

FLOOD CONTROL IMMUNITY IN RECREATION EVAPORATING

James C. Kozlowski, J.D., Ph.D.  
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Reported case law from the federal courts indicates that governmental liability for public recreation injuries on federal sites should be the exception rather than the rule. Significant limited immunity is generally available under an applicable state recreational use statute (RUS) and/or the discretionary function exception under the Federal Tort Claims Act (FTCA).

Pursuant to the Federal Tort Claims Act (FTCA), the federal government is liable for negligence like a private individual under the law of the jurisdiction where the injury occurred. The discretionary function exception to FTCA liability, however, preserves governmental immunity when the alleged negligence involves agency judgment grounded in "social, economic or political policy." In addition, most jurisdictions have some variation of a state recreational use statute (RUS). An RUS generally provides that a landowner owes no legal duty to guard warn or make the premises reasonably safe for public recreational use free of charge. Accordingly, under an applicable RUS, there is generally no liability for ordinary negligence. The RUS, however, does not provide immunity for willful/wanton misconduct, i.e., behavior which demonstrates an utter disregard for the physical well being of others.

In addition to limited immunity under a state RUS and FTCA discretionary function exception, following the 1986 decision of the U.S. Supreme Court in the case of *United States v. James*, an increasing number of federal courts had found that absolute immunity was available to the federal government under the Federal Flood Control Act for recreational injuries or deaths sustained in federal flood control projects. Many of these reported cases involved water based recreation in federal dam projects managed by the U.S. Army Corps of Engineers (Corps) within the Department of Defense (DoD). In these cases, the lower federal courts found the COE had absolute immunity against liability claims generally arising out of water related recreation, in particular shallow water diving injuries, on COE dam sites.

HARSH IMMUNITY

In a memorandum commenting on the U.S. Supreme Court's denial of a petition to review a claim involving a fatality on a federal dam project, Justice John Paul Stevens characterized application of immunity under the Flood Control Act by the lower federal courts as "the latest in an expanding series of tragic cases." In the case of *Hiersche v. United States*, 112 S. Ct. 1304, 117 L. Ed. 2d 525(3/9/1992), the U.S. Supreme Court had denied a "writ of certiorari," (i.e., a petition to review a decision by the lower federal courts) to determine whether the Mississippi Flood Control Act of 1928 (Flood Control Act) provided the federal government with absolute immunity from liability for all personal injuries caused by its employees in federal flood control projects. The facts of this wrongful death claim were as follows:

Jerome Hiersche, a professional diver, contracted with the Government to inspect submerged fish screens at the hydroelectric intake on the John Day Dam on the Columbia River between Oregon and Washington. Although Government employees assured him that the water flow to the fish bypass system would be

shut off, they negligently failed to do so. Petitioner's head was drawn into an orifice in the fish bypass system, and he suffered fatal injuries.

As characterized by Justice Stevens, "a once obscure sentence" in section 3 of the Flood Control Act had "assumed greater and greater importance because it has provided the Government with a defense to claims for personal injury and death caused by federal negligence, gross negligence, and even conscious governmental indifference to the safety of the public." Specifically, in the case of *United States v. James*, 478 U.S. 597, 600 (1986), the U.S. Supreme Court had found the following provision in the Flood Control Act "outlines immunity in sweeping terms": "No 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." According to Stevens, "[t]he statute at issue here is an anachronism" which needed to be resolved:

[The Federal Flood Control Act] was enacted 18 years before the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., waived the Federal Government's sovereign immunity from liability for personal injuries. At the time of its enactment, no consideration was given to the power generation, recreational, and conservation purposes of flood-control projects, or to their possible impact on the then nonexistent federal liability for personal injury and death caused by the negligent operation of such projects. Today this obsolete legislative remnant is nothing more than an engine of injustice.

While acknowledging that the Supreme Court, generally, "has a duty to resolve conflicts among the courts of appeals," in this particular instance Stevens found "Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained." Congress, however, did not do so. On the contrary, it was not until the case of *Central Green Co. v. United States*, 531 U.S. 425, 428-29, 121 S. Ct. 1005, 1008, 148 L. Ed. 2d 919 (2001) that the U.S. Supreme Court, not Congress, would provide more direction for federal courts in determining "whether the government is immune under the Flood Control Act."

## CHARACTER OF WATERS

In *Central Green*, the Supreme Court stated that it would consider the "character of the waters that cause the relevant damage and the purposes behind their release." Accordingly, under *Central Green*, it was no longer sufficient for the federal government to claim immunity under the Flood Control Act "[s]imply because waters are in some way related to a flood control project."

