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SOVEREIGN IMMUNITY, THE TAKINGS CLAUSE,
AND THE DETRIMENTAL EFFECT OF
UNREGULATED GOVERNMENT ACTION IN
LOUISIANA V. UNITED STATES

Stephanie J. Rogers

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Abstract

On January 21, 2020 the court dismissed Louisiana's action for injunctive relief from the United States Army Corps Engineers ("Corps") in which the State claimed that a federal canal in New Orleans had expanded well beyond its legal boundaries and was eating away at the State land.¹ The Corps were authorized under the River and Harbor Improvements Act of 1925 to construct the Gulf Intracoastal Waterway that ran from New Orleans to Galveston. In 1942, Congress expanded the authorized width of the Waterway to 125 feet.² The State asserts that the Waterway is now 670 feet in width at some points and is encroaching on the State's White Lake Wetlands Conservation Area.³ This expansion and encroachment contributes to coastal erosion and saltwater intrusion.⁴

The United States Court of Appeals for the Fifth Circuit affirmed the district court's decision to dismiss the case.⁵ The Court held that Louisiana lacked subject matter jurisdiction. In so holding, the court stated that the United States had not waived its sovereign immunity for such a claim under 5 U.S.C.

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1. *Louisiana v. United States*, 948 F.3d 317 (5th Cir. 2020).

2. *Id.* at 319.

3. Kevin McGill, *Court Tosses Louisiana's Suit Over Widening Waterway*, U.S. NEWS & WORLD REP. (Jan. 21, 2020, 1:55 PM), <https://www.usnews.com/news/best-states/louisiana/articles/2020-01-21/court-tosses-louisianas-suit-over-widening-waterway>.

4. *Id.*

5. *Louisiana*, 948 F.3d at 324.

§ 702 because the State failed to prove the requirements for waiver.⁶ Specifically, the State's action does not challenge agency action and, additionally, the alleged injury does not fall within the zone of interest.⁷ This note will argue that the Corps did owe a duty to the State under 30 U.S.C.S. § 426, the Corps breached that duty when the federal canal encroached upon more land than was authorized by the Act, and the injury such breach caused was within the zone of interest of § 426. In addition, the Corps violated the Takings Clause of the Fifth Amendment when the federal canal increased in width.

I. BACKGROUND

Louisiana is made up of relatively low flatlands; its highest point is below 1,000 feet.⁸ It is located on the Mississippi River's alluvial plain and the coastal plain of the Gulf of Mexico.⁹ In addition to the waterfront areas created by the Mississippi River and the Gulf of Mexico, Louisiana is full of bayous, large lagoons, and oxbow lakes.¹⁰ The state has lost close to 2,000 square miles of coastland in the last 80 years.¹¹

Louisiana's economy is extremely dependent on its fertile soils and waters.¹² The rich soil, plentiful water, and humid, subtropical climate all contribute to the state as an abundant supplier of soybeans, cotton, dairy products, strawberries, hay, pecans, and vegetables and provide the state with the U.S.'s largest production of rice, sugarcane, and sweet potatoes.¹³ The local waters provide the state with a thriving fishing industry that contributes approximately one billion dollars annually to the local economy.¹⁴

6. *Id.*

7. *Id.* at 322.

8. Amanda Briney, *Geography of Louisiana*, THOUGHTCO (July 17, 2018), <https://www.thoughtco.com/geography-of-louisiana-1435734> [https://perma.cc/9X2H-9AR8].

9. *Id.*

10. *Id.*

11. Brad Plumer, *Watch How Louisiana's Coastline Has Vanished Over the Last 80 Years*, VOX (June 2, 2016), <https://www.vox.com/2014/8/30/6084585/watch-how-louisianas-coastline-has-vanished-in-the-last-80-years> [https://perma.cc/ED59-W2BY].

