IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BIG OAK FARMS, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 11-275L Hon. Nancy B. Firestone
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

THE GOVERNMENT'S RESPONSE BRIEF REGARDING IMPACT OF *ARKANSAS GAME & FISH COMMISSION V. UNITED STATES* ON ORDER DISMISSING PLAINITFFS' TAKINGS CLAIMS

STUART F. DELERY
Principal Deputy Assistant Attorney General

JEANNE E. DAVIDSON
Director

IGNACIA S. MORENO
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Divisions

LARY COOK LARSON
Trial Attorney
United States Department of Justice
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
Tele: (202) 305-0294
Fax: (202) 305-0274
lary.larson@usdoj.gov

BRYANT G. SNEE
Deputy Director

P. DAVIS OLIVER
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 580, Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 353-0516
Fax: (202) 514-8624

Attorneys for Defendant

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I. Introduction

In Arkansas Game and Fish Commission v. United States, 133 S. Ct. 511 (2012) ("Arkansas Game"), the Court cautioned against using general expressions, unnecessary to the decision of a case, as controlling law to determine different issues presented in subsequent cases. 133 S. Ct. at 520. The Arkansas Game decision was based on a trial court finding that flooding repeated over a period of six years would not have occurred absent action by the United States. 133 S. Ct. at 517, 522 (The plaintiff's land "had not been exposed to flooding comparable to [those six years'] accumulations in any other time span either prior to or after the construction of the Dam.") The holding in Arkansas Game is "that recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability." 133 S. Ct. at 515.

Plaintiffs attempt to apply general expressions by the Court that are unnecessary to the Arkansas Game decision to cast doubt on the continuing validity of well-established rules applicable to this case established in United States v. Sponenbarger, 308 U.S. 256, 265-66 (1939) and Danforth v. United States, 308 U.S. 271, 286-87 (1939). Arkansas Game has no application to Plaintiffs' claims, which are based on a single flooding event caused by extreme weather conditions – flooding which would have occurred absent any action by the United States.

The question presented in Arkansas Game was "whether a taking may occur within the meaning of the Takings Clause, when government-induced flood invasions, *although repetitive*, are temporary." 133 S. Ct. at 515 (emphasis added). The United States maintains that, in order to state a claim for a temporary or a permanent taking by flooding, Plaintiffs must allege intermittent or repeated flooding. ECF No. 48 at 9 -16. Plaintiffs' claim for relief is based on one flooding event, and therefore cannot constitute a compensable taking. See Nat'l By-Products, Inc. v. United States, 405 F.2d 1256, 1272-75 (Ct. Cl. 1969). Plaintiffs did not address the impact of Arkansas Game on these basic elements of takings claims or the distinction

between tort and takings law in the context of the facts alleged. Therefore, the United States offers no additional argument specifically directed to these issues in this Response.

In addition, Arkansas Game did not impact provisions of the Flood Control Act, which controls the obligation of the United States to obtain easements for the operation of the Birds Point-New Madrid Floodway ("Floodway"). However, Plaintiffs recycle arguments previously made and decided by the Court, without any reference to the impact of Arkansas Game.

II. Well-Established Rules Established by the Supreme Court Mandate Dismissal of the Takings Claims and Obviate the Need to Apply the Arkansas Game Multi-Factor Analysis

Arkansas Game recognizes that there are invariable rules in the area of takings law. 133 S. Ct. at 518. ("In view of the nearly infinite variety of ways in which government action … can affect property interests, the Court has recognized few invariable rules in this area.") The Court described two such rules: a permanent physical occupation authorized by government is a taking; and so is a regulation that permanently requires a property owner to sacrifice all beneficial use of her land. 133 St. Ct. at 518. The Court when on to state; "but aside from rules . . . of this order, most takings claims turn on situation–specific factual inquiries." Id.

The factual allegations of the Complaint place this case squarely within another set of well-established rules of the same order of magnitude – rules that were not altered by the Arkansas Game decision.[1] As explained in Defendant's opening brief, ECF No. 48 at 5-9, Sponenbarger and Danforth both hold that the United States can only be found liable for a takings claim to the extent that actions of the United States expose the land within the Floodway to more frequent floods than it would have otherwise experienced absent government action.

[1] As in the initial brief filed by the United States, the operative Second Amended Complaint will be referred to herein as the "Complaint."

Further, retention of water from unusual floods for longer periods of time or the increased depth or destructiveness of the water does not cause a taking. Danforth, 308 U.S. at 286. And there can be no takings liability when the flood control program measured in its entirety reduces the general flood hazards and confers a net benefit to a particular tract of land. Sponenbarger, 308 U.S. at 265-67; Danforth, 308 U.S. at 286-87. The facts alleged by Plaintiffs place their claims squarely within the ambit of the rules annunciated in Sponenbarger and Danforth.

