

The Missouri River: From Soup to Nuts

Speakers and Bios:

BURKE GRIGGS teaches property and natural resources law at the Washburn University School of Law in Topeka, Kansas. He specializes in American water law. Prior to joining the Washburn faculty, Professor Griggs practiced in both the public and private sectors. As an assistant attorney general, he represented the State of Kansas in federal and interstate water matters, most prominently *Kansas v. Nebraska*, an original action before the Supreme Court to enforce the Republican River Compact. Professor Griggs served as lead counsel for Kansas in the negotiations over the Kickapoo Tribe reserved water rights settlement, the first of its kind in Kansas. Outside of the litigation arena, Professor Griggs has advised Kansas's natural resources agencies on matters of water law and policy. He drafted Kan Stat. Ann. § 82a-1041, which provides for the establishment of local enhanced management areas, or LEMA's, to reduce groundwater pumping in heavily-stressed areas. He is a Nonresident Fellow of the Woods Institute for the Environment and an affiliated scholar at the Bill Lane Center for the American West, both at Stanford University. Mr. Griggs earned his B.A. from Stanford, his Ph.D from Yale (both in history) and his J.D. from the University of Kansas.

JESSE RICHARDSON JR. is a Professor of Law and the Lead Land Use Attorney at the Land Use and Sustainable Development Law Clinic at the West Virginia University College of Law, and the Legal Advisor for Water Systems Council. Before coming to WVU, Mr. Richardson was an Associate Professor at Virginia Tech. His research and experience focuses on land use law and water law. He began his legal career in private practice in his home town of Winchester, Virginia. Mr. Richardson is a former member of the Board of Directors and Past President of the American Agricultural Law Association. Mr. Richardson previously served on the Virginia Water Policy Technical Advisory Committee. He was honored with the 1999 Professional Scholarship Award from the American Agricultural Law Association, the 2004 William E. Wine Award for a history of teaching Excellence from Virginia Tech (the highest teaching award granted by the university), and the 2009 University Certificate of Excellence in Outreach. He works on water issues throughout the country.

ANTHONY B. SCHUTZ is an Associate Professor of Law and Associate Dean for Faculty at the University of Nebraska College of Law. He specializes in agricultural law, water and natural resources law, environmental law, land-use regulation, and state and local government. He has taught and written on those subjects for the last 15 years. He serves as a Director on the board of the Lower Platte South Natural Resources District.

- I. Understanding Missouri Management - All Interests, No Answers (Prof. Schutz)
 - A. Construction
 1. Reservoirs
 2. Levees
 - B. Changes

1. Landscape
 - a) Tiling
 - b) Terracing
 - c) Tillage Practices
 2. Industrial
 - a) Shipping
 - b) Power Generation
 3. Policy
 - a) Endangered Species and Habitat
 - b) Clean Water Act
 - c) Federal Farm Program
 - d) State Law
- C. Coping: A Manual for it All

II. Changes that Require Compensation: *Ideker Farms* and its relatives (Prof. Richardson)
A. The Genesis of the Litigation

In March of 2018, the United States Court of Federal Claims decided a case involving a claim by farmers, landowners, and business owners claiming a physical taking based on actions by the Army Corps of Engineers on the Missouri River that caused flooding on their properties. *Ideker Farms, Inc. v. United States*, 136 Fed.Cl. 654 (2018). The plaintiffs claim that the Corps has changed their management of the River and those changes have increased the flooding on their properties. Various plaintiffs claim a taking for flooding in 2007, 2008, 2010, 2011, 2013, and 2014.

B. Litigation Management

Forty-four plaintiffs were chosen as “Bellwether” plaintiffs, representative of the plaintiffs as a whole. These plaintiffs claim takings based on over 100 flood events.

The litigation was divided into two phases. Phase I focused on liability. Each Bellwether plaintiff testified or presented evidence to establish their property interest and the timing and duration of the flooding on their properties. Expert witnesses and federal government employees testified as to changes that the Corps made to management of the river, whether the changes have caused or intensified flooding, and whether the flooding for each year was a foreseeable result of the changes.

In Phase II, the court will decide whether the United States has any defenses and other issues associated with proving entitled to just compensation. For those entitled to just compensation, the court will decide the appropriate amount of compensation.

