originating with Bedford v. United States, 1904, 192 U.S. 217, 238, 24 S.Ct. 238, 48 L.Ed. 414, established a rule of absolute nonliability of the Government for flood damage. Judge Heebe thoroughly analyzed those cases and concluded that they did not establish an absolute prohibition of all suits against the United States for floodwater damage. Furthermore, whatever hints of absolute non-liability those cases may have contained, they have now been superseded by the more liberal policy of the Federal Tort Claims Act. *See*301 F. Supp. at 954-955. It would serve no useful purpose to repeat that analysis here. It is sufficient for us to say that we agree with Judge Heebe that *Bedford*and its progeny do not as a matter of law bar the plaintiffs’ suits against the United States under the Federal Tort Claims Act.

We call attention to the final paragraphs of Judge Heebe’s opinion. There he pointed out that despite his refusal to dismiss the action, the plaintiffs bear a heavy burden in proving that the United States was negligent in the construction of the Mississippi River— Gulf Outlet and that such negligence was the cause of their injuries. 301 F. Supp. at 956. We go along with this note of caution. In starting the plaintiffs on the journey of proving that the Government’s negligence was the cause of their injuries from a hurricane such as “Betsy”, we feel compelled to say that the plaintiffs are a long way from home.

Therefore, the judgment of the district court is affirmed and the case is remanded for further proceedings.

**1**. The other grounds alleged in support of the motions were (1) the complaints fail to state a claim against the United States upon which relief can be granted; (2) the complaints were not filed within the time period prescribed by statute; and (3) the acts complained of fall within the "discretionary function” exception of 28 U.S.C. § 2680.

**2**. The United States did not ask the court to reconsider its decisions on the other grounds urged in support of the motion to dismiss. *See*301 F.Supp. at 948 & n. 2.

**3**. The Court also granted two other parties leave to file an amicus curiae brief on behalf of the appellees. Those parties were also property owners who had suffered floodwater damage during the course of Hurricane “Betsy”. In fact, their complaints filed in the United States District Court for the Eastern District of Louisiana have been consolidated for trial with those of the plaintiffs-appellees in this appeal.

**4**. The remainder of that sentence reads as follows:

*Provided, however,*That if in carrying out the purposes of \* \* \* this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands subjected to overflow and damage or floodage rights over such lands.

**5**. The court also granted the Government’s motion to dismiss on the grounds (1) that the Federal Tort Claims Act did not authorize the plaintiffs’ action ; (2) the plaintiffs’ claims were based on alleged negligent misrepresentation and were therefore barred by the exception in 28 U.S.O. § 2680(h) ; and (3) the plaintiffs’ claims were based on the failure of Government employees to perform a “discretionary function” and were therefore barred by the exception in 28 U.S.C. § 2680(a). *See*210 F.2d at 274-279.

**6**. The court also sustained the district court’s finding that the Government had not been negligent. *See*218 F.2d at 451.

**7**. The court in *Atkinson*concluded that the purpose of § 3 was to prevent the Government from being held liable for the staggering amount of damages caused by natural floods, merely because the Government had embarked upon a vast program of flood control in an effort to alleviate the effect of the floods. Because Floods could not be eliminated in a single year, flood damage was bound to recur, and Congress did not want to burden its efforts to lessen the total effect of the floods with the cost of the damage that was certain to result in spite of its efforts.

*See also*Valley Cattle Co. v. United States, D. Hawaii 1966, 258 F.Supp. 12, 16.

# Florida East Coast Railway Co. v. United States, 519 F.2d 1184 (1975)

Before GEWIN, DYER and ADAMS,**\*** Circuit Judges, Of the Third Circuit, sitting by designation.

ADAMS, Circuit Judge:

In this appeal, which has as its focus the damage done a railroad by the washout of its line near a flood control project, the controversy revolves around the liability of the United States, a flood control district, and a general contractor. The central issues are the immunity of the United States, the jurisdiction of the court on a pendent basis over the contractor, and the alleged negligence of the flood control district.

