WATER LOG

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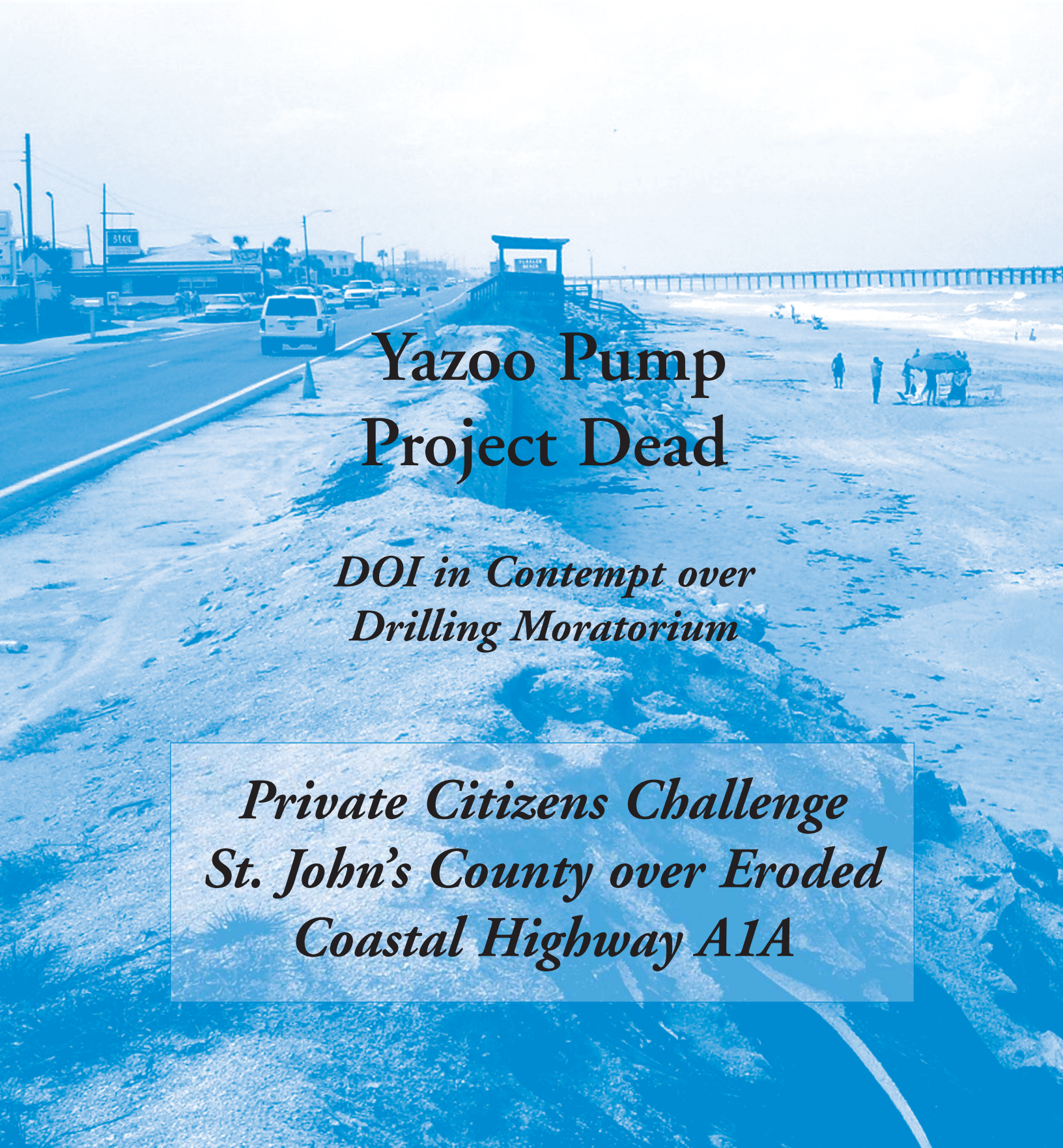

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Water Log

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Cover photograph of Highway A1A courtesy of Marc Averett.

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http://conference.ifas.ufl.edu/CIMR/agenda.htm

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June 5-7, 2011
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Coastal Zone 2011 Conference

July 17-21, 2011
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EPA's Veto of the Yazoo Pump Project Upheld

Mary McKenna[1]

On March 28, 2011, the U.S. District Court for the Northern District of Mississippi upheld the Environmental Protection Agency's (EPA) decision to veto the Yazoo Backwater Area Pump Project under Section 404(c) of the Clean Water Act (CWA). Finding that the CWA's Section 404(r) limited exemption to the EPA's veto authority was inapplicable to the Pump Project, the court granted the EPA's motion for summary judgment, effectively closing the case.

Background

The Yazoo Backwater Area Pump Project (Pump Project) is a decades-old U.S. Army Corps of Engineers (Corps) flood-control project in the Yazoo Backwater Area, a 630,000-acre area of wetlands, farmland and forests situated in the Mississippi Delta between the Mississippi and Yazoo Rivers.[2] While the primary component of the Pump Project is a single hydraulic pumping station that would pump water out of the Yazoo Backwater Area when the Mississippi River runs high, the project also includes slightly more than 60,000 acres of reforestation of agricultural land.[3] The part of the Pump Project at issue in the instant case concerns the construction of the pump station.

EPA's Veto Power under Section 404(c)

The CWA regulates the discharge of dredged or fill material into the navigable waters of the United States through a permit system under Section 404 of the Act.[4] The Corps can issue a Section 404 permit so long as the dredged or fill action complies with the EPA's regulatory requirements, set forth in Section 404(b). Under Section 404(c), however, the EPA may prohibit, restrict or deny discharges of dredged or fill material into any U.S. waters, including wetlands, when it "determines, after notice and opportunity for public hearing, that such discharge into the waters of the United States will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas."[5] Section 404(c) is therefore commonly called the EPA's "veto authority."

. . . the EPA raised concerns about the Pump Project's "impacts to wetlands and associated fish and wildlife resources, . . ."