Apparently recognizing the continued validity of the Sponenbarger and Danforth decisions, Plaintiffs claim that they "have pled that, in the absence of the federal government's involvement, their land would have enjoyed greater flood protection from local maintenance and operation of levees that were already in place before the U.S. Army Corps of Engineers ["the Corps"] took over." Pls.' Br. at 15, ECF No. 47. Plaintiffs claim that in their "but for" world they were better off without any action by the United States. Pls.' Br. at 14. However, these assertions directly contradict findings made by this Court. The Court found "[in this case], plaintiffs have not alleged any facts to suggest that there will be more frequent flooding than would have existed without the current operation plan." Big Oak Farms, Inc. v. United States, 105 Fed. Cl. 48, 57 (2012). "[T]he court also note[d] that plaintiffs have also failed to allege any facts to address the 'relative benefits' principle outlined in Sponenbarger, 308 U.S. at 265-67[.] Id. at 58 n.6. In Plaintiffs' "but for" world, the land within the Floodway would have been flooded with pre-Jadwin Plan levees in place. Plaintiffs would have the Court ignore the fact that as of May 2011, the frontline levee provided protection to a flood stage of sixty feet. Id. at 51.

Prior to the Jadwin Plan, the local levees theoretically protected the land within the Floodway to a flood stage of fifty-eight feet on the Cairo gauge. 2d Am. Compl. ¶ 36; Danforth

v. United States, 105 F.2d 318, 319 (8th Cir. 1939); Big Oak Farms, 105 Fed. Cl. at 50-51. While the Jadwin Plan was in place, the levees protected the land to a flood stage of fifty-five feet. 2d Am. Compl. ¶¶ 36, 37; Big Oak Farms, 105 Fed. Cl. at 51; Danforth, 105 F.2d at 320; Matthews v. United States, 87 Ct. Cl. 662, 664, 684 (1938). With the plan in operation in May 2011, the land was protected to a flood stage of sixty feet as measured on the Cairo gauge. Big Oak Farms, 105 Fed. Cl. at 51. In May 2011 extraordinary flooding conditions overwhelmed the levees.

> On May 2, 2011, when the flood waters reached a stage of fifty-eight feet on the Cairo gauge with a predicted stage in excess of sixty feet, the Corps, in accordance with the current operation plan, artificially breached the front line levee and for the first time since 1937 activated the Floodway.

Id. at 51-52.

Plaintiffs failed to allege more frequent flooding as required under Sponenbarger and Danforth because, "[p]ursuant to the 1965 Act, the Corps also raised the frontline levee to provide protection to sixty feet as measured on the Cairo gauge, but is authorized to artificially breach the frontline levee at a stage of fifty-eight feet if a flood of higher than sixty feet is forecast."[2] Big Oak Farms, 105 Fed. Cl. at 51. "[L]ocal maintenance and operation of levees that were already in place before the U.S. Army Corps of Engineers took over " (Pls.' Br. at 15) protected the land to a flood stage of fifty-eight feet as measured on the Cairo gauge. Big Oak Farms, 105 Fed. Cl. at 50-51 (The frontline levee that pre-existed the Jadwin Plan was lowered to a flood stage of fifty-five feet); Danforth, 105 F.2d at 319-20; Matthews, 87 Ct. Cl. at 664,

[2] Plaintiffs cannot dispute that the Corps acted in compliance with Public Law No. 89-298 (Def. Mot. to Dismiss, ECF No. 19, Ex. B) and raised the front line levees to sixty feet. Fla. Rock Indus. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987) (In order to state a takings claim Plaintiffs must concede the legality of the agency's action). Moreover, the method of operation on which Plaintiffs base their Complaint was authorized by the same law that provided for raising the levees to sixty feet.

684. The Plaintiffs cannot artfully plead around the fact that the sixty foot levees in place in May 2011 provided greater flood protection than at any time in the past, including when the levees were maintained by local interests. Not only was the frontline levee raised under the modification of the floodway pursuant to the Flood Control Act of 1965, the levee was also strengthened. Story v. Marsh, 732 F.2d 1375, 1378 (8th Cir.1984). Because the Plaintiffs' land had greater flood protection after the implementation of the flood control plan in effect and as operated in May 2011, they cannot state a claim for taking. Danforth, 308 U.S. at 286-87 (There is no taking when plaintiff found his land with the same level of flood protection after the construction of a new levee as before construction).

Without any facts to support their claim, Plaintiffs' assertion that they would have "enjoyed greater flood protection" had the United States not constructed the higher frontline levees in place as of May 2011 is meaningless. As recognized by the Court,

> [t]he plaintiff's factual allegations must "raise a right to relief above the speculative level" and cross "the line from conceivable to plausible." Bell Atl. Corp. [v. Twombly, 550 U.S. 544, 555 (2007)]. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' ... Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " [Ashcroft v.] Iqbal, 556 U.S. [662,] 678 [(2009)] (quoting Bell Atl. Corp., 550 U.S. at 555, 557, 127 S.Ct. 1955)."