12. *Id.*

13. *Id.*

14. *Id.*

In addition to the economic advantages provided by the state's geology are ecological ones. Louisiana is home to three million acres of wetlands.¹⁵ The wetlands in Louisiana account for approximately 40 percent of the wetlands in the continental U.S.¹⁶ These wetlands provide habitats for a wide variety of wildlife including birds, fish, mammals, amphibians, and smaller organisms.¹⁷

Unfortunately, the very aspects of Louisiana that provide it with these economic and ecological benefits make the state extremely susceptible to natural disasters such as hurricanes and flooding, as well as negative effects of erosion that can be contributed to by human activity such as dredging wetlands for canals and draining for agriculture, grazing, or development.¹⁸ About seventy-five square kilometers of the state's wetlands are lost annually.¹⁹ Part of these losses can be contributed to a system of dredged canals that facilitate the exchange of salt water from the Gulf of Mexico into freshwater wetlands, which causes deterioration.²⁰

Louisiana has been subject to many devastating floods over the past century, spanning from the Great Mississippi Flood of 1927,²¹ to the 2005 levee failures in Greater New Orleans,²² to the most recent 2016 floods caused in part by prolonged rainfall, which resulted in an estimate of 50,000 to 75,000 flooded structures and over a dozen deaths.²³ After the flood damage of Hurricane Katrina, Louisiana property owners sued the U.S. Army Corps of Engineers in an attempt to hold them liable for the damages.²⁴ The United States Court of Federal Claims held the U.S. Army Corps of Engineers liable under the Tucker Act.²⁵ However, the United

15. S. Jeffress Williams, *Louisiana Coastal Wetlands: A Resource at Risk*, U.S. GEOLOGICAL SURV. (last visited Jan. 14, 2021) <https://pubs.usgs.gov/fs/la-wetlands/> [<https://perma.cc/6CNP-Z2LT>].

16. *Id.*

17. *Wildlife*, RESTORE THE MISS. RIVER DELTA (last visited Jan 14, 2021), <http://mississippiriverdelta.org/whats-at-stake/wildlife/> [<https://perma.cc/LZU9-6J6R>].

18. Williams, *supra* note 15.

19. *Id.*

20. *Id.*

21. *Mississippi River Flood History 1543-Present*, NAT'L WEATHER SERV. (Aug. 10, 2019), https://www.weather.gov/lix/ms_flood_history [<https://perma.cc/3QEA-8GG2>].

22. See CNN Editorial Research, *Hurricane Katrina Statistics Fast Facts*, CNN (Aug. 12, 2020), <https://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/index.html> [<https://perma.cc/EKY6-BHLF>].

23. *What Causes the Historic August 2016 Flood, and What are the Odds it Could Happen Again?*, THE ADVOCATE (August 5, 2017), https://www.theadvocate.com/louisiana_flood_2016/article_3b7578fc-77b0-11e7-9aab-f7c07d05efcb.html [<https://perma.cc/2XGQ-HZ9T>].

24. *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354 (Fed. Cir. 2018).

25. *Id.* at 1357.

States Court of Appeals for the Federal Circuit reversed this decision, finding that the government's inaction cannot create liability under a takings claim.²⁶

In 1968, the Corps constructed a canal between the port of New Orleans and the Gulf of Mexico to increase navigation and commerce between the two.²⁷ In 2005, when Hurricane Katrina hit, property owners brought a claim asserting that both action and inaction "constituted a [governmental] taking by causing flood damage to their properties."²⁸ The property owners alleged that the "construction, operation, and improper maintenance" of such governmentally constructed canals "increased storm surge along the channel."²⁹ The Claims Court "found that the substantially-increased, storm surge-induced flooding of Plaintiffs' properties that occurred during Hurricane Katrina and in later storms was a direct result of the Corps' cumulative acts, omissions, and policies over time."³⁰ The Federal Circuit reversed, stating that in a takings claim the government can only be held liable for affirmative actions.³¹

This is not the only example of federally created canals that led to negative repercussions. In 1925, the United States Congress approved an act that authorized the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.³² One of these projects included the Gulf Intracoastal Waterway which ran from New Orleans, Louisiana to Galveston, Texas.³³ In 1928, the United States entered into a Servitude Agreement³⁴ with Louisiana that provided a servitude across a portion of the White Lake Property.³⁵ The servitude was to consist of a strip of land 300 feet wide for the purpose of constructing,

26. *Id.*

27. Katie Seegers Roth, *Federal Circuit Holds U.S. Army Corps of Engineers Not Liable for Hurricane Katrina Flooding*, THE ENERGY L. BLOG (Apr. 25, 2018), <https://www.theenergylawblog.com/2018/04/articles/litigation/federal-circuit-holds-u-s-army-corps-of-engineers-not-liable-for-hurricane-katrina-flood-damage/> [https://perma.cc/B823-RF83].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. H.R. 11472, 68th Cong. (2nd Sess. 1925).