In the instant case, the EPA raised concerns about the Pump Project's "impacts to wetlands and associated fish and wildlife resources, its alleged potential to exacerbate existing water quality problems in the Yazoo Backwater Area, the purported inadequacy of the proposed compensatory mitigation, and the uncertainty associated with the proposed reforestation."[6] The EPA participated in a series of interagency meetings with the Corps and representatives of the Board of Mississippi Levee Commissioners (Levee Board), which oversees flood control and drainage projects in the Mississippi Delta. While the Levee Board—comprised of elected officials from several Mississippi counties—supported the project, the EPA continued to voice its concerns and discussed nonstructural floodplain management alternatives in the Yazoo Backwater Area. The EPA also

expressed similar reservations in meetings with the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ). Despite improvements made to the Pump Project, the EPA remained concerned about the nature and the extent of the anticipated adverse environmental impacts on fishery areas and wildlife.

Pursuant to Section 404(c) of the CWA, the EPA initiated a Section 404(c) review of the proposed project in February 2008. After extensive evaluation, the EPA vetoed the pump station aspect of the project in September 2008, based on the belief that the Pump Project would significantly degrade at least 67,000 acres of wetlands and other waters of the United States, which in turn would have an unacceptable adverse effect on wildlife and fisheries resources.[7] The EPA's final determination also suggested that less environmentally damaging practicable alternatives to improve flood protection existed.

The Levee Board sued the EPA in August 2009, challenging the EPA's Section 404(c) veto authority to halt the project. The Levee Board contended that Section 404(r) of the CWA preempted the EPA's veto because the project had long ago been approved by Congress. In November 2010, the National Wildlife Federation, the Mississippi Wildlife Federation, and the Environmental Defense Fund joined the lawsuit as intervenor-defendants, siding with the EPA.

Exemption under Section 404(r)

In 1977, Congress amended the CWA, exempting certain federal construction projects from Section 404 permit requirements. Specifically, Section 404(r) added a narrow exemption to federal projects "specifically authorized" by Congress; to qualify for a Section 404(r) exemption, (1) the effects of the discharge, including consideration of Section 404(b)(1) guidelines, must be included in an environmental impact statement (EIS) for the project pursuant to the National Environmental Policy Act (NEPA); *and* (2) the EIS must be submitted to Congress before the actual discharge of dredged or fill material and prior to the authorization of the project or the appropriation of funds for construction.[8] In short, "a federal project 'specifically authorized' by Congress may be exempt from the EPA's veto authority under Section 404(c) if the requirements of Section 404(r) are met."[9]

An EIS was never submitted to Congress

The Levee Board argued that a Final EIS was submitted to Congress before an appropriation of funds for the construction of the Pump Project via cover letters submitted "for information" to the Chairmen of the Public Works Committees of the House and Senate in March 1983.[10] The Levee Board contended that these letters, which stated, among other things, that a final EIS was enclosed, equated to a submission to Congress.[11] The court, however, disagreed, finding the record "void of any indication showing that the Final EIS mentioned in the March 28, 1983 letters related to the Pump Project and, even if the Final EIS did refer to the Pump Project, such an EIS was not in final or adequate form as required under Section 404(r),"[12] given that the Pump Project was still pre-decisional at the time.

Assuming, nevertheless, that the court viewed the EIS referenced in the March 28, 1983 letters as relating to the Pump Project and as being final and adequate, the court still found no evidence that the EIS was "submitted to Congress" within the meaning of Section 404(r). The court held that Section 404(r) requires a submission to the entire body of Congress, as opposed to a particular committee.[13] Because the March 28, 1983 letters were addressed only to the Chairmen of the Public Works Committees of the House and the Senate, and not to Congress as a whole, the court found that they were not formally submitted to Congress as required by Section 404(r). Moreover, the court underscored that Executive Order 12,322 (issued by President Reagan in 1981 to ensure efficient and coordinated planning and review of water-resources programs and projects) directs that an agency must submit a proposal, plan or report relating to a federally assisted water-resources project to the Director of the OMB before it submits the proposal, plan or report to Congress.[14] Here, the court found no evidence that a report on the Pump Project was submitted to the OMB by the EPA or the Corps. The court further flagged that the U.S. House of Representatives' official rules state that all communications from executive departments intended for the consideration of any committees of the House must be addressed to the Speaker of the House for referral to appropriate committees, and that these rules were in effect 1983.[15] These House rules were also not followed.

Lastly, the court dismissed the Levee Board's separation of powers argument. The Levee Board contended that because Congress appropriated funds to the Pump Project in the Energy and Water Development Appropriation Bill of 1985 that Congress must have viewed, evaluated, and approved a Final EIS related to the Pump Project, creating an exemption under Section

404(r). The court determined that even if funds were allegedly appropriated in the Energy and Water Development Appropriation Bill of 1985, it did not necessarily mean that Congress had received the EIS; Congress appropriates funds to a vast majority of federal projects in which the appropriate agency evaluates the EIS and the Corps issues a permit.[16] Finding no evidence to support that Congress ever received—much less evaluated or approved—an EIS for the Pump Project, Section 404(r) was never triggered, mooting a separation of powers issue.

Because the court found no evidence that a final and adequate EIS was "submitted to Congress," it found the CWA's Section 404(r)'s exemption inapplicable and upheld the EPA's Section 404(c) veto authority regarding the Pump Project.

Conclusion

The court dismissed the lawsuit, upholding the EPA's veto power in this particular case. That veto authority, however, is sparingly used; the EPA's veto of the Pump Project marks one of only twelve projects ever vetoed since the CWA's enactment in 1972.[17] It remains to be seen whether the Levee Board will appeal this ruling. In the meantime, the Yazoo Backwater Area Pump Project is dead, bringing this decades-long project to a close.

Endnotes

1. 2011 J.D. Candidate, University of Mississippi School of Law.
2. Bd. of Miss. Levee Comm'rs v. U.S. Envtl. Prot. Agency, 2011 WL 1159374, *5-8 (N.D. Miss. 2011).
3. Final Determination of the U.S. Environmental Protection Agency's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project, Issaquena County, Miss. 7 (2008), *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/ upload/2008_09_02_wetlands_Yazoo_Final_Determination_Signed_8-31-08.pdf.
4. 33 U.S.C. § 1344.
5. 33 U.S.C. § 1344(c).
6. *Bd. of Miss. Levee Comm'rs*, 2011 WL 1159374 at *8.
7. *See supra* note 3.
8. 33 U.S.C. § 1344(r).
9. *Bd. of Miss. Levee Comm'rs*, 2011 WL 1159374 at *2.
10. *Id.* at *12.
11. *Id.*
12. *Id.* at *14.
13. *Id.* at *15.
14. *Id.*
15. *Id.* at *16.
16. *Id.* at *18.
17. EPA, Clean Water Act Section 404(c) "Veto Authority," http://www.epa.gov/owow/wetlands/pdf/404c.pdf.

