2010-5084

United States Court of Appeals for the Federal Circuit

JOHN R. MILDENBERGER, MICHELE C. RUTH, ROBERT O. BARATTA, CAROL A. BARATTA, JOSEPH K. HENDERSON, PATRICIA T. HENDERSON, CHARLES C. CRISPIN, JULIE D. CRISPIN, WILLIAM E. GUY, JR., STELLA S. GUY, JAMES J. HARTER, PATRICIA C. HARTER, FLOYD D. JORDAN, MARJORIE N. JORDAN, CHARLES V. LOCKE, VERA A. LOCKE, ANN S. MACMILLAN, PAUL PARE, ROBERT H. PARE, JR., ERYN T. PARE, JOHN F. PATTESON, ROBERT PEARSON, FREDERICK RUTZE, KIMBERLY RUTZKE, BRIAN SCHMIDT, DEBORAH SCHMIDT, MARK S. BEATTY, ATHOL DOYLE CLOUD, JR., PATRICIA P. CLOUD, MARK R. CONNELL, PHILIP TAFOYA, and GERALDINE TAFOYA,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in Case No. 06-CV-760, Judge Lynn J. Bush.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants, Mildenberger, et al. (collectively "the Riparian Owners") reply to the Government's responsive brief as follows:

1. The Riparian Owners possess a constitutionally protected riparian right that has been taken by the Corps' discharges

There is no question but that the Riparian Owners have some protectable property interests at issue in this case. For as the U.S. Supreme Court stated just this term in a taking case involving Florida riparian rights, the Fifth Amendment fully applies to the taking of riparian rights:

> The Takings Clause—"nor shall private property be taken for public use, without just compensation," U.S. Const., Amdt. 5—applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land. Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property.[1]

Likewise, there is no question that the Florida Supreme Court has repeatedly held that the Floridian riparian owner has rights that include "the right to have the water kept free from pollution . . . ."[2] Although the Government discounts this statement as dictum, or as old authority, the Florida Supreme Court certainly has

[1] *Stop the Beach Renourishment v. Fla. Dep't of Envt'l Prot.*, 130 S. Ct. 2592, 2601 (2010) (citations and footnote omitted).
[2] *Ferry Pass Inspectors' & Shippers' Assoc. v. White's River Inspectors & Shippers' Assoc.*, 48 So. 643, 644 (Fla. 1909).

not done so, and to the contrary, it has quoted this same language as good law.[3] And neither the Government nor the amicus curiae has been able to find any Florida authority to the contrary.[4]

The Government erroneously relies on overruled authority when it cites *Central and South Florida Flood Control District v. Griffith*,[5] for the proposition that "just such an argument by riparian owners to special rights in adjacent waters was rejected in *Central and South Florida Flood Control District v. Griffith*."[6] For that case relied entirely on an earlier decision of the same Florida Court of Appeals, *Carmazi v. Board of County Commissioners of Dade County*,[7] which (along with the Government's argument here) was expressly *disapproved* by the Florida Supreme Court in *Game and Fresh Water Fish Commission v. Lake Islands*.[8] Instead, the Florida Supreme Court reaffirmed the correctness of *Ferry Pass*

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[3] *Game & Fresh Water Fish Comm'n v. Lake Islands*, 407 So. 2d 189 (Fla. 1981).
[4] The best that amicus curiae could do is to suggest that this Court certify the issue to the Florida Supreme Court for review. Amicus Br. of the South Fla. Water Mgmt. Dist. 11 (Aug. 10, 2010). The Riparian Owners agree with the amicus curiae on this sole point: If this Court doubts the continued integrity of *Ferry Pass* as good law in Florida, then the Riparian Owners urge this Court to certify the nature of the property rights issue to the Florida Supreme Court for review. *See* Fla. Const. Art. 5 § 3(b)(6); Fla. R. App. Proc. 9.030(a)(2)(C); *see also Chevy Chase Land Co. v. United States*, 158 F.3d 574 (Fed. Cir. 1998).
[5] *Central and South Florida Flood Control District v. Griffith*, 119 So. 2d 423 (Fla. 3d DCA 1960).
[6] Resp. Br. at 46.
[7] *Carmazi v. Bd. of County Comm'ns of Dade County*, 108 So. 2d 318 (Fla. 3d DCA 1959), *overrruled by Game & Fresh Water Fish Comm'n v. Lake Islands*, 407 So. 2d 189 (Fla. 1981).
[8] *Lake Islands*, 407 So. 2d at 193.

Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association,[9] in which this Court, speaking through Chief Justice Whitfield, set forth in detail the rights of riparian owners as follows:

> Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and reliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper or lower riparian owners or others, the right to have the water kept free from pollution, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his property, the right to use the water in common with the public for navigation, fishing, and other purposes in which the public has an interest.[10]

The Government only tells part of the story when it also asks this Court to blithely ignore Florida Statute § 253.141(1), which defines riparian rights to include "rights of ingress, egress, boating, bathing and fishing and such others as may be or have been defined by law," on the ground that it is "only a tax law."[11] What the *Belvedere* Court actually held is that the statute does not prohibit severance of the riparian right from the land, but that the riparian owner must be paid severance damages in a condemnation if it does so: "However, we must conclude that the act

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[9] *Ferry Pass*, 48 So. 643.
[10] *Lake Islands*, 407 So. 2d at 191 (emphasis removed).
[11] Resp. Br. 44 (citing *Belvedere Development Corp. v. Dep't. of Transp., Div. of Admin.*, 476 So. 2d 649, 652–53 (Fla. 1985)).

of condemning petitioners' lands without compensating them for their riparian property rights under these facts was an unconstitutional taking."[12]

Actually supporting the Riparian Owners' position, the trial court, the Government, and even the amicus curiae all seemingly agree that under Florida law the riparian owner is entitled to unfettered access to and use of the water in which he or she owns a riparian interest.[13] Yet none of them attempts to harmonize this right to access and use the water with the Corps' operation of the S-80 floodgate through which the Corps discharges billions of gallons of polluted water into the St. Lucie River adjacent to the Riparian Owners' property, thereby destroying their right to access and use the water adjacent to their homes, among other injuries, for which the Fifth Amendment requires just compensation.

So the Government's pollution of the St. Lucie River obviously infringes at least three elements of what the trial court identified (and the Government conceded at pp. 40–41) as among the "special or exclusive" rights of the Riparian Owners: "'(1) the right to have access to the water; (2) the right to reasonably use the water; . . . and [3] the right to the unobstructed view of the water.'"[14] The Riparian Owners can hardly be said to have retained their right to access, use, view,

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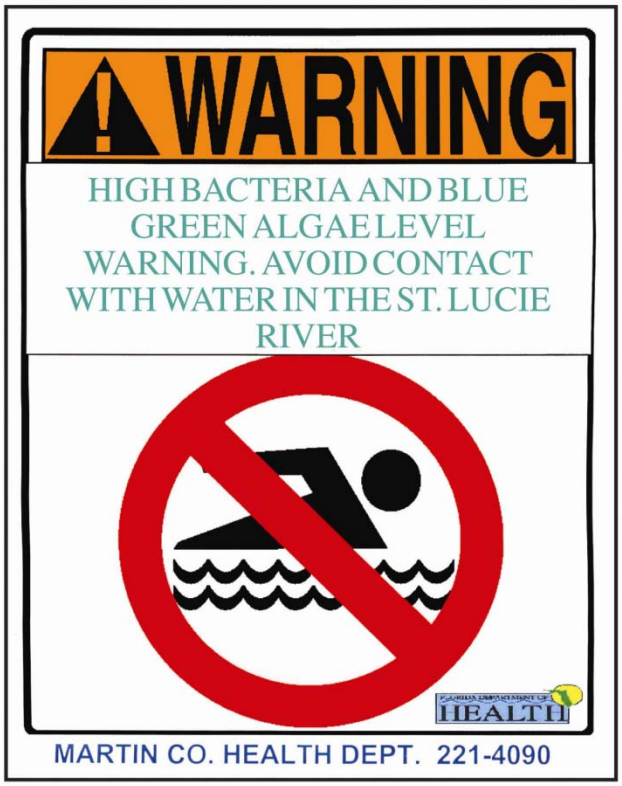
[12] *Belvedere Dev. Corp. v. Dep't. of Transp., Div. of Admin.*, 476 So. 2d 649, 652 (Fla. 1985).
[13] Resp. Br. 40; Amicus Br. 3.
[14] Resp. Br. 40–41 (quoting *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008), *aff'd sub nom., Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 130 S. Ct. 2592 (2010)).