I. *Factual Background.*

Pursuant to authorization under the Flood Control Act of 1948,**1** the United States Army Corps of Engineers (Corps), an instrumentality of the federal government, undertook to implement the congressionally approved Central and Southern Florida Flood Control Project. The purpose of the project was to control high water conditions in the area in question during the rainy season, and to impound additional water in Lake Okeechobee for use during the dry season.**2**

Levees 64 and 65 of the flood control project parallel one of the branch lines, known as the K-line, of the Florida East Coast Railway. That portion of the Kline between mileposts 29 and 40.08 runs north to south, along the eastern side of Levees 64 and 65. The interceptor canal adjacent to Levee 64 lies to the north of and flows into the canal adjacent to \*1188Levee 65. Between them is Culvert No. 1.**3**

At the southern terminus of Levee 65 —where its interceptor canal empties into the St. Lucie Canal — is Structure 153 which, the district court found, regulates the water level and the rate of flow in the interceptor canals for the two levees. By controlling the flow and level of the water in the interceptor canals, Structure 153 in turn affects the velocity of water draining from the surrounding area.

The land both east and west of the stretch of the K-line in question is extremely flat and swampy. Prior to construction of the flood control project, surface waters in the area flowed in a southwesterly direction, under three bridges and through numerous equalizer culverts underlying the railway’s roadbed. Between the time it was constructed in 1925 and October 1969, when the first washout in this case occurred, the K-line never suffered a washout or serious erosion, even during hurricanes and other periods of heavy rainfall. Building the levees and the structures appurtenant to them, the trial judge found, destroyed the natural drainage in the area.

The Central and Southern Florida Flood Control District (Flood Control District) acquired the land and the right-of-way upon which the project was to be constructed. It assured the Corps that it would hold the United States free from damages resulting from the building and operation of the project, and would maintain and operate the flood control system after its completion.

Although the Corps had primary responsibility for the design of the project, the trial judge found that the Flood Control District worked closely with the Corps in the planning stages. The Flood Control District, according to the trial judge, “reviewed, in detail, and commented on the General Design Memorandum . . ., the Detailed Design Memorandum . . . and the Project Plans and Specifications. It was responsible for alignment of the project. . The Flood Control District also provided advice and assistance to the Corps with regard to the actual construction of the project.” In addition, the Flood Control District furnished 15 per cent of the funds for completing the undertaking.

On April 3, 1968, the Corps awarded the principal construction contract to Troup Brothers, Inc. The trial court found that Troup, as the prime contractor, worked under the supervision of the Corps and was responsible for seeing that the project was completed in accordance with the plans and specifications drawn up by the Corps. Troup in turn hired Cross Contracting Company to perform all the excavation work and to install the flood control project structures.

During an extraordinarily heavy rainfall on October 29, 1969 a washout occurred at milepost 37.76 on the K-line. The washout resulted from the following: leaving Structure 153 open, removing “earth plugs” **3a** opposite the railroad’s culverts, using temporary culverts of less than design capacity, and failing to maintain water elevation in the Levee 65 canal. Water flowed too rapidly out of the Levee 65 canal, lowering water elevation and ultimately generating high velocity flows from the surrounding area through the railroad’s culvert, resulting in its erosion and washout.

After the washout of October 1969, the Flood Control District and the Corps recognized the deficiencies in the design of the flood control system. However, neither the Flood Control District nor the Corps warned the railroad or took steps necessary to correct the defects.

A second washout occurred at milepost 31.24 on March 26, 1970, again during a rainfall “greatly in excess of normal.” 5.9 inches of rain féll in the nine hours immediately preceding the washout, the heaviest such rainfall in 33 years.

\*1189The March 1970 washout also was the result of leaving Structure 153 open and removing the earth plugs in both levee canals. Consequently, water elevation was not maintained in either of the interceptor canals, and the flow of water into the Levee 64 canal was not adequately controlled. No attempt had been made to prevent erosion in the area between the roadbed and the Levee 64 canal. The rapid passage of water into the canal created a pressure differential between the east and west sides of the railway roadbed and an uncontrolled flow through its culverts. This washout caused the derailment of a Florida East Coast train.

The railroad incurred damages of approximately $438,000 as a result of the washouts that took place in October 1969 and March 1970, and because of the derailment that ensued.

Florida East Coast, a Florida corporation, filed suit on September 21, 1970, against the United States and Cross, seeking to recover for the losses that were caused by the washouts. Cross filed a third-party complaint against the Flood Control District on July 6, 1971. The United States on March 24, 1972 impleaded Troup as a third-party defendant. Then on May 9, 1972, Florida East Coast amended its complaint to assert claims directly against the two third-party defendants, Troup and the Flood Control District. Troup moved for a dismissal of the allegations by Florida East Coast against it on the ground that the district court had no jurisdiction over those claims, since there is no diversity between Troup and the railroad.