As this article went to press, the Levee Board appealed this decision to the U.S. Court of Appeals for the Fifth Circuit.

Photograph of pump project in progress on the Little Calument River courtesy of the USACE.

Dept. of Interior Held In Contempt over Drilling Moratorium

Barton S. Norfleet[1]

Last year's drilling moratorium, issued in the wake of the *Deepwater Horizon* oil spill, has been the subject of ongoing litigation between the Department of Interior (DOI) and various owners and operators of offshore drilling support services (collectively Hornbeck Offshore Services). In the latest development, Hornbeck Offshore Services brought a civil contempt action against the DOI.[2] Hornbeck Offshore Services argued that the DOI violated an earlier court order, and therefore, Hornbeck was entitled to an award of attorney fees. In February, a Louisiana federal district court agreed with Hornbeck Offshore Services and ordered DOI to pay Hornbeck's attorney's fees.

Background

After the April 2010 explosion on BP's *Deepwater Horizon* rig and the resulting oil spill, President Obama ordered the DOI to conduct a review of the incident. On May 27, 2010, the DOI released a review which suggested that all blowout preventer equipment and emergency systems be recertified, new design and testing procedures be implemented, and increased safety measures be required on all rigs.[3] Although the review was said to have been peer reviewed by a team of scientists, some of these identified scientists later denied participating in the review.[4] On May 28th, the DOI, exercising its authority under the Outer Continental Shelf Lands Act (OCSLA), placed a moratorium on all drilling operations in the Gulf of Mexico which were drilling at depths greater than 500 feet for the purpose of implementing improved safety measures. The OCSLA gives the DOI power to issue a moratorium if "there is a threat of serious, irreparable, or immediate harm or damage to life, to property, to any mineral deposits, or to the marine, coastal, or human environment."[5]

Hornbeck Offshore Services and others challenged the moratorium in court, and sought an injunction to prevent possible negative effects on individual business, local economies, and the economy at large.[6] On June 22, 2010, the court granted the injunction finding the DOI's decision arbitrary and capricious. According to the court, the moratorium of May 28, 2010 made no reference to any "irreparable harm," did not contain any predictions as to the length of time necessary to introduce proposed safety measures, and suggested that operations conducted at depths greater than 1,000 ft., not 500 ft., carried more complex risks than shallower operations.[7]

During the two weeks following the lifting of the moratorium, the DOI repeatedly announced that a new moratorium would be issued soon and therefore no new drilling commenced. On July 12th, the DOI rescinded the first moratorium and immediately enacted a second which eliminated the "drilling at 500 ft. standard" and imposed a ban on rigs which used "subsea blowout preventers or surface blowout preventers on a floating facility."[8] According to the court, this new moratorium, although textually different, was essentially identical to the first as all of the rigs drilling at 500 ft. used the blowout preventers at issue. The second moratorium also upheld the same expiration date of November 30, 2010. The new moratorium was lifted on October 12, 2010, and in November it was revealed that a White House official had made adjustments to the Safety Report before it was released which had created the misleading appearance of the Report being scientifically peer reviewed.[9] The plaintiffs then initiated a suit against the DOI under a civil contempt and bad faith claim in hopes of recovering their attorney fees.

Civil Contempt

Hornbeck Offshore Services chose to make a civil contempt claim because it wanted compensation of attorney's fees, and a contempt claim can offer monetary compensation to parties who have suffered "unnecessary injuries or costs because of contemptuous conduct."[10] To prove a civil contempt claim, the aggrieved party must show "by clear and convincing evidence: 1) that a court order was in effect, 2) that the order required certain conduct by the [government], and 3) that the [government] failed to comply with the court's order."[11] The party must also show that the evidence in relation to the contempt charge is "so clear, direct and weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case."[12]

In this case, the court found that the first two requirements were clearly met. It became Hornbeck Offshore Services' burden to prove the third element (that the government failed to comply with the court's order) by producing evidence meeting the clear and convincing standard. Hornbeck Offshore Services argued that the DOI "showcased its defiance" of the first injunction by failing to seek a remand, continually expressing an intention of resolving and reapplying the moratorium, and notifying the operators that a new moratorium would soon be issued. On February 2, 2011, the court ruled in favor of Hornbeck Offshore Services stating that the "showcase of defiance" elements along with the issuance of a second essentially identical moratorium so soon after the first injunction constituted enough clear and convincing evidence to establish that the DOI was in fact in contempt of court.[13]

Conclusion

Although the DOI was ordered to pay Hornbeck Offshore Services' attorney's fees, no dollar amount has been set. The case was handed over to another magistrate judge to decide how much compensation is warranted. The DOI has currently appealed the case to the U.S. Fifth Circuit Court of Appeals (New Orleans), and a hearing has been slated for the week of June 6th, to be presided over by a panel of three federal judges.[14]

In a related matter, the same court, on February 17, 2011, issued an order requiring the DOI to respond to seven drilling permit applications within thirty days of the ruling.[15] However, the DOI was relieved of this obligation when the Fifth Circuit, responding to the DOI's appeal, stayed the lower court's order until the outcome of the DOI's appeal is determined. Currently there have been only two new deepwater (OCS) drilling permits issued since the lifting of the second moratorium.