and enjoy the waters of the St. Lucie River when it is covered with a dense mat of toxic blue-green algae;[15] floating with dead fish, sea turtles, and marine mammals;[16] choked with thousands of dead and rotting sting rays;[17] transformed into a concoction the color of foamy Coca-Cola;[18] infected with high levels of dangerous fecal coliform bacteria;[19] stinking with the smells of dead or decaying sea life;[20] and contact with the water is prohibited by signs posted by the health authority reading "No Swimming."[21]



Source: Expert Report of Robert L.P. Voisinet, JA 333

The notion that the Riparian Owners can truly be said to have retained their right to access, use, and view the St. Lucie River waters even though the Government, by discharging huge volumes of highly polluted water through the S-80 floodgates, has rendered those waters

[15] JA 301 ¶ 21; JA 282–83 ¶ 11; JA 226–27 ¶ 22; JA 559, lines 9–18.
[16] JA 348 ¶ 2; JA 360 ¶ 2; JA 356–57 ¶ 3.
[17] JA 362–63 ¶ 2.
[18] JA 340 ¶ 2.
[19] JA 546–49.
[20] JA 344–45 ¶ 2; JA 356–57 ¶ 3; JA 376–77 ¶ 2.
[21] JA 546–49.

toxic, noxious, and unhealthy is untenable.[22] Indeed, as many of the Riparian Owners testified in the trial court proceedings, a boat owner cannot enter or access water that is so polluted that it corrodes the boat and leads to possible disease upon contact with the water.[23] If the only right that a riparian owner possesses is a right to view polluted water, and a right to access means only a right to walk up to the edge of water that cannot be entered into by boat or swimming, then that right is meaningless. And a meaningless constitutional right is no right at all.[24]

Finally, the Government incorrectly asserts that the Riparian Owners dismissed their claims relating to the need to remove their boats from the water or constantly clean them, to suffer odors and ugly sights of dead or dying fish and other animals, and to view filthy and polluted water.[25] This is incorrect. These, together with claims of damage to their docks and other property located in the water are not "upland claims," as the Government asserts, but part and parcel of the riparian right to access, use, and view the St. Lucie—unimpaired by unhealthy and noxious conditions caused by the Government's discharge of pollution into the river from the S-80 structure.

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[22] *See also* JA 708–24, Amici Briefs of the city of Stuart, Florida and Martin County, Florida in the trial court (detailing the impacts of Corps' discharges have had on the City and County, both owners of riparian property on the St. Lucie).
[23] JA 336, JA 342, JA 344–46; JA 351–52; JA 356, JA 358, JA 364, JA 366, JA 368–70; JA 372, JA 374.
[24] *See generally United States v. Scott*, 590 F.2d 531, 532 (3d Cir. 1979).
[25] Resp. Br. 46.

In short, nothing in the Government's response negates the conclusion that the trial court erred as a matter of law in concluding that the Riparian Owners in this case do not possess riparian rights entitled to the robust protection of the Fifth Amendment.

2. The trial court erred in finding the Riparian Owners' claims untimely

The Supreme Court in *Franconia Associates v. United States*[26] held that the accrual principles applicable to the Government under the Tucker Act are the same as those applicable to private parties under ordinary statutes of limitation:

> We do not agree that § 2501 creates a special accrual rule for suits against the United States. Contrary to the Government's contention, the text of § 2501 is unexceptional . . . . In line with our recognition that limitations principles should generally apply to the Government "in the same way that" they apply to private parties, we reject the Government's proposed construction of § 2501. That position, we conclude, presents an "unduly restrictiv[e]" reading of the congressional waiver of sovereign immunity . . . .[27]

