

A Radical Proposal: Does St. Bernard Par. Gov't v. United States allow the Federal Government to Step Away from Flood Protection and Create Wild Seashores and Wild Rivers?

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Introduction

Through time, floods have been the costly natural disasters in the United States. Even discounting hurricane driven flooding such as Hurricanes Katrina, Irma, and Harvey, floods are regular causes of billion-dollar events. While floods are natural events that are critical to ecological systems, they become costly human disasters when people use floodplain land in ways that are harmed by flooding.¹ In the worst case, lives are lost when flooding occurs too quickly for people to go to safety, or when people choose to stay in high risk areas despite warnings to evacuate.

Until modern times, rivers and seaports were primary means of transportation. Most older cities are located on rivers, lake ports, or seaports. Many of the seaports are on river deltas, which are low and prone to flooding by storm tides. Shorelines are also popular recreational areas, which brings residential housing and tourism related businesses. As communities expand in these low-lying areas, there is pressure to expand construction into high risk zones.

Floods are increasingly costly because there are many incentives that push human habitation to high risk flood areas. Despite the obvious risks of flooding, populations and property continue to increase in high risk flood zones, especially on the coasts. At this point in time, the steadily increasing yearly cost of flood damage is primarily due to increased property at risk and not due to increased hydrologic flooding caused by climate change.²

Federal and state policies incentivize high risk construction in floodplains and along the coast. The federal government hides the cost of risk through subsidized premiums in the National Flood Insurance Program (NFIP). Federal disaster relief programs such as the Road Home Program after Hurricane Katrina subsidize reconstruction in flooded areas for persons without flood insurance, and supplement payments to those with flood insurance. The federal government also subsidizes high risk development through levee building and other flood control measures that reduce the frequency of small floods but increase the severity of

¹ When planners and politicians talk about floods, they mean floods that have destroyed human property or lives. The flood itself is often termed the hydrologic flood. Roger A Pielke Jr & Mary W Downton, *Precipitation and damaging floods: Trends in the United States, 1932-97*, 13 JOURNAL OF CLIMATE 3625–3637 (2000).

² Josè I Barredo, *Normalised flood losses in Europe: 1970-2006*, 9 NATURAL HAZARDS AND EARTH SYSTEM SCIENCE 97–104 (2009).

major floods. State and local governments encourage development through land use permitting in high risk flood areas.³

hydrologic flooding will increase as the earth warms. Warmer air holds more moisture and provides more energy for storm development. Both the August 2016 flooding in Louisiana and the 2017 Hurricane Harvey flooding in Houston were likely worsened by global warming. Sea level rise from warming is exacerbating flood risk and even conservative projections of the increase in sea level by 2050 and 2100 show massive destruction of coastal property displacement of populations. The effects of sea level rise on coastal rivers increases flooding well inland. Protecting current and future high risk property with flood control structures, augmented with massive federal bailouts when that protection fails, may exceed the political will of the federal government and the resources of state and local governments. Such protections would have massive environmental consequences, destroying most coastal wetlands and beaches.

The federal government must develop new policies to move at risk populations away from areas at high risk of flooding, both to control costs and to protect the environment. Fundamental to these policies is resolving the question of whether people have a property right to demand that flood protection be built by the government, and whether the government has a legal duty to maintain existing flood control structures. Neither issue is new, but both were the subject of extensive litigation after Hurricane Katrina. The Federal Tort Claims Act cases were dismissed in 2012, after having been upheld by the District Court.⁴ The same claims were also presented as takings claims, which were upheld by the Court of Claims in 2016.⁵ The Federal Circuit dismissed these claims in 2018, in a broad opinion laying out the standards for temporary takings and for stating an injury from flood control projects.⁶ This opinion provides guidance for rethinking federal flood policies to that people are moved out of high risk areas and wetlands and beaches are protected.

The first part of this paper will review the history of temporary takings – takings by episodic events and the tension between temporary takings and tort claims actions. The second will review the holding of the SB case and its context in the Hurricane Katrina litigation. The final section will explore the policy implications of the SB's court's standard for takings claims that arise ancillary to flood control.