C. Phase I: Causation

The threshold issue in the case is whether the plaintiffs can show that the Corps caused the flooding that supports the takings claim. The court sided with the plaintiffs and found that a

plaintiff can meet the burden of proof with respect to causation if the plaintiff proves that: (1) the Corps' System and River Changes were made for a single purpose; (2) the cumulative and combined effects of the changes led to higher water surface elevations (WSEs) than would have existing with the changes; and, (3) the higher WSEs led to flooding or more severe flooding than the flooding that the plaintiff would have experienced without the changes. The court rejected the Corps claim that their series of decisions on a year-by-year basis should be considered separately. "The government cannot obtain an exemption from takings liability on the ground that the series of interim deviations were adopted on a year-by-year basis, rather than as part of a single multi-year plan, when the deviations were designed to serve a single purpose and *collectively* caused repeated flooding and timber loss on the Commission's property." *Ark. Game & Fish Comm'n v. United States* ("*Ark. Game & Fish III*"), 736 F.3d 1364, 1370 (Fed. Cir. 2013).

1. Foreseeability

The plaintiffs must also prove foreseeability. To prove foreseeability, the plaintiffs must show either (1) that the Corps intended to take plaintiffs' property interests by its actions in making the System and River Changes it instituted to comply with the ESA or (2) that the invasion of the plaintiffs' property interests was the "foreseeable or predictable result" of the Corps' System and River Changes. *Ark. Game & Fish III*, 736 F.3d at 1372 (quoting *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005)). The 2011 flooding was different since the Corps made releases to protect the integrity of dams and reservoirs, as opposed to protection of threatened and endangered species. Therefore the plaintiffs will have to prove foreseeability differently for 2011. Finally, the plaintiffs must show the severity of the injury. The court held that, at this stage of the litigation, plaintiffs must show that government-induced flooding interfered with plaintiffs' ability to use their land for its intended purposes.

After considering the evidence, the court held that:

- (1) Landowners failed to show causation for the 2011 floods, but for the remaining floods causation was proven;
- (2) Landowners established that management changes caused an increase in WSEs that caused flooding of their properties;
- (3) Landowners showed that flooding was a direct and foreseeable consequence of the Corps' actions;
- (4) Landowners failed to establish that Corps' restoration of side channel chute caused breach of middle levee;
- (5) Landowners failed to establish that Corps' new river management policy caused breach of upper levee; and,
- (6) Landowners established that Corps' management changes caused overtopping of levees that caused levee failures and flooding of properties.

Therefore, 14 of the representative plaintiffs established causation, foreseeability and severity. These plaintiffs will move to the next stage of litigation, where the government will attempt to establish defenses and if a taking has occurred, the amount of damages. Fourteen of the representative plaintiffs have established causation and foreseeability, but not severity. The court will consider severity as well as defenses and damages at the next stage of the litigation. Sixteen plaintiffs failed to establish causation and these claims are subject to dismissal.

2. Relative Benefits, Motions to Reconsider, and a Motion to Amend the Answer

In April of 2018, just over a month after the decision in *Ideker Farms*, the United States Court of Appeals for the Federal Circuit decided *St. Bernard Parish Government v. United States*, 887 F.3d 1354 (2018). In *St. Bernard Parish Government*, a group of landowners in New Orleans filed suit against the United States, alleging a Fifth Amendment taking related to flood damage caused by Hurricane Katrina and other hurricanes because the government had failed to properly maintain or modify the Mississippi River-Gulf Outlet channel and because of government construction and operation of the channel. The United States Court of Federal Claims entered judgment for the landowners and awarded compensation.

On appeal, the Court of Appeals held that the government's failure to properly maintain Mississippi River-Gulf Outlet channel (MRGO) could not be the basis of a takings claim. A government failure to act may state a tort claim, but not a takings claim. "A property loss compensable as a taking only results when the asserted invasion is the direct, natural, or probable result of authorized government *action*." [citations omitted] [emphasis added]

In addition, the landowners failed to establish that the government's construction and operation of the channel caused damage to their properties. The plaintiffs and the Claims Court failed to apply the correct legal standard. The causation analysis must account for government flood control projects that reduced the risk of flooding.