Endnotes

1. 2012 J.D. Candidate, University of Mississippi School of Law.
2. Hornbeck Offshore Services, LLC v. Salazar, No. 10-1663, 2011 WL 454802 (E.D.La. Feb. 2, 2011).
3. Dept. of Interior, Increased Safety Measures for Energy Development on the Outer Continental Shelf, May 27, 2010, http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598.
4. *Hornbeck Offshore Services*, 2011 WL 454802, at *1.
5. 43 U.S.C. § 1334(a)(1).
6. Hornbeck Offshore Services, L.L.C. v. Salazar, 696 F.Supp.2d 627, 631 (E.D.La. 2010).
7. *Id.* at 632.
8. *Hornbeck Offshore Services*, 2011 WL 454802, at *1.
9. *Id.* at 2.
10. *Id.*
11. *Id.* (citing Am. Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574, 581 (5th Cir.2000)).
12. Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 582 (5th Cir.2005).
13. *Hornbeck Offshore Services*, 2011 WL 454802, at *3.
14. Laurel Brubaker Calkins & Allen Johnson Jr., *Appeals Court to Hear Arguments on Gulf Drilling Permit Delay,* Bloomberg, April 8, 2011, http://www.bloomberg.com/news/2011-04-08/oil-industry-s-gulf-drill-ban-appeal-to-get-june-hearing-in-new-orleans.html.
15. *Appeals Court Issues a Stay on Drilling Ruling*, Associated Press, March 15, 2011, *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/03/appeals_court_issues_a_stay_on.html.

Photograph of DOI Secretary Ken Salazar and oiled brown pelican clean-up courtesy of USFWS.

Citizens and County Take Coastal Highway A1A Dispute to Court

James F. Choate III[1]

A trial court in Florida recently rejected a challenge by private property owners to St. Johns County's management of Old A1A, a coastal road so plagued by inundation from hurricanes and storms that large portions of the road are no longer passable by automobile.[2] Specifically, the Seventh Judicial Circuit of Florida granted summary judgment for the County, reinforcing both the discretionary nature of St. Johns County's duty to improve Old A1A, as well as the County's discretion in providing emergency services to the property owners. Within the ruling, the court denied plaintiff residents' requested injunctive relief (e.g. requiring the County to repair and maintain the road), and rejected both takings challenges (e.g. diminished property access, and temporary moratorium on construction).

Background

Summer Haven, founded as a seasonal resort in the late nineteenth century, is one of the oldest beach communities along Florida's east coast, and sits on a narrow Atlantic barrier island south of St. Augustine, FL. Today, the community consists of a 1.6 mile subdivision of approximately sixty-five residential lots located at the southernmost tip of St. Johns County; it is bordered by the Atlantic Ocean to the east and the Summer Haven River to the west. Access to Summer Haven is provided by a county road known as Old A1A, situated at the doorsteps of the Atlantic Ocean, and providing the only ocean buffer for the Summer Haven residences.

Due to chronic and periodic ocean inundation for more than three decades, Old A1A is now nearly nonexistent over many portions of the 1.6 mile roadway. Documented degradation of the road dates back to 1979 when the State abandoned this stretch of road to the County, and rerouted S.R. A1A westward of the Summer Haven River. At that time, only three residences existed along Old A1A. Although still passable when the County first acquired the road, significant coastal erosion, storms, and tides had already begun to undermine the roadway and create unpaved sections. Even so, residential construction continued as twenty-five additional residences along Old A1A have been built since County acquisition. In 1984, a series of storms destroyed approximately one mile of the road. Despite its deterioration, the county chose not to abandon the road fearing public beach access to the Atlantic Ocean would be lost along this portion of the county if the road were abandoned. Nevertheless, very little money was spent on maintenance and repairs. However, in 2000 the County obtained Federal Emergency Management Agency (FEMA) funds to make emergency repairs to the road as temporary fixes to significant hurricane damage.

In 2004, hurricanes again inundated many portions of Old A1A, leaving it severely damaged. In response, the County enacted a temporary one-year moratorium on building permits at Summer Haven as a means to protect the public's health, safety, and welfare while investigating potential ways to improve public safety. During this time, the County conducted an engineering study to assess options and used FEMA money to repave the southern section of the road. The study concluded that a $13 million dollar beach renourishment program was needed, with an additional $5 to $8 million expenditure every three to five years. After a thirty-six month ban on building permits, the County lifted the moratorium in September 2008.

Today, less than a third of the road is paved while the majority of the roadway is covered by sand and

requires four-wheel drive vehicles to navigate. The northern most part of the road has all but disappeared, and a new inlet has formed, threatening to destroy significant portions of Old A1A altogether. Due to the unsafe condition of the roadway, the County has refused to dispatch large fire trucks for emergency calls along Old A1A. Current estimates to adequately restore and protect Old A1A involve an initial investment of around $7 to $8 million for dune raising, with an additional $4.5 million every eight to ten years. Because such sums grossly exceed the County's budget for road improvements and maintenance, the County is simply refusing such expenditures. Summer Haven residents believe the road will disappear completely in the next five to ten years.

Trial Court Decision

Frustrated by the lack of permanent solutions to the deteriorating roadway, residents at Summer Haven filed suit against St. Johns County alleging 1) a duty to repair and maintain Old A1A in a safe, passable condition, 2) a duty to provide emergency services to Summer Haven residents, and 3) inverse condemnation takings claims for both the loss of access to the properties and the temporary moratorium on building permits. On May 21, 2009, the court granted summary judgment for the County on all counts, finding no duty under Florida law 1) to provide fire protection services to the residents, or 2) to repair or restore Old A1A other than as established at the discretion of the County. Looking to relevant Florida statutory law governing the "powers and duties" of Florida counties, the court found Fla. Stat. § 125.01 "long on 'powers' but woefully short on 'duties.'"[3] Ultimately, the court concluded that the statute lacked a "statutory mandate for the county to provide and maintain roads."[4]

The court then relied upon Florida Supreme Court precedent for the proposition that "there is no liability for the failure of a governmental entity to build, expand, or modernize capital improvements such as buildings and roads."[5] Under Florida law, sovereign immunity is generally waived for a governmental entity's operational-level actions. But as recognized by the court, "judgmental, planning-level" decisions are immune from suit. As highlighted by the court, County expenditures from 2000 to 2005 averaged $244,305 a year per mile for Old A1A, in contrast to an average of $9,656 a year per mile for all other county roads. Thus, likely swayed by the large-scale expenditure needed to restore the road, the court construed the maintenance and repairs of Old A1A as a discretionary capital improvement decision, which effectively sheltered the County from suit.