33. *Id.*

34. A servitude agreement gives the right to an owner of real property to use a portion of the real property of another in conjunction with their own. Servitude, BLACK'S LAW DICTIONARY (10th ed. 2014).

35. *Louisiana v. United States*, 6:18-CV-00174, p. 2 (W.D. La. 11/20/18) 2018 U.S. Dist. LEXIS 221390.

maintaining, and operating the Gulf Intracoastal Waterway.³⁶ In 1942, the United States Congress expanded the dimensions of the waterway to twelve feet deep by 125 feet wide.³⁷ The servitude agreement states:

THIS GRANT, transfer and donation is made and accepted for and in consideration of the price and sum of NO DOLLARS and the further benefits to accrue to the grantor in the added convenience for the use of said canal and the *enhanced value that will result to adjacent lands*, as the result of the construction and maintenance of said canal.³⁸

The waterway continues to be in use under the exclusive control and authority of the United States.³⁹ However, the United States has failed to maintain the agreed upon boundaries of the waterway.⁴⁰ Over time, the width of the channel has expanded⁴¹ in some places as much as 900 feet wide.⁴² This expansion has contributed to land loss in Louisiana as well as salt water intrusion and coastal erosion.⁴³ The wetlands are being impeded upon and the canal is encroaching on the White Lake Wetlands Conservation Area.⁴⁴

The repercussions of this expansion are significant. If the canal continues to expand as it has, parts of it will become open water.⁴⁵ Such areas would no longer be accessible to current ships and tugs that travel in the canal but are not designed for open water transport.⁴⁶ One in five jobs in Louisiana are in ports and port products; if the coastal lands continue to erode thousands of jobs could be lost.⁴⁷ In addition to the economic impact, the changing coastal topography and encroachment on the White Lake

36. *Id.*

37. *Id.*

38. *Id.* (emphasis added).

39. *Id.*

40. Alexandria Burris, *Landry Sues U.S. Corps of Engineers for Loss of Louisiana Coastline*, BUS. NEWS (Feb. 9, 2018) <https://www.businessreport.com/article/landry-sues-us-corps-engineers-loss-louisiana-coastline> [<https://perma.cc/5BAU-S5UB>].

41. *Id.*

42. *Id.*

43. *Id.*

44. Louisiana, 2018 U.S. Dist. LEXIS 221390.

45. Jim Wyerman, *Gulf Intracoastal Waterway Faces Big Challenges*, RESTORE THE MISS. RIVER DELTA (Aug. 30, 2012), <https://mississippiriverdelta.org/gulf-intracoastal-waterway-faces-big-challenges/> [<https://perma.cc/HSA7-WSNH>].

46. *Id.*

47. *Id.*

Wetland Conservation Area could endanger habitats of the animals and plants that live there, including maidencane, bull tongue, cattail, Jamaican sawgrass, roseau cane, spikerbuch, and submerged aquatic vegetation.⁴⁸

Beyond these concerns, the lack of maintenance of the canal has the potential to lead to the kind of devastation seen after Hurricane Katrina as claimed by property owners in St. Bernard Parish in 2016. The saltwater intrusion and coastal erosion caused by the negligent upkeep of the canal are exactly the types of elements that increased storm surges and flooding that led to over five million dollars in damages done to property owners' land in the St. Bernard Parish.⁴⁹