While MRGO was under construction, Congress authorized funding to implement the Barrier Plan through the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPV Project). The LPV Project reduced the risk of flooding in New Orleans, and the construction began at about the same time that construction of MRGO was concluding. The court held that "[w]hen the government takes actions that are directly related to preventing the same type of injury on the same property where the damage occurred, such action must be taken into account even if the two actions were not the result of the same project." The court distinguished taking into account offsetting benefits in determining economic injury from the case at hand, where causation was the issue. Therefore, the proper analysis of causation must look at whether the plaintiffs worse off as opposed to the situation where the government had done nothing at all.

Motions for Reconsideration

Both parties in *Ideker* filed motions for reconsideration. After the motions were filed, the decision in *St. Bernard Parish Government* was released. The United States Court of Federal Claims considered the motions in *Ideker Farms, Inc. v. United States*, 142 Fed.Cl. 222 (2019), discussing the application of *St. Bernard Parish Government* in great detail.

The court explained that St. Bernard Parish Government requires that the court consider all government actions “directed to the same risk that is alleged to have caused the injury to plaintiffs.” *Ideker Farms, Inc. v. United States*, 142 Fed.Cl. 222, 229 (2019) (quoting *St. Bernard Parish Government*). The government actions need not serve the same flood control purpose or be near in time. The plaintiffs argue that St. Bernard Parish Government dictates that their 2011 claims should move forward. However, to prove causation, the plaintiffs needed to show that the flooding would not have been as severe as it was if the Missouri River System protections or Corps’ flood decreasing actions, as well as the Corps’ post-2004 flood increasing actions did not exist. The plaintiffs failed to make that case for the 2011 floods.

The government, on the other hand, argues that the plaintiffs who established causation and foreseeability for 2007, 2008, 2010, 2013, and 2014 failed to prove the flooding that they experienced in those years would not have occurred without the Missouri River System and the flood reduction actions. The court found that, while the flood decreasing and flood increasing actions are related, the plaintiffs should be able to avail themselves of the *Hardwick, John B. Hardwicke Co. v. United States*, 467 F.2d 488 (Ct. Cl. 1972), exception.

In *St. Bernard Parish Government*, the Circuit Court noted that in *Hardwicke dicta* indicated that if the flood increasing government action comes after the flood reducing government action, the risk reducing action would still have to be considered in evaluating causation if the risk-increasing action was “contemplated” at the time the risk reducing action was taken. In *Ideker*, although fish and wildlife protection was a duty of the Corps when the River and Mainstem System were designed, the Corps’ actions here, pursuant to a court order mandating ESA compliance, were not contemplated at that time. Therefore, a comparison of the pre-2004 world to the post-2004 world is appropriate for all years other than 2011. Both motions for reconsideration were denied.

The United States’ Motion to Amend Answer

The United States then moved to amend their answer to add a liability-related defense related to the relative benefits doctrine. The Court of Federal Claims held that under the law of the case doctrine, baseline used by the trial court for determining causation applied in deciding just compensation.

The relative benefits doctrine holds that “if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty.” *United States v. Sponenbarger*, 308 U.S. 256, 266-267, 60 S.Ct. 225, 84 L.Ed. 230 (1939). Although the motion to amend was denied, the court stated that the government may introduce evidence of post-2014 specific flood risk-reducing activities aimed at addressing the increase in flood risk. This

evidence would go to the purposes of determining the severity, duration and type of taking (permanent or temporary).

D. Phase II: What's Left?

Trial has been set for Phase II. Fourteen of the representative plaintiffs established causation, foreseeability and severity. These plaintiffs will move to the next stage of litigation, where the government will attempt to establish defenses and if a taking has occurred, the amount of damages. Fourteen of the representative plaintiffs have established causation and foreseeability, but not severity. The court will consider severity as well as defenses and damages at the next stage of the litigation. Sixteen plaintiffs failed to establish causation and these claims are subject to dismissal.

III. What's Next? Lessons for the Basin and Beyond (Prof. Griggs)

- A. The Complexity of Missouri River Basin Management
- B. Federalism and Interagency Issues (USACE, USBR, DOI, USEPA, USDA)
- C. Interstate Legal and Political Issues
- D. States' options for improving water use and efficiency in the Basin
- E. The Future of the Missouri System amid Global Climate Change