Unable to explain how the St. Lucie could have been permanently damaged in the 1950s so as to deprive the trial court of jurisdiction on statute of limitations grounds, yet in the 1990s remain the most biologically diverse estuary in the country, the Government's brief simply ignores this devastating fact—and hopes this Court will do the same. The Government's claim that "the CFC did not clearly err when it found that the condition of the St. Lucie River between 2003 and 2005

[26] *Franconia Assocs. v. United States*, 536 U.S. 129 (2002).
[27] *Id.* at 145 (citation omitted).

mirrored that of the River in the 1950s,"[28] and that the Riparian Owners' claim therefore accrued in the 1950s, is utterly irreconcilable with the trial court's finding (based on agreed facts) that "[a]s recently as 1998, the estuary provided habitat for more than 4000 plant and animal species, including manatees, dolphins, sea turtles and a wide variety of fish and invertebrates."[29] And it conflicts with the fact that, as the parties also agreed, as of 1994, the St. Lucie contained "the highest number of aquatic organisms of any Estuary in the United States"[30] and was "designated as Outstanding Florida Waters, Aquatic Preserve, and an Estuary of National Significance."[31]

Nor does the Government attempt to refute the established fact that permanent injury to the St. Lucie's ecology occurred in the 2003–2005 period—within the statute of limitations—and not in the 1950s as the Government claims. The Government's statement (p. 23) that there is no evidence to support the Riparian Owners' assertion that the Government's discharges of polluted water between 2003 and 2005 dealt a knock-out blow to the St. Lucie from which it has never recovered (i.e., permanent damage), simply ignores the declaration testimony of Kevin Henderson: "[T]he Corps' discharges have completely destroyed the

[28] Resp. Br. 22.
[29] *Mildenberger v. United States*, 91 Fed. Cl. 217, 244 (2010).
[30] JA 675.
[31] JA 674.

oyster and sea grass habitat."[32] The Government's argument also ignores the declaration of Dr. Grant Gilmore, the leading authority on marine life in the St. Lucie, in which he stated that millions of fish were impacted by the Government's discharges of pollution into the St. Lucie in the mid-2000s:

> Seagrass community observations in 2006 indicate that water from the St. Lucie River caused substantial decline in seagrass adjacent to the mouth of the St. Lucie River. . . .
>
> This loss had a catastrophic impact on regional fisheries that depend on ocean inlet seagrass habitats as essential fishery habitat. A comparison of historical and recent 2006 fish density estimates indicate that millions of fish were impacted by the loss of seagrass habitat within two to three miles of the mouth of the St. Lucie River (*see* Attachment A, chart of fish density per seagrasses acre comparing 1974 and 2006).[33]

Another environmental expert, Dr. Paul Gray explained that the Corps' program for releasing water into the St. Lucie (called Water Supply & Environment, or "WSE"), adopted in 2000, constitutes a "death sentence" for the St. Lucie:

> The Corps' own studies predict that, under the WSE Lake Regulation Schedule, the St. Lucie Estuary will receive harmfully high releases 31 percent of the time. Receiving harmful releases from the Lake 31 percent of the time creates almost constant impairment of the Estuary. Once sea grass beds, or oyster bars, or other biota are eliminated, as they were in 2005, recovery can take years. When harmful releases are occurring 31 percent of the time, the recovery may not be completed before the next damaging event occurs. Thus, a

[32] JA 273.
[33] JA 225; *see also* JA 229.

> 31 percent harmful-release prediction is tantamount to a biological death sentence for the St. Lucie Estuary.[34]

And Mark Perry, Executive Director of the Florida Oceanographic Society, testified that the prolonged Corps' releases from 2003–2005 killed all of the oysters and many of the other marine creatures in the St. Lucie:

> In 2005, when the salinity in the St. Lucie Estuary waters went to zero ppt for longer than 28 days, biologists estimate that every living oyster in the Estuary was killed. Fresh water releases during spring months, a period when oysters are spawning, prevent a full recovery of this oyster population because the fresh water either flushes larvae downstream (into the sea) where substrate is limited, or simply kills outright the larvae and spat due to low salinities. . . . After 28 days of fresh water conditions complete mortality of adult and juvenile oysters resulted. Restoration efforts that were started after 2005 had to start all over again. . . .
>
> The impact of non-saline, fresh water discharges from Lake Okeechobee on the ecological health of the St. Lucie Estuary is dramatic and devastating. Specifically, during these events habitats such as oyster reefs and sea grasses are lost. . . . The Corps' discharges in 2003, 2005, and again in 2008, repeatedly injuring the Estuary, and wiping out the recovery efforts made after the last devastation. Corps' discharges made under the Corps' Water Supply and Environment (WSE) schedule from 2000 to 2007 killed every benthic (seabed dwelling) community in the Estuary and severely damaged the benthic communities in the [Indian River] lagoon. As of today, these communities have not yet recovered.[35]

The Government's promises to fix the problem go back to the 1950s, as the Riparian Owners showed in their opening brief (pp. 41 to 45). Although the Government claims that the Corps' mitigation efforts did not commence until the

[34] JA 246.
[35] JA 286–87.

mid-1990s,[36] this is certainly not supported by the record before the Court. A few examples of the same newspaper articles on which the Government and the trial court relied make this point crystal clear. The evidence shows that

- as early as 1952, the Corps "pledged [to] Martin County that they will not release Lake Okeechobee's muddy deluge into the world-famous fishing grounds of the St. Lucie River, "except in cases of extreme emergency," and "plan to use the Caloosahatchee River as the 'regulatory discharge'"; [37]

- "[a]s long ago as 1958, the Corps proposed to construct a 'third outlet south' for Lake Okeechobee waters as an alternative to dumping polluted Lake Okeechobee water into the St. Lucie";[38]

- in 1970, "[n]ow Corps officials talk of a costly new project—a 10-year effort to clean up the river";[39] and

- in 1996, the Corps was "in the planning and design phase of a system that will eventually return the river to health . . . ."[40]

The trial court properly rejected the Government's claim that, because it did not generate the pollution in Lake Okeechobee, it may discharge those toxic pollutants into the St. Lucie with impunity.[41] The Government owns and operates the entire Central and South Florida Project, which collects and distills those pollutants into a highly concentrated brew of nitrogen, phosphates, and other

[36] Resp. Br. 24.
[37] JA 588.
[38] JA 274.
[39] JA 593.
[40] JA 597.
[41] *Mildenberger*, 91 Fed. Cl. at 259–60.

sedimentary matter.[42] Under the federal Clean Water Act[43] no person (including the Government) may discharge these pollutants into navigable waters without a permit—regardless of who initially generated the pollutants:

> [T]he Clean Water Act requires federal facilities and federal activities to comply with state water quality standards. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998) ("Under the Clean Water Act, all federal agencies must comply with state water quality standards . . . . 33 U.S.C. § 1323(a)."); *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 (9th Cir. 1989) ("The [Clean Water Act] also requires states to implement water quality standards with which federal agencies must comply. *See* 33 U.S.C. §§ 1313, 1323."); *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 848 (9th Cir. 1987) ("The [Clean Water Act] requires each state to develop and implement 'water quality' standards to protect and enhance the quality of water within the state. 33 U.S.C. § 1313. The Act also requires all federal agencies to comply with all state requirements. 33 U.S.C. § 1323.").[44]

The Government cites no case for the extraordinary proposition that it may deposit toxic pollutants anywhere it likes without consequence—and that is certainly not the law.

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[42] *See id.* at 224–25.

[43] 33 U.S.C. §§ 1311, 1323; *see also Metropolitan Sanitary Dist. v. United States Dep't of Navy*, 722 F. Supp. 1565, 1569–70 (N.D. Ill. 1989), *partially rev'd at*, 737 F. Supp. 51 (N.D. Ill. 1990).

[44] *Nat'l Wildlife Fed. v. U.S. Army Corps of Eng'ns.*, 132 F. Supp. 2d 876, 889 (D. Or. 2001).