The court further acknowledged that although Florida case law permits a property owner to seek declaratory relief where a county puts a road on a "no maintenance" schedule,[6] such was not the case here due to the County's repeated attempts to restore Old A1A. In distinguishing prior Florida cases, the court reinforced that under Florida law, the "frequency, quality, and extent of maintenance of . . . roads was discretionary with the county," and therefore free of judicial interference according to relevant Florida Supreme Court precedent.[7]

Turning to the residents' inverse condemnation takings claim based upon diminished property access, the court pointed to the residents' inability to produce "any Florida case holding that governmental inaction can be the basis for a loss of access inverse condemnation claim."[8] An inverse condemnation claim is "an action brought by a property owner for compensation from a governmental entity that has [allegedly] taken the owner's property without bringing formal condemnation proceedings."[9] Ultimately, the court denied the takings claim, and ruled that alleged County inaction to improve a road severely damaged by natural forces (e.g. storms and wave action) cannot support an inverse condemnation suit. The court similarly denied the residents' takings

Photograph courtesy of Julian Colton.

claims (based on the temporary building moratorium along Old A1A), ruling that the temporary ban was reasonably related to the County's objective of protecting the public health and safety. The court also found the claim perpetually unripe due to the moratorium's repeal.

In recognition of the endless financial expenditures the County faces in attempting to fix Old A1A, the court commented in dictum that "[g]iven the 'new inlet' at Summer Haven, it would be impractical if not impossible to restore the road."[10] In similar language, the court further noted the "futility" of such a decision, stating that "[i]t is doubtful that there is any permanent fix to the erosion problem."[11]

The Appeal

The case is currently on appeal to the Florida Fifth District Court of Appeal ("5th DCA"), a state appeals court.[12] At oral arguments held October 19, 2010, the residents renewed their arguments on all counts, and strongly reinforced their belief that the County must 1) fix the road and restore access, 2) abandon the road, or 3) compensate them for loss of access to their property. Questions from the appellate judges focused on the existence of a duty to maintain the road under Florida law, the legal standard to determine whether the County had met such a duty, and whether a *de facto* abandonment had occurred under the present facts even though the County had not formally abandoned Old A1A.

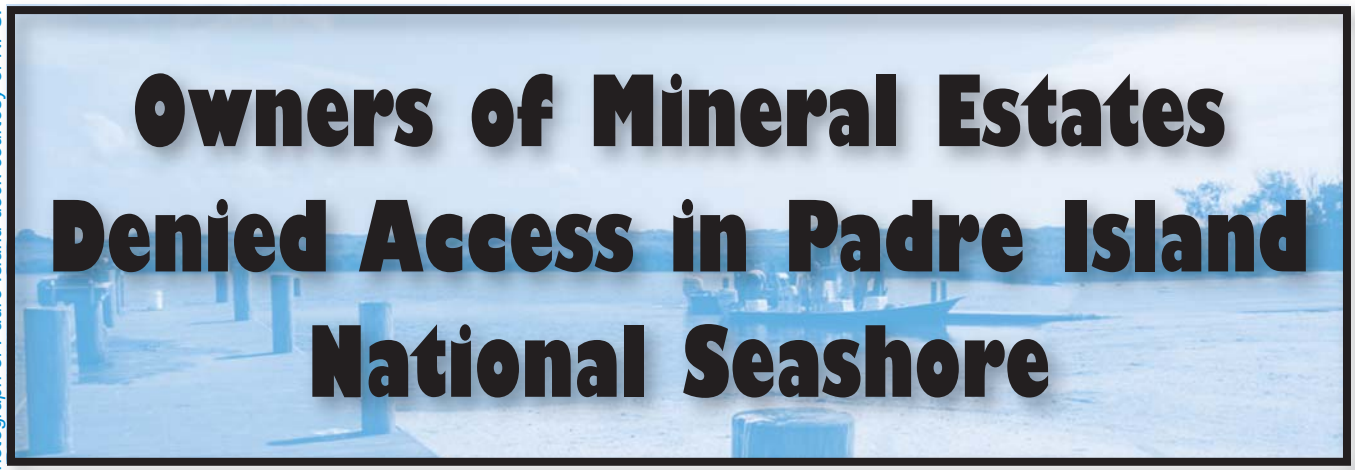
Particularly colorful discussion also ensued over whether "one toy shovel of sand" of road maintenance would meet the requisite legal standard for the duty to maintain.[13] In response, the County asserted a separation of powers argument claiming that such capital expenditures were discretionary, political decisions free from judicial interference. The County further argued that the road simply could not be considered to be on a "no maintenance" schedule as evidenced by the millions of dollars poured into the restoration efforts over the last decade; and the County highlighted the continuing, albeit limited, restoration efforts as a result of regulatory limitations imposed by the Florida Department of Environmental Protection (e.g. beach compatible sand only, limited asphalt restoration, no limerock/shell stabilization measures).[14] As for the inverse condemnation takings claim for loss of property access, the County emphasized the lack of any U.S. cases that County inaction (e.g. failing to improve a road) might cause an inverse condemnation taking for which compensation was owed.

Conclusion

The outcome of this case should be of supreme interest to similarly-situated, coastal property owners around the State of Florida, as future, similar scenarios seem all too probable. Unfortunately, Summer Haven seemingly marks the judicial starting line for local governments willing to concede defeat to large-scale coastal erosion in the face of extreme financial corrective measures, while still refusing to officially abandon their respective coastal roadways as a means of preserving the public right of way to the beach. As the case currently stands, St. Johns County has mounted a highly interesting legal defense (e.g. refusing to spend millions to correct Mother Nature, while similarly refusing to abandon the road to preserve the public right of way) to which a Judge of the Fifth DCA has likened to a "romantic entanglement" of sorts, never before seen in a Florida property case.[15] Whether other local governments around the State will follow the County's lead for similar roadways seemingly condemned by Mother Nature is what makes this case fascinating. A decision is expected later this year.