The case was tried before the district court, sitting without a jury, from January 8, 1973 to March 13, 1973. Following the trial, judgment was entered in favor of the United States on the ground that the federal government is immune from liability for flood damages in connection with flood control projects. Cross was held liable for the losses that followed from each of the washouts because of its negligence in constructing the flood control system, removing the earth plugs, installing inadequate culverts, and failing to operate Structure 153. It was also liable for nuisance and trespass for its conduct that created conditions of rapid runoff. Troup was found responsible for the actions of Cross, its subcontractor, and, in addition, for failure to supervise Cross.

The district court found the Flood Control District liable for permitting the construction of a nuisance on its land and for trespass by reason of the rapid runoff of water it had caused. It was also held liable for negligence as owner of failure to assure that the project was properly designed, constructed and operated, and vicariously as a joint venturer with the Corps. As a joint venturer with the Corps, the Flood Control District was held responsible for the negligence of the Corps with respect to the design, construction, and operation of the project, for nuisance and trespass, and for the activities of Troup and Cross. This last element of liability was predicated upon the nondelegability of the Corps’ duty of care with respect to contractors over whom it retained control.

Cross appears to have satisfied the judgment of the district court and has not appealed. Troup and the Flood Control District filed appeals from the award of damages against them. Florida East Coast appealed from the judgment in favor of the United States.

We affirm the judgment of the district court in all respects.

II. *Contentions of the Parties.*

*A. Contentions by Florida East Coast.*

Florida East Coast on its cross-appeal insists that the United States is not immune, under 33 U.S.C. § 702c, from liability for its negligence in the construction of this project. The railroad contends, first, that the statute does not relieve the United States of responsibility for damages resulting from floods created by its own negligence. Also, the damage here, Florida East Coast claims, was not caused by “floods or flood waters” within the scope of the immunity provision, but rather by the rapid run\*1190off of surface waters. Finally, the railroad argues that section 702c has been superseded by the Federal Tort Claims Act.

The United States declares in response that section 702c relieves it of liability for damages resulting from all floods, whether the flood is natural or man-made. The events which occasioned the washout of the K-line, the government insists, constitute a “flood” within the intent of the Congress in enacting section 702c. The United States also argues that the immunity provisions of the flood control legislation have not been superseded by the Federal Tort Claims Act.

…

III. *The Immunity Issue.*

Florida East Coast submits that the district court erred in several respects in determining that the United States is statutorily immune from liability for damages resulting from the government’s negligence in the planning or installation of a flood control project.

Section 702c provides in pertinent part:

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . . .**4**

Section 702c, the railroad contends, insulates the government from liability only with respect to natural, as opposed to artificially precipitated, floods. The federal courts, however, have reached a consensus that the United States is protected from liability for damages caused by “floods or flood waters” in connection with flood control projects, even when the government’s own negligence has caused or aggravated the losses.**5** There are decisions which impose liability on the United States for damages from flooding, but such decisions do not involve flood control projects within the contemplation of section 702c.**6** Rather the subjects of such suits are drainage facilities incidental to other government installations, navigation projects, and government conduct “wholly unrelated to any act of Congress authorizing expenditures of federal funds for flood control, or any act taken pursuant to such authorization.”**7** Decisions that lie beyond the scope of section 702c cannot be understood to limit the immunity of the federal government for flood damage in connection with projects like the one present here.

Moreover, contrary to the argument pressed by Florida East Coast, this individualized provision concerning federal immunity was not implicitly repealed by the passage of the Federal Tort Claims Act.**8** The Tort Claims . Act**9** \*1192lists the statutes specifically revoked thereby, and section 702c is not among them. There is little specific evidence concerning the legislative intent under-girding section 702c.**10** It would appear, however, that in view of the enormous cost of a broad flood control program, and the potential for immense liability if the United States were held responsible for negligent construction, Congress wished to impose a ceiling on the total cost of the enterprise.**11** Therefore, we must conclude, with the Eighth Circuit, that

when consideration is given to the basic importance of section [702c] to the vast federal flood control appropriations and undertakings, it should not lightly be assumed that the fundamental policy was reversed by mere implication . . . -**12**

The railroad contends, however, that the conditions of section 702c immunity were not met here because the washouts were not caused by “floods or flood waters” as required by the Act. Instead, claims the railroad, the washouts were caused by rapid surface water runoff drawn under the roadbed and into the negligently designed and negligently built interceptor canals.