³ JG Titus et al., State and local governments plan for development of most land vulnerable to rising sea level along the US Atlantic coast, 4 ENVIRONMENTAL RESEARCH LETTERS 044008 (2009).

⁴ In re Katrina Canal Breaches Litigation, 696 F.3d 436 (5th Cir.(La.) 2012)

⁵ St. Bernard Par. Gov't v. United States, 126 Fed. Cl. 707 (2016), rev'd, 887 F.3d 1354 (Fed. Cir. 2018).

⁶ St. Bernard Par. Gov't v. United States, 887 F.3d 1354 (Fed. Cir. 2018).

Takings Claims

Takings claims derive from the Just Compensation Clause of the Fifth Amendment of the United States Constitution, which provides that: “nor shall private property be taken for public use, without just compensation.”⁷ Traditional takings claims involve the federal government taking title or complete control of the property. Examples include taking property to build roads or to use as a park. While flooding the property by building a dam downstream does not involve the government taking title to the property, early cases established that it does constitute a taking.⁸ The property owner is entitled to a hearing to determine if the property is being put to a proper public use and that the compensation being paid is fair market value. The United States Supreme Court construes public use broadly and it seldom constrains the taking of property by the federal government.⁹ State constitutions and state legislation limit what is considered a public purpose beyond the bare US constitutional limits.

Traditional takings involve intentional complete and permanent dominion over the land. The actual intrusion into the land may be episodic, as long as it is intentional and predictable. For example, flood control projects often include floodways, where floodwaters are diverted when they exceed the carrying capacity of the flood control system. While the government has not taken the land, the courts have found that the government has taken a flowage easement.¹⁰ The government must purchase the land in the floodway, or purchase the use of the flowage easement. Flowage easements are an important part of the Mississippi River flood control system.

Regulatory takings claims arise when a landowner believes that government regulations, such as zoning regulations, have reduced the land’s value. The United States Supreme Court construes these cases narrowly. In the lead case, *Lucas v. South Carolina*, the court found a regulatory taking because the zoning restrictions prevented all construction on the coastal property. Since this was intended to be a residential property, this left no value for the land. Regulations that still leave

⁷ 5th Amendment of the United States Constitution.

⁸ *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L.Ed. 557 (1872).

⁹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁰ *United States v. Lynah*, 188 U. S. 445, 470, 47 L. ed. 539, 548, 23 Sup. Ct. Rep. 349: ‘Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto,—in this case those at least which belong to a riparian proprietor,—pass to the government and it becomes henceforth the full owner.’ *United States v. Cress*, 243 U.S. 316, 328, 37 S. Ct. 380, 385, 61 L. Ed. 746 (1917)

some beneficial use of the land have not been found to be regulatory takings. Regulatory takings claims are beginning to arise in cases where the government prevents private landowners from building flood protection structures such as sea walls. In low elevation coastal areas, properties will be eventually be lost if they are not protected by a seawall. There is little precedent in this area.

Unintentional damages to land, without any attempt to take dominion over the land, are not takings. Examples would include cutting trees on private land that was mistaken for public land, damaging property through an accident such as an automobile accident, or temporarily flooding land by unintentionally breaching a dike. These examples of one-time, unintentional damage to land are not covered by the Just Compensation Clause. Prior to 1946, when the Federal Tort Claims Act (FTCA) was passed, these claims were barred by sovereign immunity. The only avenue for compensation was a private bill, passed through Congress and signed by the president. Landowners can now seek compensation for these accidental damages under the Federal tort claims act. Unlike private tort claims however the government is protected from intentional actions, as long as they do not violate statutes or regulations. This is called the discretionary authority exception to liability.

The FTCA is a statute in derogation of sovereign immunity. Thus, when the courts construe the FTCA, they seek to preserve sovereign immunity. This leads the courts to read the discretionary authority defense broadly, because this preserves sovereign immunity. Thus, in the Allen case, the discretionary authority exception protected the government from liability when it intentionally exposed persons downwind of nuclear testing to nuclear fallout. In the Hurricane Katrina levee breach cases, the appeals court found that the discretionary authority exception protected the government from liability, even though the trial court had found that the government had knowingly and intentionally built levees that would not protect the city of New Orleans from extreme storms.