3. The navigational servitude issue turns on the purpose of the discharges, not the overall purpose of the Lake Okeechobee structure

The Government's entire argument in its response, resting largely on the *Coastal Petroleum* decision,[45] is wrong headed for this primary reason. The test for determining if the taking of a property interest is barred by the navigational servitude depends directly on the purpose of the governmental action. This issue was resolved by the Supreme Court in *United States v. Gerlach Livestock Co.*,[46] a case involving the taking of water rights for the creation of the Central Valley Project. The Government in that case argued that the takings claim of the riparian rights in that case was likewise barred by the navigational servitude defense because the purpose of the Central Valley Project was to further navigation.[47] The Court agreed that the purpose of the project was navigation:

> In the Rivers and Harbors Act of August 26, 1937, § 2, 50 Stat. 844, 850, and again in the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, Congress said that "The entire Central Valley project * * * is * * * declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof * * *." The 1937 Act also provided that "the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control * * *."
>
> * * *
>
> It is not to be doubted that the totality of a plan so comprehensive has some legitimate relation to control of inland navigation or that

[45] *Coastal Petroleum v. United States*, 207 Ct. Cl. 701 (1975).
[46] *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950).
[47] *Id.* at 730.

> particular components may be described without pretense as navigation and flood control projects. This made it appropriate that Congress should justify making this undertaking a national burden by general reference to its power over commerce and navigation.[48]

The Supreme Court refused, however, to agree with the Government's position in that case—the same position the Government takes here—that simply because a physical structure was authorized by Congress to control navigation, all actions taken in connection with that project were immune from takings liability. Rather, the Court viewed the overarching navigational purpose as justifying the project itself, and not determining future takings claims, as the Government argued in *Gerlach* and in this case:

> On the contrary, Congress' general direction of purpose we think was intended to help meet any objection to its constitutional power to undertake this big bundle of big projects. The custom of invoking the navigation power in authorizing improvements appears to have had its origin when the power of the Central Government to make internal improvements was contested and in doubt. It was not until 1936 that this Court in *United States v. Butler*, 297 U.S. 1 . . . , declared for the first time, and without dissent on this point, that, in conferring power upon Congress to tax 'to pay the Debts and provide for the common Defense and general Welfare of the United States,' the Constitution, [art. 1, § 8, cl. 1] delegates a power separate and distinct from those later enumerated, and one not restricted by them, and that Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. If any doubt of this power remained, it was laid to rest the following year in *Helvering v. Davis*, 301 U.S. 619, 640 . . . . Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as

[48] *Id.* at 730, 735.

> clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation. But in view of this background we think that reference to the navigation power was in justification of federal action on the whole, not for effect on private rights at every location along each component project.
>
> * * *
>
> We cannot twist these words into an election on the part of Congress under its navigation power to take such water rights without compensation. In the language of Mr. Justice Holmes, writing for the Court in *International Paper Co. v. United States*, 282 U.S. 399, 407, . . . Congress 'proceeded on the footing of a full recognition of (riparians') rights and of the Government's duty to pay for the taking that (it) purported to accomplish.' We conclude that, whether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain.[49]

And in *Kaiser-Aetna v. United States*, the Supreme Court held that the commerce clause is not a blanket exception to the just compensation clause:

> Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation.[50]

As in *Gerlach* and *Kaiser-Aetna*, the Corps' releases that the Riparian Owners complain of in this case have virtually nothing to do with navigation and everything to do with flood control, water storage, irrigation, and other purposes.

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[49] *Id.* at 737–39.

[50] *Kaiser-Aetna v. United States*, 444 U.S. 164, 172 (1979) (citation omitted).

The navigation servitude is an affirmative defense for which the Government has the burden of proof.[51] Here, the trial court erroneously granted summary judgment to the Government on this affirmative defense because a very significant triable issue of material fact exists with respect to the purposes for which the Government discharges massive quantities of polluted water from the S-80 structure. Unless the purpose of this discharge is to aid navigation, this affirmative defense must fail: "The precedents clearly establish that the Government's purpose must be related to navigation if it wishes to avoid paying compensation for the regulation or control of private property."[52]

The trial court's purported finding of fact that "[t]he primary purpose of defendant's regulatory discharges into the St. Lucie River is to protect the structural integrity of the levees surrounding Lake Okeechobee"[53] is not only a disputed factual issue on which summary judgment must be denied—it actually lacks any support in the record of this case and is contradicted by the Government's own evidence. For example, in response to the Riparian Owners' Proposed Finding of Fact No. 35,[54] the Government stated, quoting the Corps' own

[51] *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000), *cert. denied*, 546 U.S. 818.
[52] *Id.* at 1385.
[53] *Mildenberger*, 91 Fed. Cl. at 252.
[54] JA 672.