We conclude that Congress intended to insulate the United States from the type of liability asserted here. In enacting section 702c Congress granted immunity to the United States in “the broadest and most emphatic language,” **13** protecting it against “liability of any kind . . . for any damage from or by floods or flood waters . .**14** Congress did not limit this immunity to damage done directly by inundation, but provided for immunity also from damage resulting “from . flood waters.”

The damages in question here occurred adjacent to a federal flood control project as a consequence of its design and operation. According to the trial judge, one of the contributing factors was a heavy rainfall so extraordinary that the region was declared a flood disaster area. In *Stover v. United States,*the trial judge defined a flood as “water which inundates an area of the surface of the earth where it ordinarily would not be expected to be,” and as “[w]ater which has overflowed the natural banks of the stream in its natural channel . .”**15** The railroad reasons that because the water that caused the damage was not overflow water from the interceptor canals, it was not flood water at all, but surface water. The *Stover*definition, however, is not restrictive; the term “floods and flood waters” as used in section 702c is sufficiently comprehensive to encompass the extraordinary rising of waters even in a place where water may often be found, such as the swampy area around the K-line.**16** This is particularly true when the . site of the rising waters is within a larger region designated a flood disaster area. In both instances the damage done to the railroad, though not the result of inundation of the line itself, resulted from the presence of flood waters around -its roadbed.

It does not seem reasonable to hold that Congress intended to create immunity for damages which occur when waters within a flood control area leave their normal course, but at the same \*1193time intended to permit liability for damage from the increased flow of flood water through its normal channels. Yet, to sustain the railroad’s argument would require us to so interpret section 702c. This we decline to do. Accordingly, we affirm the district court’s conclusion that, within the factual context presented here, the United States is immune.

…

Affirmed.

**1**. 62 Stat. 1175, 1176.

**2**. H.R.Doc. No. 643, 80th Cong., 2d Sess. (1948).

**3**. A sketch of the project area is included as Appendix A.

**3a**. Earth plugs are unexcavated sections of a canal or ditch, employed to control drainage.

**4**. 33 U.S.C. § 702c (1970).

**5**. *See, e. g., Parks v. United States,*370 F.2d 92 (2d Cir. 1966); *Stover v. United States,*332 F.2d 204 (9th Cir.), *cert. denied*379 U.S. 922, 85 S.Ct. 276, 13 L.Ed.2d 335 (1964); *B. Amusement Co. v. United States,*180 F.Supp. 386, 148 Ct.Cl. 337 (1960).

**6**. *Seaboard Coastline R. R. Co. v. United States,*473 F.2d 714 (5th Cir. 1973); *Graci v. United States,*456 F.2d 20, 25-27 (5th Cir. 1971); *Peterson v. United States,*367 F.2d 271, 275-76 (9th Cir. 1966); *Valley Cattle Co. v. United States,*258 F.Supp. 12, 16 (D.Haw. 1966). *See McClaskey v. United States,*386 F.2d 807, 808 n. 1 (9th Cir. 1967).

**7**. *Peterson,*367 F.2d at 275. Cf. *Graci v. United States,*496 F.2d 20, 25-27 (5th Cir. 1971).

**8**. *Parks v. United States,*370 F.2d 92 (2d Cir. 1966); *Stover v. United States,*332 F.2d 204 (9th Cir.), *cert. denied*379 U.S. 922, 85 S.Ct. 276, 13 L.Ed.2d 335 (1964); *National Mfg. Co. v. United States,*210 F.2d 263 (8th Cir.), *cert. denied*347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954); *B. Amusement Co. v. United States,*180 F.Supp. 386, 148 Ct.Cl. 337 (1960); *Villarreal v. United States,*177 F.Supp. 879 (S.D.Tex.1959).

**9**. 60 Stat. 842, 846-847.

**10**. Graci v. *United States,*456 F.2d 20, 23 (5th Cir. 1971).

**11**. *Clark v. United States,*218 F.2d 446, 451-52 (9th Cir. 1954); *Graci*v. *United States,*456 F.2d 20, 25 (5th Cir. 1971).

**12**. *National Mfg. Co.,*210 F.2d át 274.

**13**. *National Mfg. Co.,*210 F.2d at 270.

**14**. 33 U.S.C. § 702c (1970).

**15**. 204 F.Supp. 477, 485 (N.D.Cal.1962), *aff'd*332 F.2d 204 (9th Cir.), *cert. denied*379 U.S. 922, 85 S.Ct. 276, 13 L.Ed.2d 385 (1964).

