

Legal Sidebar

Extreme Weather Events and Government Compensation

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On May 1, 2015, developments in two courts sent the same signal: a government sometimes has to compensate land owners for “takings” of their property rights under the Constitution when government measures and extreme weather events such as hurricanes or droughts intersect. One case, from Louisiana, involves too much water; the other, from Texas, too little.

The Louisiana case dealt with the Mississippi River-Gulf Outlet, popularly referred to as MR GO (spoken as “Mister Go”). MR GO is a 76-mile navigational channel authorized by Congress and built and operated by the Corps of Engineers to facilitate vessel traffic between New Orleans and the Gulf of Mexico. Following Hurricane Katrina in 2005, owners of flooded land in and near the Lower Ninth Ward of New Orleans alleged that the Army Corps of Engineers had constructed, expanded, and operated MR GO in a manner that significantly increased storm surge up the channel, resulting in flooding of their properties during Hurricane Katrina and subsequent hurricanes and storms. Based on such allegations, they sought compensation in the U.S. Court of Federal Claims (CFC) for a taking of their property.

Initially, the CFC stayed the takings case while several hundred tort claims against the United States also based on Hurricane Katrina flooding were adjudicated in federal district court. Once those claims were denied by the Fifth Circuit, the CFC reactivated the takings claims. Relying heavily on the Supreme Court’s recent flooding/taking opinion in [Arkansas Game & Fish Comm’n v. United States](#), the CFC held in [St. Bernard Parish Gov’t v. United States](#) in May that the Corps’ involvement with MR GO over the decades had effected a temporary physical taking of plaintiffs’ properties by the aforementioned flooding. If upheld on appeal, this decision will underscore that government water projects that contribute to damage caused by extreme weather events may result in takings liability. And this liability, based as it is on the Constitution, trumps any applicable exemptions from the [Federal Tort Claims Act’s](#) waiver of sovereign immunity and even the explicit [Flood Control Act bar](#) on federal liability for flood waters.

The Texas case involves the Edwards Aquifer, which supplies groundwater for irrigation, municipal, and industrial uses in south central Texas. Under Texas law, withdrawals of groundwater require a permit, obtained from the Edwards Aquifer Authority established by the state in 1995. In the majority of states, regulatory restrictions on groundwater withdrawal create little possibility of the state having to compensate the landowner for a “taking” of property rights: while [courts](#) traditionally have treated groundwater rights as constitutionally protected, they have also seen them as only conditional rights of use and thus have resisted allowing compensation for government limitation of groundwater withdrawals. In 2012, however, the Texas Supreme Court in [Edwards Aquifer Auth. v. Day](#) adopted the view that a land owner owns the groundwater beneath his land outright (subject to the right of capture), analogizing to the state’s law for oil and gas. Accordingly, *Day* enhanced the possibility of “takings” requiring compensation when the Authority did not grant permits for all the groundwater a land owner might desire. And that was precisely the result the following year, 2013, in [Edwards Aquifer Authority v. Bragg](#). There, a commercial pecan grower was denied a groundwater withdrawal permit for one orchard over the Edwards Aquifer, and granted a limited permit for a second one. The Texas intermediate appellate court found a regulatory taking of the grower’s groundwater withdrawal rights, even while noting that, for land over the Edwards Aquifer, “demand [for groundwater] exceeds supply” and “[r]egulation is essential to [groundwater’s] conservation and use.” On May 1, 2015, the Texas Supreme Court denied

petitions for review, letting this decision stand.

The *Bragg* decision from the intermediate appellate court is striking in that it directed the state to compensate the land owners without any finding by the court that the groundwater allocation scheme at issue was unreasonable or not needed. On the other hand, Texas, as mentioned, follows the minority view of outright ownership of groundwater. In the majority of states, where groundwater rights are more conditional, courts are likely to continue finding that in general the government does not have to pay when reasonably regulating groundwater withdrawals.