AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Property/Takings

**In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, No. 17-9002 (Fed. Cl. 2020)**

*The city of Houston was built along the Buffalo Bayou on the coastal plains of Texas. It routinely suffers from flooding, and in 1937 the state legislature initiated a process of flood abatement. In 1948, the Army Corp of Engineers completed the construction of the Barker and Addicks dams, which were located upstream and west of city along the Buffalo Bayou. Both dams created “dry” reservoirs that could hold excess water until they could be drained through a controlled release. The dams and reservoirs are maintained and operated by the Corps.*

*On August 25, 2017, Hurricane Harvey made landfall and stalled over the Houston area, producing nearly three feet of rainwater over the course of four days. The result was an unprecedented level of flooding. By August 28, the pool of water that had accumulated had reached record levels and stretched beyond government-owned land. On August 28, the Corps began an unprecedented release of water from both reservoirs. On August 31, uncontrolled water was flowing around the dams. The Corps continued an emergency release of water for an extended period, and the reservoirs were not fully drained until mid-October.*

*In September 2017, property owners filed complaints in the federal court of claims arguing that the flooding of their property during and after Hurricane Harvey was an unconstitutional takings by the federal government that required compensation. The property owners upstream of the dam were separated from the property owners downstream of the dam, and the court ruled that Corps had temporarily taken the upstream property when it allowed the reservoir to overflow and stored excess floodwater on private property in order to mitigate downstream flooding. The case of the downstream property owners was considered separately, on the theory that Corps’ decision to open the gates and release floodwaters out from the reservoir constituted a temporary taking of their property. The court rejected that allegation, holding that downstream property owners did not have a constitutionally protected interest in perfect flood mitigation.*

Judge SMITH.

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The courts have long held that “[f]or a takings claim to succeed under the Fifth Amendment, under either a physical invasion or regulatory takings theory, a claimant must first establish a compensable property interest.” Moreover, “not all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.” *United States v. Willow River Power Co.* (1945). . . .

The Supreme Court has repeatedly held that “state law defines property interests.” . . .

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As property rights are defined by state law, the Court must look to Texas law to determine whether plaintiffs have a protected property interest in perfect flood control in the wake of an Act of God. After careful review of over 150 years of Texas flood-related decisions, the Court finds that the State of Texas has never recognized such a property right, and, in fact, that the laws of Texas have specifically excluded the right to perfect flood control from the “bundle of sticks” afforded property owners downstream of water control structures. . . .

Article 17 of the Texas State Constitution provides that “[n]o person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being Texas State Constitution also specifically enumerates that the police power is an exception to takings liability and that compensation is not required for “an incidental use, by (A) the State, a political subdivision of the State, or the public at large; or (B) an entity granted the power of eminent domain under law.” Texas courts have routinely interpreted this clause to mean that property is owned subject to the pre-existing limits of the State’s police power. . . .

The Texas Supreme Court has long recognized that flooding is a major issue within the state’s borders and that the government must endeavor to control it. . . . In highlighting the importance of flood mitigation, the *Motl* Court noted that “flood waters are to be treated as a common enemy, the control and suppression of which is a public right and duty.” *Motl v. Boyd* (TX 1926). This decision demonstrates that the right to protect the public from flooding is not something new, but rather “of ancient origin, universal in its extent.”In fact, flood mitigation is not only a right but a duty. . . . The Court interprets such precedent to stand for the conclusion that Texas law clearly recognizes the state’s authority to mitigate against flooding to be a legitimate use of the police power. Additionally, Texas jurisprudence illuminates precisely how the state’s police power is superior to the rights of property owners, and waters are “subject to regulation and control by the State, regardless of the riparian’s land which may border upon the stream.” . . . As such, the plaintiffs in this case own their land subject to the legitimate exercise of the police power to control and mitigate against flooding.

In addition to holding that efforts expended to mitigate against flooding constitute a legitimate use of the police power, Texas courts have rejected the theory that failure to perfectly mitigate against Acts of God can rise to the level of a taking under Texas law. The court in *McWilliams v. Masterson* (TX 2003) held that “[i]t has long been the rule that one is not responsible for injury or loss caused by an act of God.” . . . Under Texas law, to determine whether an occurrence was an Act of God, a court need only ask whether it was “so unusual that it could not have been reasonably expected or provided against.” As Harvey was a 2000-year storm, the likes of which the Houston area had never seen, the storm was of a kind that “could not have been reasonably expected or provided against.” As such, the Court concludes that Harvey was most assuredly an Act of God.