**16**. *Cf.*42 U.S.C. § 4121(c) (Supp. III 1973), which defines flood, for the purposes of the national flood insurance program, to include:

the collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels ....

# Central Green Co. v. United States, 531 U.S. 425, 148 L. Ed. 2d 919, 121 S. Ct. 1005 (2001)

Justice Stevens delivered the opinion of the Court.

Incident to the authorization of a massive flood control project for the Mississippi River in 1928, Congress enacted an immunity provision which stated that “[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.” 45 \*427Stat. 535, as amended, 33 U. S. C. § 702c. At issue in this case is the meaning of the words “floods or flood waters.” The narrow question presented is whether those words encompass all the water that flows through a federal facility that was designed and is operated, at least in part, for flood control purposes. The Ninth Circuit, relying upon a broader construction of §702e than some other federal courts have adopted, concluded that they do. We granted certiorari to resolve the conflict, 529 U. S. 1017 (2000), and now reverse.

I

Petitioner owns 1,000 acres of pistachio orchards in California’s San Joaquin Valley. The Madera Canal, a federal facility that has been leased to the Madera Irrigation District (MID), flows through petitioner’s property. In 1996, petitioner brought this action against respondent United States and the MID alleging that their negligence in the design, construction, and maintenance of the canal had caused subsurface flooding resulting in damage to the orchards and increased operating costs for petitioner. Petitioner did not allege that any physical failure of the dam caused the damage to its property. The complaint sought damages under the Federal Tort Claims Act, 28 U. S. C. §2671 *et seq.,*as well as injunctive relief. Relying on the immunity granted by the Flood Control Act of 1928, 33 U.S.C. §702c, the United States moved for judgment on the pleadings.

Accepting petitioner’s submission that the Madera Canal was used for irrigation purposes, the District Court nevertheless dismissed the complaint because the parties agreed that the canal was a part of the Friant Division of the Central Valley Project, and that flood control was one of the purposes of that project. The District Court’s decision was dictated by an earlier Ninth Circuit case, which held that if a ‘“project has flood control as one of its purposes, and the \*428events giving rise to the action were not wholly unrelated to the project,’ ” immunity necessarily attached.**1**

On appeal, the Ninth Circuit affirmed. It agreed with petitioner that the Madera Canal “serves no flood control purpose,” but nevertheless held that immunity attached “solely because it is a branch of the Central Valley Project.” 177 F. 3d 834, 839 (1999). As the Ninth Circuit put it, “[although the water in the Madera Canal was not held for the purpose of flood control, because it was part of the Central Valley Project, it was *‘not wholly unrelated,’*to flood control.” *Ibid,*(emphasis added). In so holding, however, the court recognized that the Government would probably not have enjoyed immunity in at least three other Circuits where the courts require a nexus between flood control activities and the harm done to the plaintiff.**2** Noting the “harsh result of [the] decision,” the Ninth Circuit frankly acknowledged that “[t]he ‘not wholly unrelated’ test applied by this and other circuits reads broadly an already broadly written grant of immunity.” *Ibid.*As the Ninth Circuit recognized, under such a test, there would seem to be no “set of facts where the government is not immune from damage arising from water that at one time passed through part of the Central Valley or other flood control project.” *Ibid.*

II

Not until more than a half century after its enactment did this Court have occasion to interpret §702c. In a consolidated case arising out of two separate accidents, we held that the section “bars recovery where the Federal Government \*429would otherwise be liable under the Federal Tort Claims Act, 28 U. S. C. § 2671 *et seq.,*for personal injury caused by the Federal Government’s negligent failure to warn of the dangers from the release of floodwaters from federal flood control projects.” *United States*v. *James,*478 U. S. 597, 599 (1986).

The principal issue in the *James*case was whether the statutory word “damage” encompassed not just property damage, but also personal injuries and death. In light of the legislative history, which it reviewed at some length, *id.,*at 606-609,610-612, the Court concluded that the best reading of the statutory text was one which was both broader and less literal, and which encompassed the claims at issue in the two cases before the Court.

In both instances, the injuries were caused by the turbulent current generated by unwarned releases of waters from a reservoir after the Army Corps of Engineers had determined that the waters were at “flood stage.” The fact that the injuries were caused by “flood waters” was undisputed.**3** In its opinion, the Court held that the language of the statute covered the two accidents because the “injuries occurred as a result of the release of waters from reservoirs that had reached flood stage.” *Id.,*at 604.

