

**DOES RISING WATER
GIVE RISE TO COMPENSATION?**
(A DISCUSSION OF TAKINGS IN THE CONTEXT OF REVERSED RECLAMATION)

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Introduction

It is well settled that flooding, in the most common sense, causes a compensable taking by virtue of physical invasion. That is, when government action diverts water onto otherwise dry land in a way that permanently prevents the owner from using the affected property (an effective ouster), constitutional principles require that the owner be compensated for the flooded land and related damages.¹ A classic example of this straightforward type of flooding is when storm water from a highway drains onto private land. Such takings may be whole or partial,

¹ For permanent ouster, courts generally have not required the continuous presence of flood waters. Flooding that is reasonably certain to recur (such as with rain-induced ponding) is considered a permanent condition which will support a takings claim. See Kendry v. State Road Dept., 213 So.2d 23 (Fla. 4th DCA 1968) *cert. den.* 222 So.2d 752 (Fla. 1969); Thompson v. Nassau County, 343 So.2d 965 (Fla. 1st DCA 1977); Martin v. City of Monticello, 632 So.2d 236 (Fla. 1st DCA 1994). Compare Dudley v. Orange County, 137 So.2d 863 (Fla. 5th DCA 1962), *app. disp.* 146 So.2d 379 (Fla. 1962), *cert. den.* 372 U.S. 959 (1963).

and exist without regard to the degree of diminution in the property's *overall* value or to the economic viability of remaining uses on any unaffected portions of a tract (those would be factors in non-physical takings which occur by virtue of legal regulation).²

Because flooding is usually a simple question of physical invasion, the reader may wonder why the topic of flooding is one of interest for a “regulatory takings” seminar. The reason is that flooding caused by deliberate cessation of flood control, while still not subject to the strictures of regulatory takings analysis, indirectly results from an exercise of the police power. That is, while the flooding of land is a physical occurrence, the decision to cease flood control is typically motivated by a new understanding of the environment and changed strategies for its protection. The purpose of this article is to probe whether this particular form of flooding is compensable.

The answer to that question involves the interaction of constitutional/equitable principles with emerging environmental management practices. It will have significant consequences for citizens

² See Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992) for the distinction between physical and regulatory takings analyses and the landmark decision of Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Unfortunately, courts occasionally confuse the two by misapplying regulatory takings analysis in flooding cases. For example, see Scruggin v. City of Grubs, 887 S.W.2d 283 (Ark. 1994).

and governments in states like Florida where massive land reclamation and drainage projects, such as those in the Everglades and the Kissimmee River basin, are being reversed to approximate historic natural conditions. This process is generally known as “environmental restoration.”³

Compensability

Cases dealing with reversal of major reclamation projects are predictably few because of the scale of those projects and the relatively recent shift in public policy away from reclamation (draining wet land) toward restoration (flooding dry land). The bulk of precedent relates to changes in smaller scale flood control measures and dates from the late

³ The withdrawal of flood control in the event of a flood emergency presents a different issue. It was held to be non-compensable in Dudley v. Orange County, 137 So.2d 859 (Fla. 5th DCA 1962), *appeal dismissed* 146 So.2d 379 (Fla. 1962), *cert. den.* 372 U.S. 959 (1963).

1800's to the mid-1900's.⁴ The cases are conflicting among jurisdictions and sometimes within them. Rather than a lengthy attempt to report and reconcile decisions from many jurisdictions,⁵ this article will focus primarily on Florida law as an illustrative overview of decisive issues. Though the outcome in other jurisdictions might be different, Florida cases highlight factors which have been pivotal in determining compensability generally.