Endnotes

1. J.D. (Stetson University College of Law), 2009; LL.M. (University of Florida), 2010; Attorney, U.S. Army Corps of Engineers, Charleston S.C. All views expressed in this article are those of the author in his individual capacity and do not necessarily reflect those of the Department of Defense, the U.S. Army, or the U.S. Army Corps of Engineers, which have indicated neither approval nor disapproval of the positions the author takes in this article.
2. Jordan v. St. Johns County, Case No. CA05-694 (Fla. 7th Jud. Cir. May 21, 2009), *appeal docketed*, Case No. 5D09-2183 (Fla. 5th Dist. Ct. App. June 23, 2009).
3. *Id*. at 7.
4. *Id.*
5. *Id.* at 8 (citing Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912, 920 (Fla. 1985)).
6. Ecological Development, Inc. v. Walton County, 558 So.2d 1069 (Fla. 1st Dist. Ct. App. 1990).
7. *St. Johns County*, Case No. CA05-694, at 10.
8. *Id.* at 13.
9. Black's Law Dictionary 233 (2d Pocket ed. 2001).
10. *St. Johns County*, Case No. CA05-694, at 23.
11. *Id.*
12. Jordan v. St. Johns County, Case No. 5D09-2183 (Fla. 5th Dist. Ct. App. June 23, 2009).
13. Oral Argument video transcript, at 19:20-23:10 minutes, Jordan v. St. Johns County, No. 5D09-2183 (Fla. 5th Dist. Ct. App. June 23, 2009), available at http://www.5dca.org/ArchivedOAs/2010/Aoa10-19-10.pdf.
14. *Id.* at 25:11 – 25:38 minutes.
15. *Id.* at 24:50 – 25:38 minutes.



Photograph of Padre Island dock courtesy of NPS.

Owners of Mineral Estates Denied Access in Padre Island National Seashore

April Killcreas[1]

The owners of mineral estates in the Padre Island National Seashore filed a lawsuit against the National Park Service, alleging that the Park Service's oil and gas management plan exceeded its regulatory power over the Seashore. The provisions of the oil and gas management plan at issue restrict access of oil and gas developers seeking to exploit the mineral deposits beneath Sensitive Resource Areas of the Seashore. The U.S. District Court for the Southern District of Texas agreed with the owners of the mineral rights, and the Park Service appealed the ruling to the U.S. Fifth Circuit Court of Appeals. In January, the Fifth Circuit denied the owners of the mineral estates the rights of ingress and egress, effectively preventing these oil and gas developers from accessing and developing the Seashore's subsurface minerals.

Background

Before Congress established the Padre Island National Seashore in 1962, this previously inaccessible barrier island near Corpus Christi, Texas, had become a prime target for both real estate and oil and gas developers.[2] Under the Seashore's Enabling Act, which formally established Padre Island as a National Seashore Recreation Area, Congress authorized the National Park Service to acquire privately owned land to become part of the Seashore; however, Congress mandated that the Park Service could only obtain state-owned lands from Texas with the state's approval.[3]

In 1963, Texas passed a Consent Statute, which authorized the federal government to obtain both public and private lands on Padre Island.[4] In granting this authority, Texas allowed the federal government to acquire title only to the Island's surface lands, reserving its entire mineral estate and permitting the use of the surface land for purposes related to mining, developing, or removing the land's underlying minerals, including oil and gas. Furthermore, in this Consent Statute, Texas permitted the federal government's acquisition of private land for the recreation area, as long as no acquisition would deprive the grantor or successor of the right of ingress and egress (the right to enter and leave the property) in order to explore for and develop oil and gas deposits.[5]

As a national recreation area, Padre Island must be managed by the Park Service to preserve the island's environment for recreational uses while also maintaining the legal rights of the mineral estates' owners by permitting them to extract oil and gas.[6] Often, these two goals create tension, as demonstrated by the Park Service's Oil and Gas Management Plan of 2001. This Plan establishes areas of Padre Island as Sensitive Resource Areas (SRAs) containing rare or vulnerable resources; to preserve the surrounding environment, many of these areas are either closed to drilling operations altogether or require such operations to be designed to avoid or reduce impacts to the SRAs, in turn substantially increasing the cost of operations in these areas.[7]

In response to the Park Service's enactment of this Plan, Dunn-McCampbell and other oil and gas companies owning mineral rights on Padre Island brought suit in the Southern District of Texas under the Administrative Procedure Act. These parties claimed that the Plan violates the Enabling Act by closing SRAs to oil and gas exploration and drilling and impairs their right to enter the property in which they own the mineral rights. Dunn-McCampbell argued that their rights of ingress and egress are protected by the Enabling Act and the Consent Statute; however, the Park Service

maintained not only that it had the right to close certain lands to drilling operations to preserve the environment for recreational use but also that the Enabling Act afforded oil and gas companies like Dunn-McCampbell no protection from such closures.[8] The district court held that the Consent Statute protected Dunn-McCampbell's right to ingress and egress and that the Park Service's regulations designating SRAs deprived the plaintiffs of that right by closing certain areas of Padre Island to oil and gas operations. The Park Service appealed the district court's ruling to the U.S. Fifth Circuit Court of Appeals.

The Enabling Act and the Consent Statute

Dunn-McCampbell maintains that the Oil and Gas Management Plan is inconsistent with the Park Service's authority to promulgate regulations, on the grounds that the Plan violates Dunn-McCampbell's rights of ingress and egress which are protected by the Consent Statute and the Enabling Act. In the Enabling Act, Congress authorized the Park Service to acquire land for the Seashore as well as promulgate regulations to govern this acquired land. Specifically, the Enabling Act states that "the property acquired by the Secretary [of the Department of Interior] . . . shall be administered by the Secretary, subject to the provisions of sections 1 and 2 to 4 of [the National Park Service Organic Act]."[9] According to Dunn-McCampbell, this sentence of the Enabling Act indicates that certain sections of the Park Service's Organic Act preserve their rights of ingress and egress.