Nevertheless, the Court’s opinion in *James*included a passage that lends support to the Ninth Circuit’s holding in this case. In that passage, the Court wrote:

\*430“Nor do the terms 'flood’ and 'flood waters’ create any uncertainty in the context of accidents such as the ones at issue in these cases. The Act concerns flood control projects designed to carry floodwaters. *It is thus clear from § 702c’s plain language that the terms ‘flood’ and ‘flood waters’ apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control,*as well as to waters that such projects cannot control.” *Id.,*at 605 (emphasis added).**4**

The sentence that we have italicized and, in particular, the phrase “related to flood control” have generated conflicting opinions among the Courts of Appeals. In an attempt to make sense of what is admittedly confusing dicta, some courts have focused on whether the damage relates in some, often tenuous, way to a flood control project, rather than whether it relates to “floods or flood waters.”**5** However, \*431more than one court has pointed out that, if read literally, the sentence sweeps so broadly as to make little sense.**6** Moreover, the sentence was unquestionably dictum because it was not essential to our disposition of any of the issues contested in *James.****7***It is therefore appropriate to resort to the text of the statute, as illuminated by our holding in *James,*rather than to that isolated comment, to determine whether the water flowing through the Madera Canal that allegedly caused the damage to petitioner’s pistachio orchards is covered by § 702c. See *Humphrey’s Executor*v. *United States,*295 U. S. 602, 627 (1935) (dicta “may be followed if sufficiently persuasive” but are not binding). See also *U. S. Bancorp Mortgage Co.*v. *Bonner Mall Partnership,*513 U. S. 18, 24 (1994).

In *James,*we held that the phrase “floods or flood waters” is not narrowly confined to those waters that a federal project is unable to control, and that it encompasses waters that are released for flood control purposes when reservoired waters are at flood stage. That holding, however, is vastly different from the Ninth Circuit’s reading of § 702c, under which immunity attaches simply because the Madera Canal is part of the Friant Division of the Central Valley Project, and flood control is one of the purposes served by that project. The \*432holding in *James*also differs from the less attenuated and more fact-specific position advanced by the Government, which would require us to take judicial notice of evidence that the Friant Division of the Central Valley Project and, indeed, the Madera Canal itself can and do serve flood control purposes. We ultimately conclude that the judgment cannot be upheld under either rationale, but begin with a description of the Central Valley Project and an explanation of the factual basis for the Government’s submission.

III

We begin by observing that water can be either a liability or an asset. The Mississippi River flood of 1927 was unquestionably an example of the former. That flood in turn led to the enactment of the 1928 Flood Control Act. Similar, though less extreme, floods of the Sacramento and San Joaquin Rivers in California provided an important motivation for the authorization of the Central Valley Project. Although that project has not completely eliminated flooding on either river, it has succeeded in converting a huge liability into an immensely valuable asset. Justice Jackson described the magnitude of that transformation in his opinion for the Court in *United States*v. *Gerlach Live Stock Co.,*389 U. S. 725 (1950):

“This is a gigantic undertaking to redistribute the principal fresh-water resources of California. Central Valley is a vast basin, stretching over 400 miles on its polar axis and a hundred in width, in the heart of California. Bounded by the Sierra Nevada on the east and by coastal ranges on the west, it consists actually of two separate river valleys which merge in a single pass to the sea at the Golden Gate. Its rich acres, counted in the millions, are deficient in rainfall and must remain generally arid and unfruitful unless artificially watered.

\*433“To . . . make water available where it would be of greatest service, the State of California proposed to re-engineer its natural water distribution. This project was taken over by the United States in 1935 and has since been a federal enterprise. The plan, in broad outline, is to capture and store waters of both rivers and many of their tributaries in their highland basins, in some cases taking advantage of the resulting head for generation of electric energy. . . . [T]he waters of the San Joaquin will be arrested at Friant, where they would take leave of the mountains, and will be diverted north and south through a system of canals and sold to irrigate more than a million acres of land, some as far as 160 miles away. A cost of refreshing this great expanse of semiarid land is that, except for occasional spills, only a dry river bed will cross the plain below the dam. Here, however, surplus waters from the north are utilized, for through a 150-mile canal Sacramento water is to be pumped to the cultivated lands formerly dependent on the San Joaquin.” *Id.,*at 728-729.

