

## **Major Court Decision with implications for Climate Adaptation, Hazard Mitigation and a Safer and More Just Future.**

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On May 1, 2015, the U.S. Court of Claims issued an enormously important decision concerning flood damage caused by Hurricane Katrina and subsequent hurricanes. That case, *Saint Bernard Parish Government v. United States*, No. 05-1119L (May 1, 2015), found the United States government liable for potentially huge sums of money.

In *St. Bernard Parish*, The US Court of Claims essentially agreed with the Plaintiffs that the US Army Corps of Engineers construction, maintenance and operation of a portion of the enormous Mississippi Rivers and Tributaries project, in particular a portion of the project designed and built for navigation rather than flood control, called MR- GO resulted in temporary takings by causing increased flooding of the plaintiffs' properties during Hurricane Katrina other flood events.

It appears that the results of this case enormously validates what some of us predicted, following the decision in the 2013 *Arkansas Game and Fish* case, 132 S. Ct. 1856 (U.S. 2012), with respect to constriction of immunity for actions by government which harm people and property . Further information on *Arkansas Game and Fish*, as well as other important cases involving Constitutional protections, including *Koontz v. St Johns River Water Management District*, 133 S. Ct. 2586 (2013) can be found in a webinar featuring Professor Lisa Sun Ed Thomas and Dr. John Wiener available at: <http://player.vimeo.com/video/83390903>

Further details on *Koontz* can be found in an article by Lynsey R. Johnson and Ed Thomas available on the ABA website at:

[http://www.americanbar.org/content/dam/aba/administrative/state\\_local\\_government/land\\_use.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/state_local_government/land_use.authcheckdam.pdf)

Both *Arkansas Fish and Game* and the *St. Bernard Parish* lawsuit are essentially a successful end run around the very broad immunity provided to the United States pursuant to the Mississippi Flood Control Act of 1928, 33 U.S.C. §702 c:

*"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."*

In reviewing previous cases involving damages allegedly relating to federal flood control projects, courts had previously almost always dismissed claims of damages based on federally legislated immunity. For example, in *United States v. James*, 478 U.S. 597 (1986), despite a

finding by the trial court that the flood control project operating agency “willfully and maliciously failed to warn of a known danger”, the United States was nevertheless immune from damages pursuant to 33 U.S.C. §702 c. In *James*, the Supreme Court observed:

*"As the facts in this case demonstrate, one can well understand why the Court of Appeals sought to find a principled way to hold the Government responsible for its concededly negligent conduct. But our role is to effectuate Congress' intent, and Congress rarely speaks more plainly than it has in the provision we apply here. If that provision is to be changed, it should be by Congress and not by this Court. We therefore follow the plain language of 702c, a section of the 1928 Act that received careful consideration by Congress and that has remained unchanged for nearly 60 years, and hold that the Federal Government is immune from suit in this type of case."*

The Plaintiffs in both *Arkansas Game and Fish* and *St. Bernard Parish* very cleverly avoided attempting to sue for damages, under the Federal Tort Claims Act, as would be more usual in a case where there was not such a specific grant of immunity. While federally legislated immunity from damages involving flood control projects was the law, the US Constitution trumps federal legislation. If one can manage to successfully find a provision in the US Constitution on which to litigate, one has a chance in court. In this case the Plaintiffs chose to litigate based on the provisions contained in the Fifth Amendment to the Constitution prohibiting government taking of property without compensation.

**It seems to me that the *St. Bernard Parish* decision really emphasizes the importance of science and engineering in determining foreseeability, and better understanding that a legally required “standard of care” is ever evolving, as our knowledge and human understanding increase.**

**Architects, Engineers, developers, community officials and all others involved with development decision-making need to realize that legal liability may involve a jury of ordinary folks evaluating whether a person, agency or company was legally culpable for failure to take foreseeable natural hazards into account when undertaking some activity which later resulted in misery harm or even death**

**Recent litigation supports and enforces a view that based on ancient principles of law, morality and equity; folks do not possess the right to harm their neighbors. Actions which harm others have consequences beyond karmic payback, to include both civil and even in some unusually egregious situations, criminal penalties. Today, due to it is much easier to show through forensic sciences such as forensic hydrology, forensic earthquake engineering, forensic fire science, forensic chemistry, and forensic hydraulics that the actions of one**

person or group caused harm to another person or group. Future litigation for situations such as climate refugees may well be based on forensic climate science?

In essence, today due to greatly improved understanding of natural and foreseeable processes we can much more easily answer the question posed by Jimmy Cagney in the wonderful old movie, *Mr. Roberts*: "All right, who did it; I want to know who did it?"

In part, the solutions to today's problems involve our Nation and the world following the wisdom of the First Nations; redeveloping a sense of stewardship of the earth; and following of the ancient Maxim of law: *sic utere tuo ut alienum non laedas*, [use your property so as not to harm others]. The great moralist Mohandas Gandhi described *sic utere tuo ut alienum non laedas* as "a grand doctrine of life and the basis of ahimsa (peaceful relations between neighbors). This Maxim of Law has also been called inarguable and universally accepted.

Litigation may well help us begin to solve our serious problems of moral hazard, including dissuading activities which exacerbate climate change, whereby one person or group externalizes the true cost of an activity to others. We know that way too often the folks most harmed by that externalization of costs are the most vulnerable and underrepresented populations, much as described in the excellent NAACP publication: *Equity in Building Resilience in Adaptation Planning*, by Jacki Patterson. That publication is available at:

<http://www.naacp.org/blog/entry/equity-in-resilience-building-for-climate-adaptation-planning>

In 2007, I wrote an article for the Environmental Law Institute which posed a question in its title: *Recovery Following Hurricane Katrina: Will Litigation and Uncertainty Today Make for an Improved Tomorrow?* [National Wetlands Newsletter, vol. 29, no. 5.] The article is available on the Natural Hazard Mitigation Association website at:

[http://nhma.info/uploads/resources/ET\\_Katrina\\_Insurance\\_082907.pdf](http://nhma.info/uploads/resources/ET_Katrina_Insurance_082907.pdf)

In that Article I expressed the hope that the Katrina Litigation would prod Society to do a better job of at providing a safer, more just and resilient future for our Nation:

*"Organizations as disparate as ProtectingAmerica.org, the National Association of Realtors, The National Association of Insurance Commissioners, and many others agree that our nation needs*

*legislation setting up some sort of national catastrophic insurance program to better prepare for the financial consequences of human occupancy in hazardous locations. Any such catastrophic insurance program must provide for proper building codes and land use planning to protect wetlands and floodplains so that the consequences of future floods and other hazards are not exacerbated due to poor planning, engineering, and land use."*

The article went on to urge:

*"As Katrina so clearly demonstrated, we must do a better job of providing for the rebuilding of shattered lives following a catastrophe. At the same time, our land use and building decisions must improve dramatically. Otherwise, the problems we currently face in hazard management will only get worse."*

**Today I renew all the thoughts in the National Wetlands Newsletter I wrote in 2007.**

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