. . . . Texas law has specifically limited liability in both a takings and a tort context where the operator of a water control structure fails to perfectly mitigate against flooding caused by an Act of God. *Harris County Flood Control District v. Kerr* (TX 2016). This limitation on property rights exists both when the operator fails to do more to protect downstream properties from flooding, and when the operator induces the release of water, so long as the water is released at a lesser rate than it is impounded*. . . .*Regardless of the intentionality of the waters’ release, the Court does not believe that Texas law provides plaintiffs with a right to be free from flood waters.

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. . . . Under Texas law, even when a release of water is intentional, a taking does not occur where “the [water control structure] never released more water than was entering the reservoir via rainfall.” . . . This is particularly true where the water is not released directly onto a plaintiff’s property, but rather is released into a river that consequently floods properties downstream. . . . As such, under Texas law, the “bundle of sticks” afforded property owners does not include to right to be free from all flooding, regardless of the intentionality behind the water’s release.

Finally, Texas law also indicates that, when an individual purchases real property, the individual acquires that property subject to the property’s pre-existing conditions and limitations. . . . As each of the plaintiffs in this case acquired their property *after* the construction of the Addicks and Barker Dams and Reservoirs, plaintiffs acquired their properties subject to the superior right of the Corps to engage in flood mitigation and to operate according to its Manual.

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. . . . As Texas law does not recognize a protectable property interest in perfect flood control in the face of an Act of God, the Court now looks to whether federal common law provides plaintiffs with such a protected property interest. . . .

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There is a fundamental difference between property rights and the benefits a government provides to its citizens. To ignore this would be to discard the last several hundred years of Anglo-American legal history. That difference is based upon the relationship between the source of the property and the new owner of the property right. The property right is created by the conveyor and arises out of the conveyor’s relationship with the recipient. That relationship most commonly takes the form of a contractual obligation. Furthermore, a property interests can occasionally be created as a gift—for example, an inheritance, an award, or a personal gift. These then become the recipient’s property. However, when a government creates programs that benefit its citizens, those programs rarely provide members of the public with property interests. This is because the justification and intention behind the program—be it flood control, the construction of a highway, or some other benefit—is for the general good of the community. It is almost never a benefit intentionally awarded for a specific group of individuals.

Additionally, despite the fact that the Corps has routinely erected water control structures to benefit property owners by mitigating against downstream flooding, the federal government never intended to provide plaintiffs downstream of a water control structure with a vested right in perfect mitigation against “flood waters.” To the contrary, Section 702c of the Flood Control Act of 1928 provides 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.” . . . Accordingly, the Court determines that, contrary to plaintiffs’ assertion that the Corps affirmatively decided to store its water on their properties, the waters released from the Reservoirs—waters only impounded behind the dams because of the occurrence of a natural disaster—were “flood waters” in excess of what the Corps could reasonably control. As such, the Court now must look to whether the existence of a dam erected for the sole purpose of protecting downstream properties from “flood waters” affords plaintiffs a vested property interest in perfect flood control when storm waters exceed a volume over which the government can successfully control.

When interpreting the FCA, courts have continuously held that simply owning property that benefits from flood control structures does not by itself confer upon those owners a vested right in perfect flood control. In fact, the Supreme Court in *United States v. Sponenbarger* (1939)categorically rejected the proposition that a Fifth Amendment Taking can arise as a result of flooding that the government did not cause and over which the government had no control. . . . Essentially, when the government undertakes efforts to mitigate against flooding, but fails to provide perfect flood control, it does not then become liable for a compensable taking because its mitigative efforts failed. . . .

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. . . . Furthermore, the Court must categorically reject plaintiffs’ arguments that the water on their properties was Corps’ water. The Reservoirs are dry reservoirs and they contained no water until Harvey made landfall. The closing and later opening of the gates under the Corps’ induced Surcharge operation does nothing to make the water “government water,” as opposed to “flood waters” as articulated in *Central Green* *v. United States* (2001).

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