National Mfg. Co. v. United States. Great Western Paint Mfg. Corp., 210 F.2d 263 (8th Cir. 1954)

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The gravamen of the plaintiffs' cases was that the Federal Tort Claims Act *270 should be so interpreted as to impose responsibility upon the United States for flood damage to plaintiffs' movable property in these cases be-cause, as
270 alleged, the United States was negligent in making or withholding Kansas river stage and flood forecasts.

The position taken for the government in the trial courts and reasserted here is that (1) recovery in these actions is barred by Section 3 of the Act of May 15, 1928, entitled, "An Act For the control of floods on the Mississippi River and its tributaries, and for other purposes" which declares that "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". 45 Stat. 534, 33 U.S.C.A. § 702c. It was and is also contended for the government that (2) the Federal Tort Claims Act un-der which the actions are sought to be maintained does not repeal these quoted provisions of Section 3, and (3) that said Tort Claims Act does not ac-cord a right of action against the United States for the damages here alleged. Furthermore, that (4) the Exception provisions of Sections 2680(h) and (5) 2680(a) of that Act bar recovery of the instant claims by express exclusionary language.

1. The bar of Section 3 of the 1928 Act.

The 1928 flood control Act authorizing appropriations in excess of $300,000,000 for flood control work on the Mississippi River provided for the preparation and submission to Congress of "projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods" including "the Missouri River and tributaries". 33 U.S.C. A. § 702j. In the later Flood Control Act of June 22, 1936, 49 Stat. 1570, 1588, Congress "ad-opted and authorized to be prosecuted" as "works of improvement, for the benefit of navigation and the control of destructive flood waters and other purposes" hundreds of flood control projects in all parts of the country in-cluding "levees and flood walls to protect people and city property" and "Kan-sas Citys on Missouri and Kansas Rivers in Missouri and Kansas". Congress also affirmed the application to the 1936 Act of the general provisions of the 1928 Act including Section 3 by providing, Sec. 8, that:

> "Nothing in this Act shall be construed as repealing or amending any provisions of the Act entitled 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes', approved May 15, 1928, or any provision of any law amendatory thereof." 33 U.S.C.A. § 701e.

Thus it appears on inspection of the two flood control Acts referred to that when Congress entered upon flood control on the great scale contemplated by the Acts it safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language. The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them. Undoubtedly floods which have traditionally been deemed "Acts of God" wreak the greatest property destruction of all natural catastrophies and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them. Congress included Section 3 in the 1928 Act and carried it forward into the 1936 Act and others with intent to exercise that power completely and to absolutely bar any such federal liability.

It was not indicated in the 1928 Act that Congress expected to carry on the federal flood control projects without imposing upon the United States certain obligations to affected owners of property. The constitutional prohibition against the taking of private property for public use without just compensation was kept in view, U.S. v. Sponenbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230, *271 and provision for compensation to be paid to landowners in certain circumstances is contained in the same section 3 which prohibits any federal liability for damage from or by floods or flood waters.[2] The Federal Tort Claims Act of August 2, 1946, had not been passed in 1928 or 1936 and the government then had a certain sovereign immunity from suit for torts but when Section 3 is read in its context it is clear Congress meant by it that damages from or by floods or flood waters should not afford any basis of liability against the United States regardless of whether the sovereign immunity was availed of or not. The declaration of Section 3 negates the existence of a cause of action against the United States in the situation covered by it.

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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 damages.

The plaintiffs in these actions argue that negligence of government employees was a proximate cause of their damages but they include in their complaints that the damages involved resulted from the fact their goods, wares,

and merchandise "were flooded and inundated by the waters and oil, mud, muck, and debris carried therewith and * * *were damaged, ruined, and destroyed" (National's complaint). In the Shipley Company's complaint it is alleged that "the said Kaw river" "flooded the said Central Industrial District and destroyed and damaged the personal property of the plaintiff". Some such allegations are necessary to present the cases. But it is in just such a situation that the language of Section 3 plainly bars recovery against the United States. The sec-tion does not limit the bar against such recovery to cases where floods or flood waters are the sole cause of damages. It does bar liability of any kind from damages "by" floods or flood waters but it goes further and in addition it bars liability for damages that result (even indirectly) "from" floods. The use of the word "from" in addition to "by" makes it clear that the bar against fed-eral liability for damages is made to apply wherever floods or flood waters have been substantial and material factors in destroying or damaging prop-erty. The language used shows Congressional anticipation that it will be claimed after the happening of floods that negligence of government employ-ees was a proximate cause of damages where floods or flood waters have des-troyed or damaged goods. But the section prohibits government liability of "any kind" and at "any place". So that uniformly and throughout the country at any place where there is damage "from" or "by" a flood or flood waters in spite of and notwithstanding federal flood control works no liability of any kind may attach to or rest upon the United States therefor.