The first of these exceptions referenced by Dunn-McCampbell provides that "[a]ny property, or interest therein, owned by the State of Texas or political subdivision thereof may be acquired only with the concurrence of such owner." In order to determine if this portion of the Organic Act protects Dunn-McCampbell's rights of ingress and egress, the Fifth Circuit examined the plain language of the Consent Statute, which provided the statutory means by which the Park Service could acquire lands owned by the State of Texas. The Consent Statute provides that, after acquiring title to the land, the Park Service may not "deprive the grantor or successor in title of the right of ingress and egress" for activities relating to oil and gas operations.[10] As long as the plain meaning of the statutory language is not ambiguous and does not lead to an absurd result, the court will interpret the statute in accordance with its plain meaning.[11]

Though Dunn-McCampbell contends that this section provides it with the right of ingress and egress, the Park Service argues, and the Fifth Circuit holds, that the Consent Statute expressly protects the rights of those who either directly granted their lands to the Service or the grantor's successors in title.[12] Dunn-McCampbell is the owner of only the mineral rights of their parcel of land; these mineral rights had been severed from the surface estate before the Service acquired title to the surface lands. Therefore, because Dunn-McCampbell never owned the surface estate, never granted this land to the Park Service, and did not obtain its land from a party who did convey the surface land to the Park Service, Dunn-McCampbell is neither a "grantor" nor a "successor in title" within the plain meaning of the Consent Statute.

In light of this finding by the Fifth Circuit, Dunn-McCampbell argues that this interpretation of the Consent Statute leads to an unreasonable outcome, because for Texas's Consent Statute to only protect mineral estates that remain unsevered from the surface estate would be absurd, considering that, at the time of the Seashore's creation, a majority of the mineral estates on Padre Island were severed from the surface estates. According to Dunn-McCampbell, by interpreting the Consent Statute to preserve the rights of ingress and egress only to "grantors or successors in title," a checkerboard of ownership rights would emerge in the Seashore, with the federal government owning the surface of the land and various private individuals owning the rights to the mineral deposits below the surface. Because this system of ownership is common among federally managed lands, the Fifth Circuit rejected Dunn-McCampbell's claim that interpreting the Consent Statute in accordance with its plain meaning would lead to an absurd or unreasonable result.

Dunn-McCampbell also relied on a second exception to the Park Service's Organic Act that is contained in the Enabling Act to preserve its rights of ingress and egress. This exception provides that, though the Park Service has acquired title to the surface land, this acquisition does not diminish the right to use the surface "under grants, leases, or easements . . . which are reasonably necessary for the exploration, development, production, storing, processing, or transporting of oil and as minerals that are removed from outside the boundaries of the national seashore."[13] Dunn-McCampbell maintains that, because the Park Service only owns the surface of the land on Padre Island, the Park Service's rights to oil and gas deposits below the surface should be considered outside the Seashore's boundaries and, thus, subject to this exception, which

would preserve Dunn-McCampbell's rights of ingress and egress. The Park Service contends that privately owned estates can exist within a national park, and the fact that it does not own the subsurface mineral rights does not physically remove these estates from the boundaries of the Seashore.

The Fifth Circuit again agreed with the Park Service, noting the difference between the granting of a parcel of land, which encompasses the physical land, and the granting of an estate in land, which is a legal right of ownership in land. The Consent Statute granted the Park Service the physical land on Padre Island, and Texas courts have established that the owner of a mineral estate owns only the right to exploit the minerals and does not have title to the entirety of the subsurface land. In this instance, Dunn-McCampbell, as the owner of the mineral estate, has a legal right of ownership in only the minerals beneath the surface of the land. Therefore, the mineral deposits beneath the surface are, in fact, within the boundaries of the Seashore, and as such, this exception does not preserve Dunn-McCampbell's rights of ingress and egress.

Conclusion

In light of the Fifth Circuit's holdings in this matter, Dunn-McCampbell and other oil and gas developers who own mineral estates within Padre Island National Seashore, but who have never had title to the surface land, have no right to ingress or egress within the boundaries of the Seashore. The effect of this holding prevents the holders of these mineral rights from exploiting the mineral deposits in the Seashore. Had the Fifth Circuit ruled otherwise and upheld the judgment of the district court, the owners of these mineral rights would have been able to engage in oil and gas exploration and development, activities which could potentially harm the Seashore's Sensitive Resource Areas.

Endnotes

1. 2012 J.D. Candidate, University of Mississippi School of Law.
2. Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Service, 630 F.3d 431, 433 (5th Cir. 2011).
3. 16 U.S.C. §§ 459d-1(a).
4. Tex. Rev. Civ. Stat. art. 6077t § 3.
5. *Id.* § 6.
6. *Dunn-McCampbell*, 630 F.3d at 432.
7. *Id.* at 434.
8. *Id.* at 435.
9. 16 U.S.C. § 459d-4.
10. Tex. Rev. Civ. Stat. art. 6077t § 6.
11. *See* U.S. v. Clayton, 613 F.3d 592, 596 (5th Cir. 2010).
12. *Dunn-McCampbell*, 630 F.3d at 438.
13. 16 U.S.C. § 459d-3(b).

Aerial photograph of Padre Island courtesy of NOAA.

City of Jackson Not Liable for Sewage Damages Under the MTCA

Allison Wroten[1]

In a closely divided decision, the Mississippi Supreme Court recently held that the City of Jackson is immune from liability under the Mississippi Tort Claims Act for damages arising from the operation and maintenance of its sewage system.[2] Two families had sought compensation from the City after the City's sewage system flooded their homes with raw sewage. Further, the court looked to an established two-prong test to determine whether the City was immune from liability and examined whether the Clean Water Act (CWA) caused the City to be liable for the damages.

Background

In 1971, the City of Jackson annexed the subdivision in which the homes of James and Linda Fortenberry and Flynn and Kathleen Wallace were located. Both homes were built in the 1960s, using six-inch sewage pipes, and at that time, were located outside of the City limits.[3] In 1977, after the subdivision was annexed, the City passed an ordinance requiring that all city sewage pipes measure eight inches in diameter.[4] In 2003, on two separate days, the City received several inches of rain. One of the rain events overflowed the City's sewer main, causing the Fortenberry's home to flood with raw sewage; after the second rain event, a city sewer line became blocked, causing the Wallace's home to flood with raw sewage. The Fortenberry's suffered six to eight inches of raw sewage in their home, while the Wallace's suffered one foot of overflow.