Historically, the discretionary authority exception has protected the government from liability in cases where it intentionally subjected land to an increased risk of harm. These cases were termed temporary takings and did not trigger the Fifth Amendment Just Compensation Clause. In the Arkansas Game and Fish Commission v United States case, the Supreme Court found that temporary takings could trigger damages under the Fifth Amendment Just Compensation Clause if they were predictably repeatable. This potentially provided a path for plaintiffs to recover under the Just Compensation Clause in cases which had historically been dismissed under the FTCA. The plaintiffs in the unsuccessful Federal tort claims act cases after Hurricane Katrina repackaged their facts as temporary takings claims. This led to the St. Bernard Parish v. the United States case recently decided by the Federal Circuit that is the subject of this paper.

What did Arkansas Game and Fish commission tell us?

This case arose from federal management of a dam upstream from property owned and managed by the Arkansas Game and Fish commission. From 1993 until 2000, the Army Corps of Engineers increased the release of water from the dam, flooding the downstream property and damaging the timber during its growing season. The Arkansas Game and Fish commission argued that the United States had taken a flowage easement and should compensate the state for the loss of timber. The United States argued that since this taking was temporary and would not reoccur in the future, it was not compensable under the Just Compensation Clause. As an intentional act carrying out government policy, it would also not be compensable under the FTCA.

The Court of Federal Claims found that the releases of water from the dam significantly increased the yearly flooding that had been observed prior to 1993. This caused significant damage to the timber in the management area. The Court stressed that this was not six independent accidents. The timber was damaged because of the cumulative effect of six years of intentional flooding. The Court of Federal Claims awarded more than \$5 million in damages and the case was appealed to the Federal Circuit. The Federal Circuit conceded that the permanent damage to the timber would normally be considered a taking. It argued, however, that flooding in flowage easement cases were different from ordinary takings and could not constitute temporary takings. It based this on a 1924 case, *Sanguinetti v. United States*.¹¹ *Sanguinetti* involved flooding that arose because a drainage canal built by the United States that was insufficient to carry off floodwaters. The United States Supreme Court found that this was not sufficient to show a taking under the Fifth Amendment.

It is key to remember that the property being damaged in Arkansas Game and Fish Commission was the trees on the land, not the land itself. The Arkansas Game and Fish Commission Court started by reviewing *Pumpelly*, which held that flooding land with the dam constituted a taking. The court then reviewed *United States v. Cress*,¹² which found that periodic flooding caused by the opening of a lock also constituted a taking. The court next looked at cases arising during World War II, when factories and other private property were taken over for the war effort. While these were clearly temporary takings, ending with the war, the court found that they were compensable under the Fifth Amendment.¹³

The Court then looked at *Sanguinetti*, which the Federal Circuit had relied on in reversing the Court of Federal Claims decision awarding compensation. The Arkansas Game and Fish commission court distinguished *Sanguinetti*. It found

¹¹ 264 U.S. 146 (1924)

¹² 243 U.S. 316 (1917)

¹³ *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 267, 70 S.Ct. 644, 94 L.Ed. 816 (1950)

that Sanguinetti was a case of a single flood event after an extreme rain event. Rather than showing a pattern of intentional flooding, the case more clearly fits into the accidental damage contemplated by the FTCA. Having determined that a series of episodic, intentional flooding events, could constitute a taking, the court remanded the case back to the Federal Circuit for rehearing.

On remand, the Federal Circuit found a pattern of intentional releases of water, over a period of several years, whose cumulative effects badly damaged the management area timber. Further, the Federal Circuit found that the government was aware of and concerned about this damage to the timber. The releases of water were stopped to prevent further damage. Based on the Supreme Court's Arkansas Game and Fish Commission ruling, the Federal Circuit affirmed the Court of Federal Claims' decision and award of damages.

This leaves us with three situations. If the government accidentally damages property, and the nature of the accident is covered by the FTCA, the plaintiff can recover damages if the facts would be compensable under state tort law where the accident occurred. Second, if private property is destroyed ancillary to a governmental policy decision, the discretionary function exception will generally shelter the government from liability under the FTCA. Third, if, after a fact specific inquiry, the court finds a pattern of behavior that it determines to be a taking, the plaintiff may be compensated under the Just Compensation Clause.