Counsel for the government have been at pains to demonstrate from records of legislative hearings, debates, reports and action taken by Congress that Congress has consistently adhered to the basic concept of nonliability of the government *272 declared in Section 3 of the 1928 Act carried forward in the 1936 Act.[3]

272 Many attempts have also been made in the courts to impose liability upon the *273 United States for flood damages but such claims have been uniformly re-jected by the courts. Bedford v. United States, 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414; Jackson v. United States, 230 U.S. 1, 33 S.Ct. 1011, 57 L.Ed. 1363; Sanguinetti v. United States, 264 U.S. 146, 44 S.Ct. 264, 68 L.Ed 608; United States v. Spon- *274 enbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230; Goodman v. United States, 8 Cir., 113 F.2d 914.

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274 In Grant'v. Tennessee Valley Authority, D.C., 49 F.Supp 564, flood damage claims, though based on negligence of government employees and asserted against the Authority which is subject to suit, were denied. In granting defendant's motion for summary judgment the court said, 49 F.Supp. loe. cit. 566:

"By a long line of cases it has definitely been settled that neither the government nor its instrumen-talities would have to respond in damages arising in the devel-

> opment and maintenance of waters for purposes of navigation and flood control, including claims for negligence. It may be noted that this position is not because of governmental immunity from suit but on the grounds of public policy."

Similarly, in Atchley v. Tennessee Valley Authority, D.C.N.D.Ala., 69 F.Supp. 952, 954, a motion for summary judgment was again granted, the court pointing out that the principle of nonliability for flood damages "is not based upon the immunity to suit of the United States" and "applies whether the alleged liability is predicated on nuisance, negligence or other tortious conduct."

It is contended for the appellants that Section 3, which has been carried forward as Section 702c of the Code under a heading "Mississippi River," is not applicable to the Kansas River or its flood damage, but the point appears to be without merit. The words of the section, "floods or flood waters at any place", in the context of the Act and the succeeding flood control Acts to which the section is extended and which legislate concerning flood control projects throughout the entire country, specifically include the Kansas River and its floods and flood waters. The fact that the words Mississippi River "have lingered on in the successive editions of the United States Code is immaterial." Stephan v. United States, 319 U.S. 423, 426, 63 S.Ct. 1135, 1137, 87 L.Ed. 1490; Wong Yang Sung v. McGrath, 339 U.S. 33, 51, note 33, 70 S.Ct. 445, 94 L.Ed. 616.

It must be held that Section 3 as it stood at the time of the enactment of the Tort Claims Act of August 2, 1946, would completely bar these actions.

2. The government's contention that the Tort Claims Act does not repeal Section 3.

The Act contains a list of the statutes which it declares "are hereby repealed", 60 Stat. 842, 846, 847, and the list so expressly repealed does not include Section 3 of the 1928 Act. The contention for appellants is that there was repeal by implication but when consideration is given to the basic importance of Section 3 to the vast federal flood control appropriations and undertakings, it should not lightly be assumed that the fundamental policy was reversed by mere implication with nothing said about it. "It is a cardinal principle of construction that repeals by implication are not favored." United States v. Borden Co., 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181. A long settled public policy is not to be overridden by the general terms of a statute which does not show with certainty a legislative intent to depart from that policy. United States v. Sweet, 245 U.S. 563, 572, 38 S.Ct. 193, 62 L.Ed. 473.

3. The government's contention that the Tort Claims Act does not authorize the action.

The Tort Claims Act contains no expressions which indicate affirmatively that Congress intended to depart from the established prohibition of federal liability for any damages from or by floods or flood waters at any place. The im-

position of such a liability could not be justified in the face of that positive prohibition without some clear mandate from Congress and none such is to be found in the Act. As stated by the Supreme Court in Feres v. United States, 340 U. S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152, in rejecting other negligence claims under the Tort Claims Act, "We cannot impute to Congress such a radical de *275 parture from established law in the absence of express congressional command."