As noted above, a prime example of reversed reclamation is the Florida Everglades restoration which aims to return the area to its original swampy condition after decades of drainage and cultivation. Whether the attempted return of land to its “natural” state after long-time flood control creates a right to compensation depends largely on whether there a cognizable property interest in established artificial drainage. While Florida

⁴ See P. H. Vartanian, Annotation, *Right of Riparian Landowners to Continuance of Artificial Conditions Established Above or Below Their Land*, 88 A.L.R. 130 (1934); P.H. Vartanian, Annotation, *Liability of Municipality or Other Governmental Subdivision in Connection with Flood Protection Measures*, 5 A.L.R.2d 57 (1949); F.M. Dougherty, Annotation, *Extinguishment by Prescription of Natural Servitude for Drainage of Surface Waters*, 42 A.L.R.4th 462 (1985); S.S. Tisher, *Everglades Restoration: A Constitutional Takings Analysis*, 10 Journal of Land Use & Environmental Law 1 (1994).

⁵To a large extent, this has already been done by other writers. See citations *supra* note 4.

law on this subject appears uncertain at first glance, a close examination of the existing cases supports compensability for flooding associated with cessation of flood control.⁶

Any uncertainty on this issue has been generated mostly by two federal decisions out of the Southern District of Florida. The first was Bensch v. Metropolitan Dade County, 798 F. Supp. 678 (S.D. Fla. 1992), *dism'd* 855 F.Supp. 351 (S.D. Fla. 1994). Bensch originated in the Florida state courts when landowners in the East Everglades (the 8½ square mile area) brought an inverse condemnation suit against Dade County, the South Florida Water Management District, and other agencies based on alternative takings theories (claiming a regulatory based on downzoning of the area and physical taking due to flooding caused by increased water deliveries through their property to the adjacent national park). The case was dismissed from state courts for failure to state cause of action because the complaint did not allege denial of all economically viable use in the regulatory count and did not allege permanent ouster in the flooding count. Bensch, 541 So.2d 1329 (Fla. 3rd DCA 1989) *rev. den.* 549 So.2d 1013 (Fla. 1989). Significantly, the state courts declined to rule on the water district's defense that there could be no taking unless the flooding exceeded the

⁶The author acknowledges that another writer reaches the opposite conclusion. See Tisher article, *supra* note 4. Readers should note that Tisher's work was supported by a *government* contract in connection with studies of South Florida's ecosystem management.

original “natural” condition of the land prior to any flood control. *Id.*, note 5.

Having been denied relief in state court, the Bensch plaintiffs brought a federal civil rights action in the Southern District Court. The water management district again moved to dismiss the takings-based claims, arguing that the flooding was the result of natural causes and that therefore the owners had no property interest in flood protection benefits, relying on two older federal cases: Creppel v. U.S. Army Corps of Engineers, 500 F.Supp. 1108 (E.D.La.1980) and U.S. v. Sponenberger, 308 U.S. 256 (1939). The owners overcame this argument by their allegation that the flooding exceeded even the former natural condition which, if proven, would certainly be compensable. The trial court denied the motion to dismiss. In *dicta*, however, the trial judge concurred with the Water district’s reliance on Creppel and Sponenberger. Bensch, *supra*, 798 F.Supp. at 683.

Aside from the fact that the Bensch court’s view on compensability was mere dicta, Creppel and Sponenberger both involved the abandonment of flood control plans *before* the lands in question had ever been reclaimed (they had never been drained). Both cases are highly distinguishable from instances where flood control has been implemented and land has been cultivated or otherwise used for long periods of time with substantial investment by owners. Even in hypothetically agreeing with the Water district, the federal court acknowledged that their application would be an

“extension” of Crepel and Sponenberger. In any event, the Bensch decision does not provide any meaningful precedent on the issue of restoration because the plaintiffs’s allegation of affirmative flooding over the natural condition essentially rendered it moot.

