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EMINENT DOMAIN - MISSISSIPPI

Board of Supervisors of Issaquena County, Mississippi v. United States

United States Court of Appeals, Federal Circuit - October 19, 2023 - F.4th - 2023 WL 6886791

County board of supervisors brought takings action against the United States, alleging that actions or inactions by the United States when extending levee project led to flooding that damaged county property, destroyed private property, and reduced economic activity, thereby depriving the county of tax revenue.

The Court of Federal Claims granted the government's motion to dismiss for failure to state a claim, and county appealed.

The Court of Appeals held that:

- Failure of the United States to build pumps in backwater project area or to construct an alternative drainage system did not constitute a taking;
- Original projects to shore up river levee system did not support takings claim;
- Complaint failed to allege that flooding of property enclosed by levees was greater than would have taken place if the levee project had not been built; and
- Based on arguments on appeal, Court of Appeals would allow county to ask Claims Court to consider an amended takings complaint.

Failure of the United States government to build pumps in backwater project area after levee system was built up, or to construct an alternative drainage system, did not constitute a taking of county property, which flooded after heavy rain, as there was no affirmative government act.

Original United States government projects to shore up river levee system did not support county's takings claim stemming from flooding of backwater area following later extension of levees, even if original projects were expected to increase flood heights on the river and require additional flood protection for the flooded county backwater area, as county's complaint made no claim based on a theory involving the flood control measures on the river stemming from the original projects, which were undertaken almost a century earlier, but instead its claim for relief rested entirely on the government's actions vis-à-vis the backwater levee extension project's construction and operation.

Based on arguments on appeal, Court of Appeals would allow county to ask Claims Court to consider an amended takings complaint against the United States that would explain how the construction and operation of levee extension project led to increased flooding, even though county did not seek leave from the Claims Court to file an amended complaint and did not expressly ask for a remand for that purpose; while complaint was dismissed for failure to state a claim, and complaint did not allege but-for causation, county had argued on appeal that the United States was systematically increasing flood risk by preventing area enclosed by levee from draining when river was not flooding, but had failed to specifically allege in complaint that the levee project made things worse by blocking water

from draining during non-flood periods.

County’s complaint against the United States, based on flood control project which extended levees, failed to allege that flooding of property enclosed by levees was greater than would have taken place if the levee project had not been built, and thus failed to allege causation necessary to state a takings claim; complaint appeared to concede that absent the project, backwater flooding from river would have entered the area and there was no allegation that project made backwater river flooding worse, complaint did not plausibly explain how the construction of the levee project could have led to worse rainwater flooding than would have occurred in its absence.

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