The Act accords,

> "jurisdiction of civil actions on claims against the United States for money damages * * * for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C.A. § 1346.

Section 2674 provides:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

It is settled in Feres v. United States, supra, quoted in Dalehite v. United States, 346 U.S. 15, 43, 73 S.Ct. 956, 972, 97 L.Ed. 1427, that the Tort Claims Act "did not create new causes of action where none existed before. * * * Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

It must be held that these actions are attempts "to visit government with novel and unprecedented liabilities." Heretofore the great contribution of the United States to the struggle that has continued for generations and will long continue, to conquer floods, has been made on the basis of federal nonliability for flood damages. That has been the condition of the government's contribution. There is no cause of action for recovery of damages from or by floods or flood waters. The contention that such a cause of action has been accorded by the Tort Claims Act may not be sustained.

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Footnotes

2 . “See. 3.

> “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: 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 Kiver 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 War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.”

3 . The government’s brief presents without contr-adiction that:

> “In time of national disaster, it has always been the custom of Congress to extend assistance on an emergency relief basis. This general congressional policy is reiterated in the Disaster Relief Act of September 30, 1950, 64 Stat. 1109, which authorizes federal agencies to provide food, clothing, temporary shelter-, and other critical needs to victims of flood, hurricane, drought, earthquake, or other major disaster-. 96 Cong.Rec. 11896. But this type of assistance is obviously ‘first-aid’ in nature. 96 Cong.Rec. 11898. It excludes federal assumption of any responsibility of ‘payment for damages’ x-esulting from the disaster. 96 Cong.Rec. 11905.

> “It is especially significant that in 1951 —five years after passage of the Federal Tort Claims Act on which the instant ' suits are based — this federal policy of extending emergency relief aid but prohibiting indemnification for property damage was reexamined and explicitly reaffirmed

by Congress with specific reference to the damages caused by the July 1951 Kansas River flood.

"On July 18, 1951, within five days after the flood waters inundated the Kansas Cities, Congress appropriated $25,-000,000 for 'disaster relief' in the affected area: 65 Stat. 123. And, in strict conformity with the settled policy of emergency relief but no indemnification, the appx-opriation was earmarked 'to be used strictly for relief' in 'accordance with Public Law 875 [the Disaster Relief Act of 1950]', 97 Cong.Rec. 8177. Thus the funds were made available not for property damage indemnification but for shelter, clothing, medical supplies, and other exclusively emergency needs. 97 Cong. Rec. 8178.

"The history of other legislation in the period immediately following the flood shows even more conclusively congressional opposition to the indemnification sought in the instant suits. On August 1, 1951, less than 20 days after occurx-ence of the damages here complained of, H.R. 5022 was introduced by Representative Bolling. 97 Cong.Rec. 9359. This bill, acknowledged by its sponsor as being completely unprecedented, would have required fedrál indemnification of the damages caused by the flood. Upon referral to the Committee on the Judiciax-y, the bill was considered by Subcommittee Number 3, which has 'special jurisdiction' over bills asserting claims against the United States. Legislative Calendar, House Committee on Judiciary, 82d Cong., p. 3, 160. The Sxxbcommittee held hearings and adversely reported the bill to the full Committee, which tabled it. Id. at p. 160. While there is no printed record of the hearings, the Subcommittee's files show that the Secretary of Army, reporting on the novel indemnification proposal, declared that the

"Federal Government has never assumed responsibility for damage to private property resulting from flood damages."

Similarly, the Secretary of the Interior pointed out to the Committee that the "portion of the bill which provides for indemnification for flood losses sustained opens up, I believe, a completely new field. Your Committee will want to consider the full ramifications of a proposal which might in effect establish a Federal responsibility for losses [sustained in national disasters]."

Likewise abortive were other contemporaneous attempts in Congress to subject the Government to liability for the Kansas River flood damage. Legislative hearings, debates, reports, and action taken show strong insistence by Congress in adhering to the basic policy set forth in the 1950 Disaster Relief Act — emergency assistance only and no indemnification for property loss. Thus, H.J.Res. 341, 82d Cong.,. 1st Sess., later enacted as the Flood Rehabilitation Act of October 24, 1951, 65 Stat. 615, would,

> as originally introduced, have appropriated moneys not only for relief but, like H.R. 5022, for indemnification pux-poses. The basic objection to> 'getting into a field of paying based on loss or indemnification' rather than on relief or emergency need was expressed early in the hearings with the admonition that "there are certain basic things if Government is to last that we have to think off One of them is that a legislative body just cannot issue from the Public Treasury at its whim. Hearings Before a Subcommittee of the House Committee on Appropriations, 82d Cong., 1st Sess., on Rehabilitation of Flood Stricken Areas, p, 87."