The other federal case which *might* cause some confusion on this compensability issue is South Dade Land Corp. v. Sullivan, 853 F.Supp. 404 (S.D. Fla. 1993) in which East Everglades farmers (in the “Frog Pond” area) sought an injunction against the Army Corps to prevent it from maintaining high water levels in the national park (which had caused elevations in the water table that interfered with farming operations). The owners also claimed that the Corps activity amounted to a temporary taking. With regard to the taking issue, the court simply held that a takings claim could not support injunctive relief because the remedy is one for damages. The opinion simply does not address whether there is a property interest in continued drainage.⁷

Upon close examination, these federal East Everglades disputes have no precedential value on the issue at hand. A review of Florida state cases on the subject, however, reveals some meaningful precedent in favor of compensability in the environmental restoration context.

⁷In advocating against compensability for Everglades restoration, Tisher’s article makes much of the fact that the plaintiffs in Sullivan voluntarily dismissed their complaint. She does not mention the fact that the dismissal was motivated by favorable settlement. Tisher, *supra* note 4, at p. 24.

It is helpful to first identify what Florida courts have considered *not* to be a taking in the flood control context. The case of Arundel Corp. v. Griffin, 103 So. 422 (Fla. 1925) provides a useful illustration. In Arundel, landowners in the Everglades sued another landowner and the drainage district for alleged collusion in negligently operating drainage operations so that their lands remained flooded. In addition to a tort count, the landowners alleged a taking. The Florida Supreme Court held that there was no taking because the flooding was not due to the acts complained of, but rather, to the fact that the subject lands were still “swamp and overflowed lands” at the time. In this respect, Arundel is consistent with the results in Creppel and Sponenberger. No reclamation had occurred upon which the owner could have relied or claimed any interest.

In contrast, there are two Florida cases dealing directly with reversal of *established* flood control projects which support compensability for such flooding. Farish v. South Florida Water Management District, 515 So.2d 369 (Fla. 4th DCA 1987) and South Florida Water Management District v. Steadman Stahl, P.A. Pension Fund, 558 So.2d 1087 (Fla. 4th DCA 1990), *rev. den.* 574 So.2d 143 (Fla. 1990).

Farish involved a cattle ranch bordered by the Kissimmee River and a drainage canal. Beginning in 1948, a federal flood control project had straightened the meandering Kissimmee and “reclaimed” thousands of wetland acres for agricultural and other uses. Many years later the water district later decided to restore the hydrology of the river valley by

damming the drainage canal running adjacent to the cattle ranch.. The rancher claimed inverse condemnation on the basis that 67% of his ranch was within the original flood plain and *would* be flooded. The rancher additionally alleged that there was funding to acquire the property in the area but that the district persisted in making him unreasonable offers.

The rancher's complaint was dismissed by the trial court for failure to state a cause of action. In a terse opinion, the Fourth District affirmed without discussion, citing only Div. Admin. Dept. of Transportation v. Frenchman Inc., 476 So.2d 224 (Fla. 4th DCA 1985), *pet. for rev. disp'd*, 495 So.2d 750 (Fla. 1986) to which readers must refer to discern the court's reasoning.

Frenchman involved a strip taking from a golf course for road widening purposes. Its only applicable point to Farish was that mere future intention to acquire cannot deprive an owner of the right to lawfully use the property to be acquired.⁸

By citing Frenchman as the sole basis for its decision, the Farish court clearly conveyed that its dismissal of the rancher's complaint was

⁸ The condemnor in Frenchman had asserted an affirmative defense to severance damages claimed by the golf course owner, contending that because the owner knew about the planned taking, he should not be compensated for the loss of improvements knowingly made in the future right of way. The trial court's struck this defense and was affirmed on the principle stated in the text above.

merely because the claim was premature. Because the very basis of the owner's claim was that his property would be flooded upon return to the natural condition, the court's reasoning clearly implies that compensation would be due upon *actual* cessation of flood control.