“The Central Valley basin development envisions, in one sense, an integrated undertaking, but also an aggregate of many subsidiary projects, each of which is of first magnitude. It consists of thirty-eight major dams and reservoirs bordering the valley floor and scores of smaller ones in headwaters. It contemplates twenty-eight hydropower generating stations. It includes hundreds of miles of main canals, thousands of miles of laterals and drains, electric transmission and feeder lines and substations, and a vast network of structures for the control and use of water on two million acres of land already irrigated, three million acres of land to be newly irrigated, 360,000 acres in the delta needing protection from intrusions of salt water, and for municipal and miscellaneous purposes including cities, towns, duck clubs and game refuges. These projects are not only widely \*434separated geographically, many of them physically independent in operation, but they are authorized in separate acts from year to year and are to be constructed at different times over a considerable span of years.” *Id.,*at 733.

Justice Jackson’s description of the magnitude of the Central Valley Project makes one proposition perfectly clear: to characterize every drop of water that flows through that immense project as “flood water” simply because flood control is among the purposes served by the project unnecessarily dilutes the language of the statute. The text of the statute does not include the words “flood control project.” Rather, it states that immunity attaches to “any damage from or by floods or flood waters . . . .” Accordingly, the text of the statute directs us to determine the scope of the immunity conferred, not by the character of the federal project or the purposes it serves, but by the character of the waters that cause the relevant damage and the purposes behind their release.

IV

The Government has asked us to take judicial notice of certain basic facts about the Friant Division of the Central Valley Project and about the waters flowing through that division and, more particularly, through the Madera Canal. Although petitioner will have an opportunity to challenge those details on remand, we accept them for purposes of this opinion.

The two major rivers supplying water to the Central Valley Project are the Sacramento in the north, and the San Joaquin in the south. From its headwaters in the Sierra Nevada Mountains, the San Joaquin flows in a southwesterly direction into a reservoir, known as Millerton Lake, just above the Friant Dam. The reservoir has a storage capacity of 520,500 acre-feet of water. In dry years, the total flow in the river does not produce that amount, but on average, the \*435annual flow apparently approximates *Wz*times the reservoir’s capacity. Water is released through outlets in the dam that send it down the San Joaquin River, and also through outlets that direct it into either the Madera Canal to the northwest, or the Friant-Kern Canal to the southeast. When the water level exceeds 678 feet, it flows over the dam’s spillway into the San Joaquin. At that point, the river can accommodate a flow of 8,000 cubic feet per second without flooding. The Madera Canal can accommodate 1,200 cubic feet per second, and the Friant-Kern another 4,500 cubic feet per second. Thus, a total release of 13,700 cubic feet per second in three directions would not appear to include any “flood water.”

The Madera Canal, which is about 40 miles in length, is used primarily for irrigation purposes. Water that enters the canal at the Friant Dam is purchased by farmers who either use it immediately or store it for future use. As a result, the amount of water that enters the canal is larger than the quantity that may flow into the Chowchilla River at its terminus.**8** Except in years of extreme drought, the Madera Irrigation District provides contracting farmers with “a dependable water supply” of approximately 138,000 acre-feet of “Class 1 water.” In addition, “if, as, and when it can be made available,” the District sells “Class 2 water” to the farmers at a price that is lower than the Class 1 price because of the “uncertainty as to availability and time of occurrence.”**9** Thus, again in a literal sénse, it seems clear that none of the Class 1 or Class 2 water sold by the District and purchased by the farmers to store or irrigate their lands includes any “flood water.”

\*436Water that is not purchased under either class simply flows through the canal into the Chowchilla River. As the Government points out, that excess may include flood water. However, given the fact that the canal can accommodate a flow of 1,200 cubic feet per second, which amounts to about 2,380 acre-feet per day, it is entirely possible that over the span of a year, several times the amount of Class 1 and Class 2 waters described in the papers submitted by the Government could flow through the canal without causing anything approaching a flood. Nevertheless, according to the Government, because the Madera Canal is available to divert water that might otherwise produce a flood on the San Joaquin and flood control is among the purposes served by the canal, § 702c immunity must attach to all the water that flows through the canal. Under the Government’s approach, this would be true even if the water never approached flood stage and the terminus of the canal was parched at the end of the summer. Admittedly, it is possible to read the “related to” portion of the dictum from *James*to support that result, but neither the language of the statute itself, nor the holding in *James,*even arguably supports such a strange conclusion. Accordingly, we disavow that portion of *James'*dicta.