Notwithstanding the actual and potential damage done because of the Corps' negligent maintenance of the canal that they retain exclusive authority and control over, the United States Court of Appeals for the Fifth Circuit dismissed the case brought to them by Louisiana in an attempt to hold the government accountable for their actions.⁵⁰ The court held that the United States did not waive its sovereign immunity for such a claim under the Administrative Procedure Act ("APA")⁵¹ because the plain language of the River and Harbor Improvements Act authorized the Corps to take measures to prevent or mitigate shore damage caused by the Waterway but did not mandate such measures to be taken.⁵² Additionally, the Court of Appeals states, even if the Corps exercised its discretionary authority to act, the statute places the duty of operating and maintaining any preventative mitigative measure on the non-Federal public body that agreed to operate and maintain those measures.⁵³

II. SOVEREIGN IMMUNITY

The doctrine of sovereign immunity is a jurisdictional doctrine that prevents suit against a state or the federal government unless the party waives the immunity or Congress abrogates it.⁵⁴ Sovereign immunity protects state or federal governmental agents not only from liability, but

48. *White Lake Wetlands Conservation Area*, LA. WILDLIFE & FISHERIES (last visited Jan. 14, 2021), <https://www.wlf.louisiana.gov/page/white-lake-wetlands-conservation-area> [<https://perma.cc/JFW6-6MN8>].

49. Roth, *supra* note 27.

50. Louisiana, 948 F.3d at 320.

51. 5 U.S.C. § 702.

52. Louisiana, 948 F.3d at 323.

53. *Id.*

54. John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849 (2015).

from opposing parties having any standing to sue in the first place.⁵⁵ If a defendant is entitled to sovereign immunity, then the court must dismiss the suit for lack of jurisdiction.⁵⁶ Sovereign immunity can be waived.⁵⁷

“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁵⁸ A case claiming that an agency or an officer acted or failed to act in an official capacity cannot be denied on the ground that it is against the United States.⁵⁹ In order to prove a waiver of sovereign immunity, a plaintiff must show (1) an injury in fact attributable to the defendant’s actions, and (2) that the interest sought to be protected by the plaintiff is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.⁶⁰

Waiver of sovereign immunity is a two-part test. The court can dismiss the case by finding either that there is not injury in fact or that the injury does not fall within the zone of interest.⁶¹ The injury in fact test requires that the plaintiff has suffered actual injury.⁶² In *Louisiana v. United States*, the court held that there was no injury in fact because the State failed to prove that there was mandatory agency action under the statute in question.⁶³ The Court stated that under the River and Harbor Improvements Act the government is only authorized “to investigate, study, plan, and implement structural and nonstructural measures for the prevention and mitigation of shore damages attributable to” Federal Navigation works and shore damages attributable to the Atlantic Intercoastal Waterway.⁶⁴

The Court further stated that even if the injury in fact had been due to agency action, it would not be within the zone of interest of the statute because the statute’s purpose is to promote commerce and facilitate the transport of material and supplies for the military during World War II.⁶⁵ The injury that the Plaintiffs were complaining of was that the expansion

55. *Id.*

56. *Id.*

57. *Id.*

58. 5 U.S.C. § 702.

59. *Id.*

60. *Camp*, 397 U.S. at 152-53.

61. *Id.*

62. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 446-447 (1995).

63. *Louisiana*, 948 F.3d at 323-24.

64. *Id.* (quoting 33 U.S.C.S. § 426i).

65. *Louisiana*, 948 F.3d at 322.

of the canal is encroaching on the wetlands of the White Lakes Wetland Conservation Area, therefore they were not claiming that the government's action is in conflict with the purpose of facilitating transport or promoting commerce.⁶⁶

When looking directly at the subsection of the statute that the government addresses, they are correct in stating that action is only authorized and not directed.⁶⁷ However, in looking at the statute as a whole, this conclusion is misguided. Section 426 of the statute states that the government is *directed* to cause investigations and studies to be made with a view to devising effective means of protecting erosion of the shores of coastal and lake waters.⁶⁸ Additionally, section 426e states:

[I]t is hereby declared to be the policy of the United States, subject to this Act, to promote shore protection projects and related research that encourage the protection, restoration, and enhancement of sandy beaches, including beach restoration and periodic beach nourishment, on a comprehensive and coordinated basis by the Federal Government, State, localities, and private enterprises. In carrying out this policy, preference shall be given to areas in which there has been a Federal investment of funds and areas with respect to which the need for prevention or mitigation of damage to shores and beaches is attributable to Federal navigation projects or other Federal activities.⁶⁹

Taken in its entirety, with due weight given to the context of the statute, it is clear that the government is directed to act in accordance with the goal of protecting and restoring coastal areas that are subject to erosion.⁷⁰ The statute clearly states that special priority should be given to areas where prevention of mitigation of shore damage has been caused by federal navigation projects and activities.⁷¹

66. *Id.*

67. 33 U.S.C.S. § 426i (stating that “[t]he Secretary of the Army is *authorized* to investigate, study, plan, and implement structural and nonstructural measures for the prevention or mitigation of shore damages attributable to Federal navigation works and shore damage attributable to the Atlantic Intracoastal Waterway and the Gulf Intracoastal Waterway . . .” (emphasis added)).

68. 33 U.S.C.S. § 426.

69. *Id.* § 426e.

70. *Id.*

71. *Id.*

The Corps failed to act in accordance with the statute by failing to investigate and devise effective means to protect the shore erosion that led to the encroachment on the White Lakes Wetland Conservation Area. Louisiana is entitled to preference and priority of federal action due to the fact that such erosion and encroachment was caused by federal navigation projects that went unmaintained.

The zone of interest standing is not demanding and should be applied leniently.⁷² Courts assume that when an agency violates statutory or constitutional limitation on its authority, everyone who is suffering injury in fact and whose interests are even arguably within a relevant zone can obtain relief under the APA.⁷³ The injury in fact that is claimed is within the zone of interest as evidenced by the United States' policy of promoting shore protection projects.

The court erred in its application of the zone of interest test in two ways. First, as previously addressed, when taken as a whole the statute clearly states that the United States' policy is "to promote beach nourishment for the purposes of flood damage reduction and hurricane and storm damage reduction and related research that encourage the protection, restoration, and enhancement of sandy beaches, including beach restoration."⁷⁴ However, even if the court looked only at subsection 426i there is still an argument that the injury falls within the zone of interest. The zone of interest test is meant to be leniently applied.⁷⁵ The expansion of the Waterway due to government inaction will lead to open waters. These open waters are not conducive to navigation by the ships and tugboats that encourage commerce. Therefore, the government inaction goes against its own stated purpose to encourage commerce and facilitate travel through the Waterway.

III. THE TAKINGS CLAUSE

Eminent domain is "the right belonging to a sovereignty to take private

72. Caleb Nelson, "Standing" and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 777 (2019).

73. *Id.* at 762.

74. 33 U.S.C.S. § 426e-1(a).

75. *See, e.g.,* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 403 (1987) (stating that the asserted interest passes the zone of interest test because it has a "plausible relationship" to the provision in question); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (explaining that the interest that the plaintiff is trying to protect must only be "arguably within the zone of interest to be protected by the relevant statute").

property for its own public uses.”⁷⁶ This governmental power of eminent domain is, however, constrained by the Constitution.⁷⁷ The Fifth Amendment of the United States Constitution states “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁷⁸ The compensation requirement of the takings clause was implemented as protection for propertied classes from egalitarian redistributions of wealth.⁷⁹ Federal courts have required the United States to compensate states and localities when it takes their property at the same level that they compensate private property owners.⁸⁰

The Takings Clause protects property from regulatory burdens that “go[] too far.”⁸¹ If government action goes too far, then compensation is required.⁸² The purpose of the compensation requirement is to protect property owners from governmental action and regulatory interference with their reasonable expectations.⁸³ A Takings Clause analysis is a three-part ad hoc balancing test.⁸⁴ The test focuses on the character of the regulation, the extent to which the regulation interferes with property owners’ investment-backed expectations, and the resulting diminution in value.⁸⁵ The government is liable for compensation paid if the governmental regulation of a non-nuisance use is overly burdensome on property owners.⁸⁶

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with the property can be characterized as a physical invasion by government, than when interference arises from some

76. Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. Rev. 829, 830 (1989), (quoting *Kohl v. United States*, 91 U.S. 367, 373-74 (1875)).