In *Central Green*, the lower courts had held that the United States was immune from liability for flooding pistachio orchards simply because the water came from a federal facility maintained for irrigation and flood control purposes. The Supreme Court, however, rejected such an overly broad reading of the flood control statute in which federal courts had "focused simply on whether the waters at issue were 'related to' a flood control project." In concluding "the focus should be on the character of the waters," the Court in *Central Green* found "the damage had occurred over a number of years, making it entirely possible that water from many sources flowed through the canal."

In contrast, the Court noted that the injuries in *James* were caused by "the turbulent current generated by unwarned releases of waters from a reservoir after the Army Corps of Engineers had determined that the waters were at 'flood stage'." Accordingly, the Supreme Court found Flood Control immunity would apply where "injuries occurred as a result of the release of waters from reservoirs that had reached flood stage." In the opinion of the Court, "to characterize every drop of water that flows through that immense project as 'flood water' simply because flood control is among the purposes served by the project unnecessarily dilutes the language of the [Flood Control] statute." Accordingly, in *Central Green*, the Supreme Court found immunity under the Flood Control Act would not apply "if the water never approached flood stage and the terminus of the canal was parched at the end of the summer."

Similarly, many of the shallow diving injuries which generated the line of federal court opinions which had applied absolute immunity under the Flood Control Act did not necessarily occur because flood project waters were released at "flood stage." On the contrary, most of these recreational injuries occur in the summer, not in the spring when a release of waters at "flood stage" would be more likely. Since *Central Green*, there has been a paucity of reported court decisions from the federal courts interpreting and/or applying the Flood Control Act to recreational injury claims in federal flood control projects.

#### FLOOD STAGE WATERS

One of the first reported federal court opinions to apply the reasoning in *Central Green*, clearly limiting the scope and applicability of federal flood control immunity to water at flood stage, was *Finn v. United States* (Dist. Ore. 10/25/2001). In this case, plaintiff Finn claimed there was "no basis for the defendant's defense of immunity under the federal Flood Control Act of 1928." On June 11, 1997, Kelly Finn drowned while swimming in the designated swimming area at LePage Park. The facts of the case were as follows:

On June 11, 1997, Kelly Finn, his parents, and his brother paid a fee and entered LePage Park as business invitees. The park is located on the John Day River, above the John Day Dam, in Sherman County, Oregon. It is owned and operated by the United States Army Corps of Engineers. The park contains a designated swimming area with a floating raft.

The John Day Dam is part of the Columbia River Flood Control System. On June 11, 1997, the Columbia River was in flood condition, and the John Day Dam was being actively monitored for flood control purposes. On that day, as a result of the decision of the United States Army Corps of Engineers to actively monitor the flow of water going through the John Day Dam, the water level behind the John Day Dam was allowed to rise. The flood pool for waters contained by the John Day Dam on June 11, 1997 reached five miles up the John Day River from its confluence with the Columbia River. LaPage Park on the John Day River, where Kelly Finn drowned, was approximately 1/4 mile from the confluence of the John Day River with the Columbia River. The waters in the swimming area at LaPage Park on June 11, 1997 had been allowed to rise during the day as a result of the decision of the United States Army Corps of Engineers to limit the full flow of water through the John Day Dam on that day.

Plaintiff Charles Finn, the personal representative of the estate of Kelly Finn, filed a wrongful death action under the Federal Torts Claims Act. In his complaint, Finn alleged, in part, that "Kelly Martin Finn drowned in the designated swimming area at LePage Park as a result of defendant's [United States Army Corps of Engineers'] negligent operation and maintenance of the swimming area."

In response, the defendant United States claimed immunity under the Flood Control Act of 1928. Plaintiff, however, contended that there was "no evidence that flood water contributed in any way to the death of Kelly Finn." On the contrary, plaintiff claimed "Kelly Finn's death came about because of the negligent operation of a recreational swimming beach" and "not the character of the water or the performance of the defendant's flood control function."

In this particular instance, the United States claimed immunity under the Flood Control Act was applicable because "the character of the water at LePage Park on the day that Kelly Finn drowned was flood water." In so doing, the defendant federal government noted that "the John Day River at LePage Park where Kelly Finn drowned was in flood stage, and that it was being actively monitored by the United States Army Corps of Engineers on that day." Moreover, the United States contended that "there is no question but that the United States Army Corps of Engineers was actively manipulating the depth of the river on that day in an effort to control flooding." As a result, the United States argued that plaintiff's request for "summary judgment should be denied because the record does not support a conclusion as a matter of law at this stage in the proceedings that flood water played no part in the death of Kelly Finn."