Big Oak Farms, 105 Fed. Cl. at 52.

There is no need to engage in the multi-factor analysis described in Arkansas Game because Plaintiffs failed to sufficiently allege that the actions of the United States caused any flooding that would not have occurred if the United States had not built and operated the Birds Point-New Madrid Floodway as it did in May 2011, id. at 57; and Plaintiffs also failed to allege any facts to address the "relative benefits" principle outlined in Sponenbarger, 308 U.S. at 265-

67. Big Oak Farms, 105 Fed. Cl. at 58 n.6; Arkansas Game, 133 S. Ct. at 518 (Situation–specific factual findings are not required when invariable rules apply).

III. The United States Did Not Cause the Flooding In May 2011

The Arkansas Game decision was based on a trial court finding that repeated flooding would not have occurred absent action by the United States. 133 S. Ct. at 517, 522. Arkansas Game casts no doubt on the validity of the basic rule that there is no liability for damages caused by flooding where the flooding would have occurred anyway, absent government action. Anderson v. United States**,** 146 Ct. Cl. 691, 174 F. Supp. 945, 947 (1959) (cites omitted). In other words, the United States cannot be held liable for flooding that it does not cause. Sanguinetti v. United States, 264 U.S. 146, 148-49 (1924) (Claimant must establish a causal relationship between government action and alleged flooding.) (cited in Arkansas Game, 133 S. Ct. at 520).

In support of their argument that the United States caused the flooding in May 2011, Plaintiffs suggest that the Army Corps of Engineers has unlimited discretion to operate the Floodway. Pls.'. Br.at 15 ("The relevant issue is not how long the government refrained from blowing the levee…."). However, the Floodway is only operated under specific conditions prescribed by Congress. Pub. L. No. 89-298, 79 Stat. 1073, 1076-77 (1965); Def. Mot. to Dismiss, ECF No. 19, Ex. C, H.R. Doc. No. 308 at 148. Under the Jadwin Plan the Floodway was operated automatically when the river reached a flood stage of fifty-five feet as the headwaters flowed over the fuse-plugs. Under the plan of operation in effect in May 2011, the Floodway was activated when the river reached a flood stage of fifty-eight feet, with a predicted crest of over sixty feet. Big Oak Farms, 105 Fed. Cl. at 51-52. The allegations in the Complaint fail to establish a causal connection between the operation of the Floodway in May 2011 and the

flooding the land experienced given that the land would have flooded anyway. The root cause of the flooding was the extreme weather conditions which caused the Mississippi River to rise to levels that exceeded the protective capacity of the frontline levees. The United States is not liable for the resulting flooding. Bartz v. United States, 224 Ct. Cl. 583, 633 F.2d 571, 578 (1980) (no taking found when excessive rains forced the United States to release waters from a dam which caused damage to farmers' land downstream); Laughlin v. United States, 22 Cl. Ct. 85, 101-103 (1990), aff'd, -- F.App'x – (Fed. Cir. 1992) (No taking found when large inflows of water into reservoirs caused the United States to make corresponding large discharges in order to maintain sufficient storage space in the reservoirs).

Further, as discussed in greater detail in pleadings previously filed by the United States (ECF Nos. 19, 23, 46), "[e]ven if a causal relationship exists between the Government's action and plaintiff's damage and even if the invasion is either permanent or inevitably recurring, no liability attaches if the Government's conduct bestowed more benefit than detriment on plaintiff's property." Laughlin, 22 Cl. Ct. at 111. Plaintiffs failed to allege any facts to address the "relative benefits" principle outlined in Sponenbarger, 308 U.S. at 265-67. Big Oak Farms, 105 Fed. Cl. at 58 n.6. Therefore, Plaintiffs failed to state a takings claim.

IV. The Flood Control Act Requires the United States to Obtain Easements to the Extent that Operation of the Floodway Exposes the Land to More Frequent Flooding

Plaintiffs state that Count II of the Complaint "alleges the Corps' maintenance and operation of [the 1983 plan that was eventually executed] for decades while failing to even attempt to obtain conforming easements constituted an appropriation of flowage easements without just compensation." Pls.' Br.at 5-6). A similar argument was presented by Plaintiffs in opposition to the United States' Motion to Dismiss wherein they claimed "they suffered greater flooding and more damage because the levee was destroyed in the method prescribed by the

current operating plan, as opposed to the specifications in their easements." (Pls.' Br. in Opposition to Motion to Dismiss at 27, ECF No. 22). There is no discussion in Arkansas Game in any way related to easements required under the Flood Control Act and consequently Plaintiffs do not cite to Arkansas Game as a basis for reconsideration of the Court's Order dismissing the takings claims. Without citing any new authority, Plaintiffs reiterate the argument that they are entitled to damages because the United States did not own easements that permitted the Army Corps of Engineers to operate the Floodway in the precise manner employed in May of 2011. Such an allegation, even if true, does not state a claim for a Fifth Amendment taking and the United States was not required by statute to obtain any additional easements when the method of operation was changed.