77. *See id.* at 831.

78. U.S. Const. amend. V.

79. Jesse Dukeminier et al., *Property* 1108 (Vicki Been et al. eds., 8th ed. 2014).

80. *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

81. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1992) (establishing the goes-too-far test when applied to a takings claim).

82. *Id.*

83. *Id.*

84. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978).

85. *Id.*

86. JESSE DUKEMINIER ET AL., *PROPERTY* 1161 (Vicki Been et al. eds., 8th ed. 2014).

public program adjusting the benefits and burdens of economic life to promote the common good.⁸⁷

Takings cases often expand situations where a property owner can sue the government for just compensation for taking of property.⁸⁸ However, sovereign immunity is frequently used to shield the government from such suits.⁸⁹ In order for a sovereignty to succeed against a takings clause argument, they must show (1) that the property was taken for “public use,” and (2) that there was “just compensation.”⁹⁰ “When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”⁹¹

Takings claims generally turn on situation-specific factual inquiries.⁹² Courts have expanded this fact-specific takings test to include flooding cases, which they say should not be excluded under blanket rules, but should instead be assessed with reference to the particular circumstances of each case.⁹³ The plaintiffs in a takings claim must prove that they have a property interest for the purposes of the Fifth Amendment⁹⁴ and that the government’s actions amounted to a compensable taking for that property interest.⁹⁵ The Supreme Court has laid out a list of factors to consider when analyzing if the government’s actions amounted to a compensable taking in a flooding case.⁹⁶ These factors include: (1) the duration of the physical invasion; (2) causation; (3) intent or foreseeability; (4) the character of the land; and (5) the severity of the interference.⁹⁷

One of the primary elements of the compensable takings argument is that it must be government action that caused the taking.⁹⁸ In *St. Bernard Parish Gov’t v. United States* the court held that under the Tucker Act, the failure of the government to properly maintain the channel or to modify the channel could not be the basis of takings liability.⁹⁹ The court

87. Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).

88. Eric Berger, *The Collusion of the Takings and State Sovereign Immunity Doctrines*, 63 WASH & LEE L. REV. 494 (2006).

89. *Id.*

90. U.S. Const. amend. V.

91. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency, 535 U.S. 302, 322 (2002).

92. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

93. United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958).

94. Members of the Peanut Quota Holders Ass’n v. United States, 421 F.3d 1323, 1330 (Fed. Cir. 2005).

95. Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

96. Ark. Game & Fish Comm’n v. United States, 568 U.S. 23, 36 (2012).

97. *Id.*

98. *Id.*

99. St. Bernard Parish Gov’t v. United States, 887 F.3d 1354, 1362 (Fed. Cir. 2018).

concluded that the government cannot be liable on a takings theory for inaction.¹⁰⁰

This conclusion is upheld through case history.¹⁰¹ However, courts do not always agree on what constitutes action and what is considered inaction. In *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, the court addressed claims made against the government in relation to the government's construction of the Barker Dam in Houston, Texas and the effect the dam had on the Houston area during Tropical Storm Harvey in 2017.¹⁰² In 1945, the United States Army Corps of Engineers completed the construction of two dams, Addicks and Barker.¹⁰³ The Corps had control of the maintenance of the dams and periodically reevaluated the functionality of them.¹⁰⁴ During Tropical Storm Harvey, the Addicks and Barkers Reservoirs flooded thousands of acres of private property.¹⁰⁵ When the property owners brought suit, the government filed a motion to dismiss on many grounds, one of them being that the takings claim allegedly arose out of government inaction, not government action.¹⁰⁶ The court stated:

The government acted when it built and then modified the dams in such a way that they could and did impound storm water behind the dams on both government and private property. That the government's action bore fruit or had consequences only some years later does not obviate the reality that *action*, not *inaction*, is at issue.¹⁰⁷

The court continued by saying that the plaintiff's allegations of governmental action were strengthened by their evidence that the government was aware of the risks that the dams posed to private property and it was within their authority and control to mitigate such potential

100. *Id.*

101. *See, e.g.*, *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1341 (Fed. Cir. 2018) (stating that the government's failure to repeal an amendment is clearly inaction and thus cannot be the basis for a takings claim); *Harris Cty. Flood Control Dist. v. Karr*, 499 S.W.3d 793, 805 (2016) ("Because inaction cannot give rise to a taking, we cannot consider any alleged failure to complete the Pate Plan."); *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (rejecting Due Process claim for inaction).