Applying the standard enunciated by the Supreme Court in *Central Green*, i.e. "consider the character of the waters that cause the relevant damage and the purposes behind their release," the federal district court examined the record to determine whether the water in which Kelly Finn drowned was flood water." In the opinion of the court, there were "no facts in the record from which the court can conclude as a matter of law that flood water did not play any part in the drowning." As a result, the federal district court denied plaintiff's motion for summary judgment that there was "no basis for the defendant's defense of immunity under the federal Flood Control Act."

#### IRRIGATION RUNOFF WATERS

In the much more recent case of *Morton v. United States* (Dist. Ariz. 10/8/2010), the federal district court found the character of the water causing the damage was unrelated to flood control. In this case, the husband and two sons of Mary Lou Morton brought a wrongful death action against the United States following her drowning death in Roosevelt Lake. The facts of the case were as follows:

On the night of April 28, 2008, Mary Lou Morton, who lived on the west side of Tonto Creek, had dinner with friends who lived on the east side. Tonto Creek runs through Tonto Basin and feeds into Roosevelt Lake. After dinner, Mary decided to return home and, at the suggestion of her friend, decided to take A-Cross Road, one of the three crossings that run through Tonto Creek. Mary had never traveled on A-Cross Road before so her friend gave her directions. Later that night, however, Mary's vehicle was found in twenty feet of water fifty to seventy-five yards from the boat ramp at the Indian Point Recreation Site, one of nine

recreation sites at Roosevelt Lake. Her body was discovered about 200 yards from the ramp.

Plaintiffs alleged that "the U.S. Forest Service negligently failed to sign the route to A-Cross Road, to close the boat ramp gate, to adequately sign or light the boat ramp, the boat ramp area, or the water's edge." In so doing, plaintiffs claimed that negligently designing the road to lead directly into the lake was the reason "Mary was lead into Tonto Basin and drowned." In response, the United States contended that it was immune under the Flood Control Act of 1928, 33 U.S.C. § 702c.

As cited by the federal district court, the Flood Control Act of 1928, 33 U.S.C. § 702c 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 noted that "[t]his provision bars recovery where the federal government would otherwise be liable under the FTCA."

Citing *Central Green Co. v. United States*, 531 U.S. 425, 428-29, 121 S. Ct. 1005, 1008, 148 L. Ed. 2d 919 (2001), in determining whether the government is immune under the Flood Control Act, the federal district court noted that it "must consider the character of the waters that cause the relevant damage and the purposes behind their release." In so doing, the court acknowledged that it would be "insufficient" under *Central Green* to find governmental immunity "[s]imply because waters are in some way related to a flood control project is insufficient.

Applying the reasoning of the Supreme Court in *Central Green*, plaintiffs contended that "Mary Morton's death occurred from an activity unrelated to a flood control project." Specifically, plaintiffs claimed "the character of the water" in which Mary drowned was not "flood water" because the United States had "admitted the water in the lake was from the active conservation capacity tank, rather than from the flood water tank."

The United States, however, argued that Roosevelt Lake did contain flood water "because in 1977 the Roosevelt Dam was raised for, among other things, flood control, and at the time of Mary's death the waters were at an unusually high level." Further, the United States claimed "flood water could have been released from the active conservation area" even though these water had "never reached the exclusive flood control storage area."

Considering "the character of the waters and the purpose behind their release," the federal district court found the United States had failed to present sufficient evidence "to support a finding that flood waters killed Mary Morton."

As in *Central Green*, the damage here did not occur from a single discrete incident of flooding. There is no evidence that the lake overflowed or that Mary Morton drowned because flood waters engulfed her car. Sergeant John France testified that the week before the accident the creek had dropped 6-12 inches and the various crossings in Tonto Basin, including A-Cross, were easy to cross by vehicle.

Defendant also admits that the lake's water came from the active conservation storage area, not from the flood control storage area. While it is possible that flood waters could have been in the lake, as in *Central Green*, the issue is unclear.

*Central Green* requires us to "identify the cause of the damage rather than base a decision on the mere fact that a flood control project was involved."

Having found "the major purpose of the Roosevelt Dam is to store natural runoff for irrigation, and not flood control," the federal district court concluded it was "highly unlikely that this case really has anything to do with the Flood Control Act." As a result, the federal district court denied summary judgment in favor of the defendant United States which would have dismissed plaintiffs' claims based upon federal flood control immunity.