V

This case does raise a difficult issue because the property damage at issue was allegedly caused by continuous or repeated flows occurring over a period of years, rather than by a single, discrete incident. It is relatively easy to determine that a particular release of water that has reached flood stage is “flood water,” as in *James,*or that a release directed by a power company for the commercial purpose of generating electricity is not, as in *Henderson*v. *United States,*965 F. 2d 1488 (CA8 1992). It is, however, not such a simple matter when damage may have been caused over a period of time in part by flood waters and in part by the routine use of the canal when it contained little more than a trickle. The \*437fact that a serious flood did occur in the San Joaquin in 1997 creates the distinct possibility that flood waters may have surged down the Madera Canal and harmed petitioner’s property.

For present purposes, we merely hold that it was error to grant the Government’s motion for judgment on the pleadings and that it is the text of § 702c, as informed by our holding in James, rather than the broad dictum in that opinion, that governs the scope of the United States’ immunity from liability for damage caused “by floods or flood waters.” Accordingly, in determining whether § 702c immunity attaches, courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**1**App. to Pet. for Cert. 15 (quoting *Washington*v. *East Columbia Basin Irrigation Dist.,*105 F. 3d 517, 520 (1997)v.

**2** Citing *Fryman*v. *United States,*901 F. 2d 79 (CA7 1990); *Boyd*v. *United States,*881 F. 2d 895 (CA10 1989); and *Hayes*v. *United States,*585 F. 2d 701 (CA4 1978), the Ninth Circuit specifically identified the Fourth, Seventh, and Tenth Circuits as ones which likely would have reached a different result.

**3** The first ease arose out of an incident at the Millwood Dam in Arkansas, when “the level of the Reservoir was such that the United States Corps of Engineers designated it at ‘flood stage.’ As part of the flood control function of the Millwood facility, the Corps of Engineers began to release water through the tainter gates. This release created a swift, strong current toward the underwater discharge.” 478 U. S., at 599. The second ease arose as a result of a decision by the Corps of Engineers to release waters in the reservoir of Bayou Courtableau Basin which “were at flood stage.” *Id.,*at 601. The District Court found that §702c applied because the “ ‘gates were opened to *prevent*flooding and inundation landside of the drainage structure.’ ” *Id.,*at 602 (emphasis added).

**4** The Court appended a footnote pointing out that the District Court in each case had found that the waters at issue had been “released from federal flood control facilities to prevent flooding” and that the Court of Appeals had upheld those findings “and assumed that ‘the waters in this [consolidated] case were floodwaters.’ ” See *id,.,*at 606, n. 7.

**5** See, *e.g., Washington*v. *East Columbia Basin Irrigation Dist.,*105 F. 3d 517 (CA9 1997); *Williams*v. *United States,*957 F. 2d 742 (CA10 1992); *Dawson*v. *United States,*894 F. 2d 70 (CA3 1990); *DeWitt Bank & Trust Co.*v. *United States,*878 F 2d 246 (CA8 1989). This approach, however, can be overinclusive. As Judge Easterbrook has pointed out: “The ‘management of a flood control project’ includes building roads to reach the beaches and hiring staff to run the project. If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists’ cars on the way to the beach, or if a tree-trimmer’s car should careen through some picnickers, these injuries would be ‘associated with’ flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard to conceive that they are ‘damage from or by floods or flood waters’ within the scope of § 702c.’ ” *Fryman*v. *United States,*901 F. 2d, at 81. More \*431to the point, such an approach is also inconsistent with the statutory language. See *infra,*at 434.

**6** “Other circuits recognize that such a sweeping grant of immunity makes little sense in light of the text and purpose of the Act.” *Cantrell*v. *United States Dept. of Army Corps of Engineers,*89 F. 3d 268, 271 (CA6 1996). See also *Fryman,*901 F. 2d, at 81 *(“James*was so broadly written that it cannot be applied literally”).

**7** In addition to concluding that the word “damage” includes personal injury and death, the Court also rejected the previously arguable propositions that the Federal Government’s subsequent waiver of sovereign immunity in the Federal Tort Claims Act had impliedly repealed § 702c; and that the immunity applied only to the flood control on the Mississippi River authorized by the 1928 Act.

**8** The Chowchilla flows in a westerly direction into the San Joaquin, which in turn flows in a northwesterly direction at that point. 9

**9** In some exceptional circumstances, irrigation contractors may be obligated to buy Class 2 water at a particular time. However, contractors still pay for the water, regardless of the potential inconvenience with respect to the timing or date of delivery.