This provides an avenue for plaintiffs to convert tort claims, subject to the discretionary function exception, into compensable takings claims. The discretionary function exception was included in the FTCA to enable the federal government to make polycentric policy decisions, those that will always injure someone. Undermining the discretionary function exception by converting these claims into takings claims, will complicate federal policymaking. In emergency situations, such as managing flood control structures during extreme weather events, this could paralyze federal officials, increasing the threat to public health and safety.

Background for the St. Bernard Parish case

(The final paper will include extensive background material on Hurricane Katrina and the FTCA cases leading to the St. Bernard case.)

The plaintiffs who failed in the Levee Breach cases, either because of the discretionary authority defense in the FTCA or §702c immunity under the FCA, had one last claim against the Corps. Using the Just Compensation Clause,¹⁴ they sued the Corps for damages for a partial and temporary taking of their land.¹⁵ The

¹⁴ ... nor shall private property be taken for public use, without just compensation. 5th Amendment of the United States Constitution.

Tommaseo case,¹⁶ filed in the United State Court of Claims,¹⁷ argues that mismanagement of the MRGO destroyed wetlands that reduced storm surge:

The National Hurricane Center ("NHC") reported that Hurricane Katrina generated a "massive storm surge" that reached "15 to 19 feet ... in eastern New Orleans [and] St. Bernard Parish" .., This storm surge was so large that it "severely strained the levee system in the New Orleans area [and] overtopped large sections of the levees east of New Orleans, in Orleans Parish and St. Bernard Parish[.]" The resulting flood devastated St. Bernard Parish. ... The First Amended Complaint alleges that Plaintiffs suffered "massive flooding and destruction of [their] property" by Hurricane Katrina, and that, "but for the creation and maintenance of the MRGO by the United States, the flooding and devastation of Plaintiffs' property would not have occurred." After Hurricane Katrina, Plaintiff's property has been subjected to repeated flooding, even during minor weather events, because of the wetland loss associated with the MRGO.

Plaintiffs argue that this is an inverse condemnation, depriving them of the value of their property.¹⁸ It is clear that if the government permanently floods plaintiff's land by building a dam, it must pay the value of the inundated land.¹⁹ There is also precedent for compensation if navigation structures raise the level of a river, indirectly flooding plaintiff's land by impeding its natural drainage.²⁰ This decision was later limited to only land that was not already subject to flooding because it was below the high water mark of the river.²¹ *Bedford v. U.S.*²² looked at a more analogous case where the government modified one bank of a river, which then caused the opposite bank to erode, destroying plaintiff's property. The court found that these were consequential damages caused by a natural process,²³

¹⁵ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* 526 U.S. 687, 717 (1999). See also: *Murray v. United States*, 817 F.2d 1580, 1583 (Fed.Cir.1987) "[T]he 'just compensation' required by the Fifth Amendment has long been recognized to confer upon property owners whose property has been taken for public use the right to recover money damages from the government."

¹⁶ *Tommaseo v. U.S.*, 75 Fed.Cl. 799 (Fed.Cl. 2007).

¹⁷ The Tucker Act vests jurisdiction in the Court of Claims. 28 U.S.C.A. § 1491(a)(1).

¹⁸ "The United States Supreme Court has stated that an inverse condemnation occurs where the federal government condemns property, without conducting an eminent domain proceeding." *Tommaseo* at 803.

¹⁹ *Pumpelly v. Green Bay & Mississippi Canal Co.* 80 U.S. 166 (1871).

²⁰ *U.S. v. Lynah* 188 U.S. 445 (1903).

²¹ *U. S. v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 598 (1941).