If the import of Farish seems subtle, one need look no further than the Steadman Stahl case to be convinced of the compensability for flooding in the wake of a "change in water management policies." *Id.*, 558 So.2d at 1088. In Stahl, owners of property in an area in west Broward County, known as the "Everglades Buffer Strip," successfully maintained a takings claim for flooding which resulted from a water district's elevation of water levels in an adjacent water conservation area. (See drawing attached to this article.) The opinion reasoned that "there was substantial competent evidence that even after the initial construction of the water management project, *the land in question had beneficial uses*" and that the plaintiffs' lands were continually flooded after a 1982 change in water management policy.

The relevant appellate briefs reveal, among other things, that the "natural" condition of the land had been one of seasonal inundation, typical of the original Everglades hydrology. In the late 1940's, a study by the U.S. Army Corps of Engineers prompted construction of a system of levees, ditches and pumps to provide flood control and to prevent salt water intrusion. The plaintiff's property was included in the area intended by the Corps and Congress to benefit from the drainage provided by the system,

which was completed in 1952. Until 1972, water levels in the system were maintained by the local water management district according to the original U.S. Army design criteria. Around 1972, however, the water district began to alter the management of the system because of ecological concerns. By 1982, changes to the system caused continual knee-deep flooding on the property which had previously enjoyed beneficial uses.

The water district strenuously contended that the owner's takings claim should be denied because the pre-project water levels on site exceeded the knee-deep conditions of which the owner complained. In other words, the district argued there should be no compensation for flooding when the flooding would have occurred naturally in the historic condition. The court specifically rejected the district's contention by finding the beneficial uses enjoyed after the initial phase of the project had been taken by the inundating effects of the change in water management. It is quite apparent that the Steadman court recognized the beneficial uses facilitated by the original water management policy had become a compensable property right.

Though Farish and Steadman Stahl are the only Florida cases located by this author which deal specifically with environmental restoration, language in other Florida cases echoes the concept of a compensable interest in existing beneficial uses, even though not existing in the historic natural condition.. See Department of Transportation v. Burnette, 384 So.2d 916, 919-920 (Fla. 1st DCA 1980) and Village of Tequesta v. Jupiter

Inlet Corp., 371 So.2d 663 (Fla. 1979).

The focus on beneficial uses in this context is rooted in the equitable concepts of estoppel, obviously at play in Steadman Stahl and implicit in Farish. An owner's reasonable reliance on the original water management policy drives recognition of the resulting beneficial uses as a compensable (that is, vested) property right. A sampling of out-of-state cases further illustrates this point.

For example, the California Supreme Court required compensation to a landowner who had purchased land and made substantial expenditures to operate its business on site, in reliance upon the city's diversion of water from a lake bed in Natural Soda Products Co. V. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12 (Cal. 1943). The dry lake bed contained chemicals very valuable for the manufacture of soda products. Upon obtaining mineral leases to mine the lake bed, the soda company purchased land on the lakeshore, built plants, and installed piping to pump the chemicals to the plants. Nineteen years later, the city restored the natural flow of waters to the lake, preventing further operation of the business. Compensation was required despite the return to the "natural" condition of the lake. See also Lake Elysian High Water Level v. Clarke, 293 N.W. 140 (Minn. 1940) where the Minnesota Supreme Court found a compensable property interest in an artificial drainage condition for which owners had been assessed. The owner's property rights were no less protected because the cessation of drainage was to correct unforeseen environmental damage caused by the

drainage.

Conclusion

A careful reading of the few Florida cases which directly address flooding resulting from environmental restoration indicates that Florida courts are likely to recognize takings where established flood control has fostered beneficial uses of land, even if those uses would not have been possible in the natural condition. While the government has no obligation to continue artificial drainage in light of new environmental understandings, under existing Florida precedent, it nonetheless has an obligation to compensation for the “ouster” of beneficial uses. This estoppel-based view is shared by some jurisdictions and not by others, but it will figure significantly in the coming years as massive restoration projects get further underway.⁹

⁹The author gratefully acknowledges the assistance of Laura N. Camp, Esquire.