#### ALL PROJECT WATERS

In the case of *Craan v. U.S. Army Corps of Engineers* (E.D. Calif 1/3/2008), the federal district court found the Corps was entitled to section 702c immunity under the Flood Control Act. Applying absolute immunity based on language in *James*, typically found in federal court opinions prior to *Central Green*, the court found governmental immunity broadly applied as long as the injury results from the operation of a federal flood control project. In so doing, the *Craan* court inexplicably failed to cite, let alone apply, the Supreme Court requirement enunciated in *Central Green* that federal courts "consider the character of the waters that cause the relevant damage and the purposes behind their release" in determining the applicability of immunity under the Flood Control Act.

In this case, plaintiff Craan claimed her son Casand, age 20, drowned in Lake Isabella while "swimming with friends back and forth to a small island about 100 yards off shore." Craan contended that Casand was pulled under the water by a "strong hydro suction sediment or current." In so doing, Craan alleged that the Corps was negligent in operating and maintaining Lake Isabella. Specifically, Craan maintained that "strong undercurrents of which swimmers were unaware" along with "overgrown algae" and "unmarked underwater hazards" contributed to her son's death.

As noted by the federal district court, Congress had authorized the Corps, an agency of the U. S. Army, to construct the dam at Lake Isabella for flood control pursuant to the Flood Control Act of 1944 ("FCA"), 33 U.S.C. §§ 701, et seq. Similarly, the Corps had stated "Congress specifically authorized the project for the Isabella Reservoir on the Kern River for 'flood control and other purposes' in the Flood Control Act of 1944." Accordingly, the Corps characterized the project as a "comprehensive plan for flood control." Moreover, the Corps contended it continued to "control the dam and gross pool of floodwaters contained in Lake Isabella." As a result, the Corps argued that "section 702c immunity attaches with a 'sufficient nexus' between flood control and Casand's death." The federal district court agreed.

The Corps establishes, and plaintiffs fail to refute, that section 702c immunity applies to the Corps' control of the Lake Isabella project. Plaintiffs make no meaningful challenge to section 702c immunity which protects the Corps from liability from Casand's death. Under the circumstances, plaintiffs can allege no facts to avoid section 702c liability.

As cited by the federal district court, the Flood Control Act provides a broad grant of immunity to the Corps: "No 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" 33 U.S.C. § 702c ("section 702c").

Quoting directly from the opinion of the U.S. Supreme Court in *United States v. James*, the court acknowledged that it was "difficult to imagine broader language" in defining the scope and applicability of immunity under the Flood Control Act:

It is thus clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of . . . flood control, as well as to waters that such projects cannot control." *United States v. James*, 478 U.S. 597, 605, 106 S. Ct. 3116, 3121, 92 L. Ed. 2d 483 (1986).

In so doing, the federal district court cited the following language from federal court opinion issued prior to the Supreme Court's opinion in *Central Green*:

If injury results from operation of a federal project "for flood control purposes, government immunity is complete" and applies although the "federal project has multiple purposes and is not intended exclusively for flood control." *Morici Corp. v. United States*, 681 F.2d 645, 647 (1982)...

Even if the project was operated at the time of the negligence for a purpose other than flood control, so long as the damage or injury was not "wholly unrelated" to a Congressionally authorized flood control project, "a sufficient nexus for purposes of § 702c immunity exists." *McCarthy v. United States*, 850 F.2d 558, 562,

As described above, *Craan* court's interpretation of the scope and applicability of flood control immunity seems overly broad and inconsistent with *Central Green* because it considered the entire flood control project, regardless of the characterization of the water causing the damage.

## CONCLUSION

It is unlikely that Congress will take legislative action to clarify the scope and applicability of recreational immunity under the Flood Control Act. Given the fifteen year gap between *James* in 1986 and *Central Green* in 2001, the U.S. Supreme Court may not choose to review the applicability of Flood Control Act immunity to FTCA claims involving recreational injuries on Corps dam sites. In the meantime, despite the decision in *Craan*, most lower federal courts are likely to apply *Central Green* and "consider the character of the waters that cause the relevant damage and the purposes behind their release" in determining the applicability of immunity under the Flood Control Act.

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James C. Kozlowski, J.D., Ph.D. is an associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: [jkozlows@gmu.edu](mailto:jkozlows@gmu.edu)  
Webpage: <http://mason.gmu.edu/~jkozlows>