²² 192 U.S. 217, 24 S.Ct. 238 (1904)

²³ *Id* at 225.

even if triggered by the government's actions, and thus not compensable.²⁴ During the pendency of the trial the United States Supreme Court decided the Arkansas Game and Fish Commission space case that clarified that episodic flooding, which cumulatively damage plaintiffs' property, can constitute a taking.²⁵

In May 2015, the Court of Claims issued its judgement in the *Tommaseo* case, now restyled as *St. Bernard Parish Government v. U.S. (St. Bernard Case)*.²⁶ it found that this was a taking, thus neither §702c FCA immunity or the FTCA discretionary authority exception applied. At this point, the case became a factual determination of whether the government's action damaged or completely took the property, and the diminished value of the property. While there is a lengthy factfinding in the opinion, none of it is new because the Court waited until the FTCA cases were disposed of on appeal, then relied on . . .the District Court's "impressive rulings" of fact. . .²⁷ The Court was careful to point out that while all of the cases had been dismissed on legal points, the *Robison* facts were still valid:

The United States Court of Appeals for the Fifth Circuit also affirmed the District Court's legal conclusions. ("The district court's careful attention to the law ... allow us to uphold its expansive ruling in full, excepting our minor restatement of FCA immunity."). But, on September 24, 2012, that federal appellate court decided to consider the Government's petition for rehearing, withdrew its prior opinion, and reversed the District Court's legal ruling that the Army Corps was not immune from claims arising from levee breaches caused by MR-GO under the discretionary function exception to the Federal Tort Claims Act. In doing so, however, the District Court's factual findings were not disturbed.²⁸

The Court then goes on to reiterate all of those facts, bolstered by lay witnesses and plaintiffs' experts from the previous cases.²⁹ The government presented testimony on the very high rates of subsidence in the area,³⁰ the extensive

²⁴ *Id* at 224, citing *Gibson v. U.S.* 166 U.S. 269 (1897).

²⁵ "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Just Compensation Clause inspection. 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." *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012)

²⁶ 121 Fed. Cl. 687 (2015).

²⁷ *Id* at 691.

²⁸ *Id* at 692, citations omitted.

²⁹ *Id* at 717.

³⁰ *Supra* at note **Error! Bookmark not defined.**

evidence that there is no MRGO funnel,³¹ and the effects of subsidence on wetlands loss. The Court rejects all of the government's expert witnesses' testimony and accepted the most extreme version of the plaintiffs' expert's testimony, holding:

Although subsidence, sea level rise, and land loss took their toll on the region, the evidence in this case demonstrates that the MR-GO had the principal causal role in creating the environmental damage in St. Bernard Polder.

For these reasons, the court has determined that the record does not evidence that subsidence, sea level rise, or land loss was the cause of flooding that occurred on Plaintiffs' properties during Hurricane Katrina and subsequent hurricanes and severe storms.³²

This is a pure a statement of the steady state world view. Geology does not matter. Climate change does not matter. Everything would be fine in coastal Louisiana, but for the malfeasance of the Corps.³³ In the subsequent ruling on damages – fair compensation – the court found that government had taken some of the value of the property through the increased level of flooding that the court attributed to the Corps' actions.³⁴

(The court's findings on compensation will be detailed in the final paper. This list is from the West synopsis of the case.)

Holdings: The Court of Federal Claims, Braden, J., held that:

1 civil engineers' expert testimony regarding influences on flooding during hurricane was unreliable, subjective, and speculative;

2 no just compensation was due for fee simple value;

3 just compensation was fair market rent lost as result of storm surge flooding during period between date levees were initially breached until date Corps closed MR-GO;

³¹ *Supra* text associated with note **Error! Bookmark not defined.** and text of note **Error! Bookmark not defined.**

³² *Id* at 743.

³³ Ironically, while it would be bad science, the best ending would be for the United States to agree that they took the land and tender payment for all of it, clearing out this high risk area without having to wade into the minefield of eminent domain.

³⁴ *St. Bernard Par. Gov't v. United States*, 126 Fed. Cl. 707 (2016), rev'd, 887 F.3d 1354 (Fed. Cir. 2018).

4 payment of United States Treasury bill compounded rate of interest was warranted;

5 grants received by parishes following hurricane were subject to collateral source rule;

6 United States lacked standing to seek any offsets based on Road Home Program grants;

7 local government property tax losses constituted private property subject to Takings Clause; and

8 class certification was warranted.

(Class damages would be tens of billions of dollars.)