The Flood Control Act authorizing the initial construction and subsequent modifications of the Floodway requires the United States to obtain easements to the extent that the land is exposed to additional flooding.[3] Section 4 of the 1928 Flood Control Act, 33 U.S.C. § 702d, provides, "[t]he United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River." Easements for "additional destructive flood waters" under the act means that the United States is required to obtain flowage easements to the extent that the government increased the hazard of more frequent diversions of flood water by operation of the Bird's Point-New Madrid Floodway. Danforth, 105 F.2d at 320 (interpreting and applying Section 4 of the 1928 Flood Control Act, 33 U.S.C. § 702d). The United States is not required to obtain easements when it increases the level of flood protection.

[3] Any modified easements required for improvements of the Birds Point-New Madrid Floodway authorized by the 1965 Flood Control Act were to be acquired as provided by section 4 of the 1928 Flood Control Act (33 U.S.C. § 702d), Pub. L. No. 89-298, 79 Stat. at 1076-77.

There is no basis in law or fact for Plaintiffs' claim that it has been long understood that operation of the Floodway constitutes a taking of any land over which the United States has not obtained an easement.[4] (Pls.' Br. at 18). There is no Fifth Amendment taking when the United States has not subjected Plaintiffs' land to any additional flooding, above what would have occurred if the government had not acted. The Fifth Amendment does not make the government an insurer, guaranteeing that the evil of floods are "stamped out universally before the evil can be attacked at all." Sponenbarger, 308 U.S. at 265-267. There is no Fifth Amendment taking when the flood control project confers a net benefit to the Plaintiffs' land. Sponenbarger, 308 U.S. at 265-66; Danforth , 308 U.S. at 286-87.

Further, under the Jadwin Plan, the land was exposed to the risk of more frequent flooding as a result of government action when the height of levees was reduced. However, even under the Jadwin Plan, the United States was not required to obtain flowage easements for lands already covered by backwater flooding when the waters of the river reached fifty-five feet as measured on the Cairo gauge. Matthews, 87 Ct. Cl. at 711-12 (discussing the extent of backwater flooding through the years).

Regardless of the method of operation, the United States was not required to obtain additional or modified easements when it raised the levees to provide protection to a flood stage of sixty feet. 33 U.S.C. § 702d; Danforth, 105 F.2d at 320. Dismissal of the Plaintiffs' takings claims does not render any easements acquired unnecessary or redundant. (See Pls.' Br. at 18). To the extent that the United State acquired easements when it instituted the Jadwin Plan or

[4] In Story v. Marsh, 732 F.2d 1375 (8th Cir. 1984), cited by Plaintiffs, the Court did not find that the United States failed to obtain easements as required by law. The Court merely stated that, if the government failed to obtain necessary easements, then the land owners would have an adequate remedy. Id. at 1384.

when it subsequently modified the levees, the United States is bound by the terms of those easements.[5] However, neither the Fifth Amendment, nor the Flood Control Act required the United States to obtain additional easements when the Floodway was modified to provide greater protection. The United States can only be held liable for a taking to the extent that the Floodway, as constructed and operated in May 2011, caused greater flooding than would have occurred absent the project. A method of operation that results in retention of water from unusual floods for longer periods of time or the increased depth or destructiveness of the water does not cause a taking. These are consequential damages for which the government cannot be held responsible. Danforth, 308 U.S. at 286-87, aff'g Danforth v. United States, 105 F.2d 318 (8th Cir.1939)); Big Oak Farms, 105 Fed. Cl. at 54. The alleged failure to obtain additional easements in order to operate the Floodway in May 2011 does not constitute a taking.

Conclusion

For the reasons stated above and in Defendant's opening brief (ECF No. 48), the Court's prior decision and order dismissing Plaintiffs' Fifth Amendment takings claims is correct and should not be modified based on the Supreme Court's decision in Arkansas Game and Fish Commission v. United States, 133 S. Ct. 511 (2012).

[5] The United States does not admit that the Plaintiffs alleged or sustained any damages that exceed the scope of any existing easements. The United States has acknowledged that certain Plaintiffs have alleged a claim for damages for the deposit of excess sand and gravel under the terms of applicable easements. See Big Oak Farms, 105 Fed. Cl. at 54.

STUART F. DELERY
Principal Deputy Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/Bryant G. Snee
BRYANT G. SNEE
Deputy Director

/s P. Davis Oliver
P. DAVIS OLIVER
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
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