102. *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 138 Fed. Cl. 658, 666 (Fed. Cl. May 24, 2018).

103. *Id.* at 661.

104. *Id.* at 662.

105. *Id.*

106. *Id.* at 663.

107. *Id.* at 666.

future damage.¹⁰⁸ The court reasoned that this evidence showed the government's intent and the foreseeability of the alleged takings.¹⁰⁹

In his article, *Passive Takings: The State's Affirmative Duty to Protect Property*, Christopher Serkin argues that governments can violate the Takings Clause by failing to act in the face of a changing world.¹¹⁰ Serkin calls action under this affirmative governmental obligation a "passive takings" claim.¹¹¹ He illustrates this concept of passive takings with the example of sea-level-rise and argues that ecological threats may compel the government either to respond to or pay compensation for the damages resulting from the ecological change.¹¹²

Serkin explains that the purpose of the Fifth Amendment's Takings Clause is to protect property owners from the most significant costs of legal transitions.¹¹³ Historically, this meant that legal change was always central to a regulatory takings claim.¹¹⁴ However, Serkin argues that "there are contexts in which no principled basis exists for distinguishing between regulatory acts and omissions."¹¹⁵ One of these contexts comes with the growing research into and knowledge about environmental factors and their effect on land use.¹¹⁶ Serkin states that in environmental situations where the government is immune from consequences of inaction, this actually discourages the government from taking action to help avoid or mitigate future damages.¹¹⁷

In *Louisiana v. United States*, the Corps' initial action was creating the Gulf Intracoastal Waterway.¹¹⁸ It was in their authority and control to maintain that canal, which they failed to do.¹¹⁹ The fact that the canal would spread and encroach on the State's public land, as well as private property, was foreseeable and inevitable if the canal was not maintained properly. Therefore, as in *Upstream*, the government's action "bore fruit

108. *Id.* at 667.

109. *Id.*

110. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345 (2014).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Louisiana*, 948 F.3d at 319.

119. *Id.*

[and] had consequences only some years later,”¹²⁰ which should constitute as governmental action at issue, as opposed to inaction.

If the government was not already aware of the risks that their action posed, they most certainly have been made aware of such risks. Given the foreseeability of the consequences of their actions, and the authority and control that they have over maintaining the canal, the State of Louisiana has standing to bring a takings claim against the government in this case. Additionally, if the government is immune from such a takings claim, they will be disinclined to take such action as their previous conduct can show.

IV. THE TUCKER ACT

The United States claimed, in *Louisiana v. United States*, that the state has an adequate remedy for the alleged breach of the servitude agreement under the Tucker Act in the Court of Federal Claims.¹²¹ The Tucker Act is a federal statute of the United States under which the United States waives its sovereign immunity as to specific types of lawsuits.¹²² There are two parts to the Tucker Act.¹²³ The first part is known as the Big Tucker Act and applies to claims above \$10,000, giving them jurisdictional ground in the United States Court of Federal Claims.¹²⁴ The second part is known as the Little Tucker Act¹²⁵ and gives concurrent jurisdiction to the Court of Federal Claims and the District Courts to hear any case that could be brought where the amount in controversy does not exceed \$10,000.¹²⁶

Suits under the Tucker Act may arise out of contracts to which the government was a party or constitutional claims, particularly claims of taking of property by the government to be compensated under the Fifth Amendment.¹²⁷ “In 1887, the Tucker Act was enacted to confirm the nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based on federal statutes, executive regulations, and contracts, while also expanding the court’s authority to include monetary actions

120. *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 138 Fed. Cl. at 666.