The Federal Circuit ruling in the St. Bernard Parish case

The circuit court's opinion has three interrelated pieces. First, the court is skeptical of how the Court of Federal Claims handled the factual evidence. The lower court included extensive scientific evidence in the record, showing that the increased flooding of East New Orleans and St. Bernard Parish through time was due to sea level rise and subsidence. The judge then ignored this evidence based on the testimony of less qualified experts. The Court's skepticism was probably increased because the same claims that the MRGO increased hurricane flooding were unsuccessfully litigated after Hurricane Betsy in 1965.³⁵ While the Circuit Court ruled in a way that did not require reforming this factual determination, it is likely that its skepticism over the causation was reflected in its other rulings.

The second piece is the court's ruling on action versus inaction. The plaintiffs original FTCA case was built on a theory that the government intentionally and knowingly failed to maintain and fortify the MRGO, which led to the levee failures that flooded East New Orleans. These claims were structured as if they were a private tort claim. The negligence was knowingly failing to prevent a risk. These claims, and their underlying factual basis, then became the core of the takings claim. The appeals court rejected this failure to act claim because it found that takings liability only arises from affirmative government action.

This is a key holding. The court supports it with precedent cases where compensation was denied to plaintiffs who claimed that their land was flooded because the federal government did not protect them with flood control structures. Assuming this holding is not rejected or modified by the United States Supreme Court, it answers the question of whether there is a duty for the federal government to provide flood protection. Separate from political questions of

³⁵ Graci v. United States, 456 F.2d 20 (5th Cir. 1971); and on remand, finding no damages: Graci v. U.S., 435 F.Supp. 189 (E.D.La. 1977).

refusing to build protection, especially along the seacoast, for powerful landowners, this holding should obviate takings claims based on the destruction of unprotected property by flooding.

The second holding looks back in time and assumes that the action was the building of the MRGO. The plaintiffs argued, and the Court of Federal claims agreed, that the measure of damages was flooding attributed to the MRGO. The Court of Federal claims did not consider the level of flooding that would have occurred in the absence of the flood control projects that accompanied the building of the MRGO. The appeals court held instead that the proper measure was the net benefit of all federal flood related projects to the plaintiffs.

The net benefit standard recognizes the complexity of sorting out causation in flood control cases. Causation is particularly complex in the St. Bernard case. As discussed in the hurricane Betsy litigation, the parts of the city at issue in this case have periodically flooded as far back as records have been kept. The flooding is exacerbated by subsidence which in some places can reach 1 to 2 cm a year, and by sea level rise. The area is flat and low so that any loss of relative elevation dramatically increases flood risk:

The elevation of St. Bernard Parish varies from 6 ft (1.8 m) below sea level to 12 ft (3.6 m) above sea level. The portion of St. Bernard Parish, which lies below sea level, was marsh and swamp, which have been drained and protected by dikes. The highest natural parts of St. Bernard Parish are the natural levees, locally called “finger ridges”, of the Mississippi River, its distributaries, and a former channel of it now occupied by Bayou La Loutre. The portion of these natural levees lying sufficiently above sea level that are suitable for agriculture and urban development without the use of dikes comprise only about 58 square miles (150 square km), of the land within St. Bernard Parish.³⁶

New Orleans has much the same geology as St. Bernard Parish. Almost half of the city is below sea level, in parts as much as 12 feet below sea level. Except for the current Mississippi River levees and the natural levees of the river that are left as ridges when the river changes course, the portions of the city that are not below sea level are very close to it. These areas would not be habitable without levees and dikes and pumps. The areas below sea level would be full of water and the remaining areas would be flooded in every mild storm. The flood control systems that make life possible in New Orleans and St. Bernard Parish are all partially or fully federally funded.

As the court recognizes, under the net benefits test it is impossible for the plaintiffs to show damages from the construction and maintenance of the MRGO.

³⁶ Paul V Heinrich, *Review of the Engineering Geology of St. Bernard Parish, Louisiana*, 15 LOUISIANA GEOLOGICAL SURVEY NEWSINSIGHTS 6–11 (2005).