On October 3, 1951, the House Committee on Appropriations, while authorizing disaster relief and loan appropriations,, flatly rejected the indemnification feature of H.J.Res. 341:

> " * * * The Committee heard considerable testimony on this recommendation, and áfter careful deliberation has not approved it for severál important reasons.

> *273 "Congress has never appropriated funds for indemnities such as have been proposed here in any previous disaster of this kind, and no legislation has ever been enacted by Congress authorizing such appropriations. This would be a major departure from the present concept of Government and, therefore, must be given more extensive study than is now possible under emergency conditions that demand prompt action on the part of Congress. The Committee believes that the approval of the proposed indemnification program would commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster throughout the country regardless of the typo or size of the disaster. The financial implications inherent in such an action would be enormous. H.Rept. 1092 on II.J.Res. 341, 82d Cong., 1st Sess., p. 5."

> This same need for adhering to the established policy of non-indemnification for property damage loss sustained in the flood was reiterated in the congressional debates on II.J.Res. 341. Congressman Norrell, Chairman of the Appropriations Committee in charge of the legislation, stated:

> "I want to touch on the indemnity program for a minute. We did not go along with that. It was not authorized. It is a new policy which, Mr. Chairman, could involve a sum of money in the future that is so staggering that the mortal mind cannot comprehend it. 97 Cong.Rec. 12637.

> "And Congressman Fureolo, a member of the same Appropriations Committee, warned that 'we must be very careful not to establish a pre-

cedent that will return to haunt the Congress or bankrupt the Treasury.' 97 Cong.Rec. 12641.

"In further debate on II.J.Res. 341, Congressman Bolling brought the issue of Federal responsibility for the flood damage into even sharper focus. Stating that be 'disagreed flatly' with the majority view opposing indemnification, Congressman Bolling offered an amendment on the floor of the House of Representatives, which incorporated the same indemnity provisions stricken from II.J.Ros. 341 by the Appropriations Committee before being reported out to the House and which had also appeared in his earlier bill, H.R. 5022. 97 Cong.Rec. 12042, 12644. The House, ratifying the Committee's rejection of the indemnity provisions, defeated the amendment. 97 Cong.Rec. 12646.

"A similar amendment offered by Congressman Scrivner on the floor was also defeated. 97 Cong.Rec. 12647-8. Congressman Scrivner's futile argument in favor of indemnification is of special importance here. It shows full congressional awareness that the indemnification proposal was based, just as the claims for indemnification now before this Court are based, on the asserted liability of the United States for failure to issue adequate flood forecasts or river stage predictions. Thus, Congressman Scrivner, urging Congress to impose responsibility for the damage caused by the 1951 Kansas River flood, contended that there had not 'been adequate warning' of the impending flood. 97 Cong.Rec. 12639.

"After defeat of both the Bolling and Scrivner amendments, II.J.Res. 341 was passed by the House in the same form in which it had been reported by the Committee, i. e., without any provision for indemnification of property damage. 97 Cong.Rec. 12636, 12650. And it passed the Senate in that same form after the Senate's rejection of an indemnification amendment offered by Senator Hennings, who had authored S. 1935, the companion measure to Representative Bolling's H.R. 5022. 97 Cong.Rec. 13331, 13340. The Resolution, limited to the Rehabilitation, relief and loan provisions, with the indemnity features deliberately excluded, was approved and enacted as the Flood Rehabilitation Act on October 24, 1951, 65 Stat. 615, 616.

"We submit that this legislative history plainly shows (1) that Congress had under consideration the claims now asserted before this Court, (2) that Congress was made fully cognizant of the particular theory on which these flood claims arising out of the 1951 flood were based, i. e., the inadequate flood prediction theory, (3) that Congress, after careful consideration of the claims in hearings and in extensive debate, deliberately chose to adhere to its traditional policy of not allowing indemnification for flood damage, and (4) that Congress for that reason expressly

> declared its refusal to impose upon the United States any responsibility to pay for the flood damage sustained in the 1951 flood."