After unsuccessfully submitting claims to the City for their damages, both families filed suit against the City. In both cases, the City maintained that, under Mississippi law, the City was not liable for the damages. The trial court agreed with the City and dismissed the lawsuit. Both families appealed, and the appellate court reversed the lower court, finding that the City could be responsible for the damages.[5] The City then appealed that decision to the Mississippi Supreme Court. On appeal, the court considered whether the City's operation and maintenance of its sewage system made the City liable for the damages to the two homes.

Mississippi Tort Claims Act

During all phases of this lawsuit, the City asserted that the Mississippi Tort Claims Act (MTCA) protected the City from liability for the damages to both homes. Under the MTCA, a governmental entity is shielded from liability if the claim is based upon the exercise of a discretionary function on the part of the governmental entity.[6] A duty is deemed "discretionary when it is not imposed by law and depends upon the judgment or choice of the government entity or its employee."[7] In contrast, "a duty is ministerial if it is positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment."[8] The City claimed that its operation and maintenance of the sewage system was a discretionary duty under the MTCA, and therefore, the City was immune from liability.

Discretionary Function

To determine if the City's actions were discretionary or ministerial, the court employed a two-part test known as the public-policy function test. Under this test, the court must consider two issues: "1) did the conduct or activity involves an element of choice or judgment; and if so, 2) did that choice or judgment involve social, economic, or political policy?"[9] In evaluating the first prong, the court found that the City's operation and maintenance of its sewage system involves an element of judgment as provided by state statute, and therefore satisfies the first prong of the test. Specifically, the court examined Miss. Code § 21-27-189(b), which provides that "a municipality . . . is authorized and empowered, in the *discretion of its governmental authorities* . . . to construct, *operate and maintain sewage systems* . . . in the manner and to the extent required by the metropolitan area plan."[10] According to the court, this statutory provision clearly satisfies the first question. Dismissing both families' assertions that "once the City employs its discretion, a ministerial duty arises to exercise ordinary care in the upkeep of the sewage system," the court cited to a previous case holding that "failing to exercise ordinary care does not remove a governmental act from immunity under the MTCA."[11]

The court also noted that the appellate court had erroneously relied on the subdivision ordinance, which

required the installation of larger sewer pipes, in finding that the City's operation and maintenance of its sewage system is ministerial. The court recognized that the ordinance "clearly exempts subdivisions established before 1977," which includes the homes of the Fortenberrys and Wallaces.[12] Because the ordinance did not apply retroactively to the subdivision at issue, no ministerial duty was imposed on the City to install larger sewer pipes.

Having found that the City's operation and maintenance of its sewage system involves an element of judgment, and therefore satisfies the first prong of the public-policy function test, the court looked to see whether the City's actions satisfied the second prong. The court then found that the City's actions satisfied the second prong because the City's exercise of its judgment in operating and maintaining the system involves social, economic, and political policy decisions. Noting that the legislature believed that municipalities are "better suited to make decisions regarding the operation and maintenance of their sewage systems," the court reasoned that the act was therefore an exercise of public policy.[13] Further, the court found that the City's management of its sewer system involves both social and economic policies for two reasons: 1) the removal of sewage promotes human welfare, and 2) operating a sewage system involves discretion when deciding how to allocate funds for sewer repairs.[14] Because the City's operation and maintenance of its sewage system satisfies both prongs of the public policy function test, the court found that the actions are discretionary and, therefore, the City is shielded from liability under the MTCA.

Impact of Federal Law

After finding that the City's actions were discretionary under Mississippi law, the court next considered whether federal law, specifically the Clean Water Act (CWA), transformed the City's actions from discretionary to ministerial. The court looked specifically at a state statutory provision defining a "metropolitan area plan" which references the Federal Water Pollution Control Act, also known as the CWA. The appellate court had relied on this provision to find that the City's decision to operate and maintain its sewage system was ministerial. However, the Mississippi Supreme Court was not persuaded and determined that the CWA did not transform the City's actions into ministerial functions. While the CWA does prohibit the discharge of pollutants, including sewage, the court noted that the CWA does not positively impose by law certain standards applicable to the municipality's duty to operate and maintain its sewage system. Therefore, the duty remains a discretionary one.[15]

Dissent

Four justices dissented in this case, arguing that the majority had erred in ruling that all duties arising from the operation and maintenance of the City's sewage system are discretionary. The justice opined that a case-by-case analysis was more appropriate in deciding whether certain duties were ministerial or discretionary.[16] Further, the dissent noted that a previous holding, in which the City was held liable for property damage that occurred because of the City's failure to properly maintain a drainage ditch, was in conflict with the majority's holding in this case. While the majority dismissed the case as distinguishable because the maintenance of a drainage ditch is not explicitly made discretionary by statute, the dissenting justice noted that the City's "obligations in operation and maintenance of a sewage system are not automatically rendered discretionary" by statute.[17] The dissenting justices, therefore, argued that the majority's approach was overly broad.

Conclusion

The case was closely decided with a narrow 5-4 majority. Of the nine justices, five agreed that the City was immune under the MTCA but only four justices joined in the Court's opinion. The remaining four justices joined the dissent, leaving the precedential value of this decision uncertain. Parties to the lawsuit have requested the Mississippi Supreme Court rehear the case to provide greater clarification. If this ruling stands, the homeowners' recovery will be limited to their respective insurance coverage. In this case, one family was able to receive insurance money for their flood damages, while the other family's damage was not covered by their insurer and received nothing.[18]

Endnotes

1. 2012 J.D. Candidate, University of Mississippi School of Law.
2. Fortenberry v. City of Jackson, Nos. 2008-CT-00270-SCT, 2008-CT-00271-SCT, 2011 WL 448354 (Miss. Feb. 10, 2011).
3. *Id.* at *1.
4. *Id.*
5. *Id.* at *2.
6. Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2007).
7. *Fortenberry*, 2011 WL 448354 at *2.
8. *Id.*
9. *Id.*
10. *Id.* at *3 (emphasis original).
11. *Id.*
12. *Id.* at *4.
13. *Id.* at *5.
14. *Id.*
15. *Id.* at *6.
16. *Id.* at *7 (Randolph, J., dissenting).
17. *Id.* at *8 (Randolph, J., dissenting).
18. *Id.* at *1.

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