Without the kindness of the federal government New Orleans and St. Bernard Parish would not be habitable. Thus the court does not need to question the factual findings on causation and the role of subsidence and sea level rise. Even if all the flood damages were attributable to the MRGO, the net benefit of federal flood control projects greatly exceeds the alleged damages.

The implications of the court's decision for wetland and beach preservation

There were only two avenues for compensation for persons who want to sue the federal government for increasing their flood risk or for failing to protect them against floods. The first is the FTCA. The FTCA protects government policymaking. As long as the government's actions that increase flood risk are taken intentionally and are not forbidden by statute or regulation, the discretionary function exception prevents recovery of damages by persons harmed by these actions. This is not an unlimited right to destroy private property. As discussed by the United States Supreme Court in the Arkansas Game and Fish commission case, a pattern of intentional actions that destroy private property can trigger compensation under the Just Compensation Clause.

If the government systematically increases a property owners flood risk over the naturally occurring risk, the government can be liable for the diminution of value of the property. But the government cannot be liable for failing to provide flood protection. Nor can the government be liable for providing incomplete or imperfect flood protection. Most cases that allege improper flood protection will fail under section 702 of the flood control act of 1928, which provides complete immunity for damages caused by floodwaters. Only cases that can survive section 702 immunity will be evaluated under the Just Compensation Clause.

A logical question under the net benefits test is whether there is a reliance interest in existing flood control protection. For example, there have been calls for the federal government to remove dams and levees on the Mississippi River in order to increase the amount of sediment in the river to preserve the lower Mississippi Delta. The river is populated along most of its course with towns and farms that have been built since the original Mississippi levees were constructed. Tearing down the levee would only remove the protection provided originally by the levee. Under the net benefits test, the homeowners and businesses that would then be flooded would have no damages under the Just Compensation Clause.

More generally, the federal government could remove federally funded sea walls on beaches and other hardened structures to allow beaches and wetlands to migrate inland with sea level rise. Dams and levees can be removed from rivers to allow them to regain their natural state. Beach re-nourishment could be ended. While these actions would be politically difficult, likely impossible in most cases, the holding in the St. Bernard Parish case dramatically broadens the federal government's policy options for adaptation to sea level rise and extreme weather events.

Removing the Just Compensation Clause remedies for high-risk flood properties also changes the calculus when the government wants to use eminent domain to relocate individuals or communities to reduce flood risk. Under the net benefits test, there is no reason to start with the assumption that the government must pay pre-flood market value when it wants to buy up flooded properties. Other than contracted for flood insurance payments, Stafford act jurisprudence makes it clear that flood relief payments are strictly discretionary with FEMA. The no action part of this holding means that there is no duty for the government to rebuild properties or to rebuild flood control systems to protect properties that have been flooded. This leaves the government free to offer benefits to people who will relocate, but not to those who want to stay in the same place.

If the government chooses to use eminent domain after a major flood, the net benefits test implies that the valuation of the property under the Just Compensation Clause would be as is-not as it might be after it is rebuilt with federal grant money. Assuming further that the federal government introduces actuarial principles into the national flood insurance program, the value of high-risk properties would be further depreciated by the cost of flood insurance. If these actuarial rates were combined with limiting all relief to relocation support, the fair market value of flooded areas would be dramatically reduced. This would facilitate eminent domain buyouts except in the most wealthy neighborhoods which could rebuild themselves without federal subsidy.³⁷

An aggressive relocation program raises many fairness and social justice issues. Without such a program, however, most coastal wetlands and beaches will disappear over the next 50 to 75 years as federal and state money goes into trying to hold back the ocean. To a lesser extent, the same process will occur with inland flooding as extreme rain events increase the number of properties at high risk of flooding.

The net benefits test appears to be general. There is nothing in the court's opinion limited to flooding. One can imagine it being used in western forest areas to limit firefighting support so that a natural fire regime can be reestablished in fire climax forests. The federal government pays most of the costs of forced firefighting. Under the net benefits test, there would be no liability for the federal government if it stopped supporting firefighting. This would drive down the value of houses and create pressure on communities to accept relocation. Eminent domain could be used to remove holdouts at relatively low cost because of the depreciated value of the land once federal services are limited.

³⁷ Unless banned from reconstruction by land-use regulations.