121. *Louisiana*, 948 F.3d at 320.

122. 28 U.S.C.S. § 1346.

123. *Id.*

124. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 815 (6th Cir. 2015).

125. The “Little Tucker Act” is contained in 28 U.S.C. § 1346(a)(2).

126. *Id.*

127. 28 U.S.C.S. § 1346.

based on the Constitution.”¹²⁸ The Act confers jurisdiction over regulatory takings claims against the federal government but it does not itself create “any substantive right enforceable against the United States for money damages.”¹²⁹

The government’s claim that Louisiana has a proper remedy under the Tucker Act is a frustrating run around that cannot be squared with the similar case discussed above, *St. Bernard Parish Gov’t v. United States*, that was decided only two years prior. The plaintiffs in that case tried to bring a takings action under the Tucker Act only to be told that the failure of the government to properly maintain the channel or to modify the channel could not be the basis of takings liability as the property owners’ sole remedy for these inactions were in tort.¹³⁰

In the present case, the Court held that the government had not waived its sovereign immunity and, thus, the case was dismissed for lack of subject matter jurisdiction.¹³¹ The government stated that they had not waived their sovereign immunity under the Federal Tort Claims Act and that the plaintiffs had a proper remedy under the Tucker Act.¹³² In a previous case with similar facts, the Court held that the plaintiffs could not bring a claim under the Tucker Act because the sole remedy for the government inaction was in tort.¹³³ The APA expressly excludes judicial review in a District Court when an adequate remedy lies in another court.¹³⁴

Under this circular logic, the government seems to be completely immune from suit while sending plaintiffs from court to court trying their cases under different Acts and names. If the purpose of the Tucker Act is to waive certain aspects of sovereign immunity for the government, but the government is arguing that a case lacks subject matter jurisdiction because they have not waived sovereign immunity and thus the case should be tried under the Tucker Act, but such cases are not successful under the Tucker Act because the proper remedy is in tort, there seems to be no apparent solution or remedy to these prominent issues. The government has insurmountable power to act as it pleases in taking land from states and private property owners and then not maintaining such

128. Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 87-88 (2013).

129. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Testan*, 424 U.S. 392, 398 (1976)).

130. *St. Bernard Parish*, 887 F.3d at 1356.

131. *Louisiana*, 948 F.3d at 324.

132. *Id.*

133. *St. Bernard Parish*, 887 F.3d at 1356.

134. *See Sisk*, *supra* note 128, at 2.

land to the detriment of said parties without facing any negative repercussions for their negligence. This simply cannot be acceptable.

V. CONCLUSION

The statute at hand in the present case used directive language that the government did not act upon. This government inaction caused injury in fact that was within the zone of interest asserted in the purpose of the statute. Therefore, the United States waived its sovereign immunity and Louisiana's case was wrongfully dismissed for lack of subject matter jurisdiction. Additionally, the actions of the United States government constitute a takings argument for which just compensation has not been given. The repercussion of these actions has led to detrimental environmental effects on the coastal lining of the canal and the surrounding communities and economy.

The United States Army Corps need to be held liable for the consequences of their actions in creating and neglecting to maintain the Intracoastal Gulf Waterway. It was reasonably foreseeable that the Waterway would expand if it was not properly managed and that this expansion would encroach on public and private property in the surrounding area. The government's evasion of liability in this context creates ongoing and wide-reaching consequences. The unregulated expansion of the Gulf Intracoastal Waterway caused encroachment on the White Lake Wetlands Conservation Area. This encroachment is disruptive to the habitats of hundreds of wildlife species. Additionally, the growth in the waterway is likely to be disruptive to the fishing industry that brings in over one billion dollars a year to Louisiana's local economy.

The unmaintained waterway is currently detrimental to Louisiana's ecology and economy, but the most dangerous aspect of this waterway augmentation is the foreseeable potential of what is to come. If this waterway continues to expand, as it will if it is not maintained, there is an increased likelihood that future hurricanes will lead to disastrous floods and massive damage to homes and livelihoods.