Lake Okeechobee Regulation Schedule Study (LORSS) Supplemental Environmental Impact Statement:

> The timing and magnitude of these releases is not only important for preserving flood protection of the region, but also for protecting the natural habitats of the downstream estuaries." . . . Releases from Lake Okeechobee are made to achieve project purposes and to provide water storage capacity in the lake for the wet season and the seasonal variation in rainfall that normally occurs. Lake Okeechobee releases may be made to lower the lake in preparation for the wet season or in response to lake levels as part of the Corps' management of Lake Okeechobee to achieve multiple project purposes. During the dry season, from April 1 to June 1, lake levels are generally lowered due to natural processes that include evapotranspiration and historically low rainfall, or in the managed system, for these reasons and due to releases (for water supply, to estuaries, to Water Conservation Areas). This lowering is necessary to provide storage capacity in the lake for tropical, hurricane or other high rainfall events during the wet season.[55]

The Government's own Proposed Finding of Fact No. 3 lists navigation last in a long list of project purposes for the Central and South Florida Project:

> The C&SF project is a multi-purpose federal project, first authorized by the Flood Control Act of 1948, incorporating works previously authorized by the River and Harbors Act of 1930, that provides for flood control, drainage, regional water supply for agricultural and urban areas, prevention of saltwater intrusion, regional groundwater control, salinity control, water supply to Everglades National Park, preservation of fish and wildlife, recreation and navigation. Flood Control Act of 1948 (62 Stat. 1175); H.R. Doc. No. 643, 80th Cong. 2d Sess. (1948) ("House Document 643"); Master Water Control Manual at 2-2; Geller Decl. ¶¶ 2 and 6; Hammond Decl. ¶ 2.[56]

[55] JA 673 (citations omitted).
[56] JA 728.

And according to the Government, it did not make the decision to release devastating amounts of pollutants into the St. Lucie from 2003–2005—resulting in the taking of the Riparian Owners' rights—to protect the Hoover Dike but for a multitude of other considerations:

> The Corps' decisions on release were, during the period 2003-2005, based on the best available information at the time, given the uncertain nature of future events. This included consideration of potential impacts to public health and safety, as well as water supply needs, local basin runoff, current weather conditions, forecasted weather conditions, ecological conditions of the Lake, flood protection, navigation, salinity control, groundwater control, estuary conditions, agricultural irrigation, and recreation.[57]

For, as Mr. Hammond, the Government's designated expert on navigation testified in his May 26, 2009 deposition, the Corps' navigation-related discharges into the St. Lucie are miniscule:

> What I'm saying is, it's just—we've done calculations on this—and no, I do not have them in front of me—but it's such a very very small amount; I mean, it's a miniscule amount in regards to the size of lake.[58]

Mr. Hammond also testified that the Corps did not undertake the 1949 expansion of the 23-mile long canal to carry water from Lake Okeechobee and discharge it into the St. Lucie River for navigation purposes but instead for flood damage reduction:

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[57] JA 768 ¶ 65 (citations omitted).
[58] JA 613, lines 14–18.

> Q. Okay. On page four in paragraph seven of your declaration, you state that the Corps expanded the St. Lucie Canal in 1949. Was the purpose of that expansion for navigation purposes?
> A. No, ma'am. It was for flood damage reduction.[59]

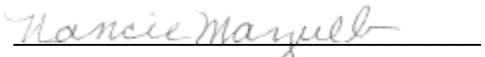
Because the Corps' S-80 discharges of polluted water into the St. Lucie serve no navigation purpose, the Corps is not immune from takings liability because of the navigational servitude.[60] Put more simply, the navigational servitude protects the Government from takings liability for actions in support of navigation; it is not a blanket authorization to pollute waterways (such as the St. Lucie River) with impunity. And because a triable issue of fact exists as to whether the discharges into the St. Lucie were to protect the Hoover Dike or for other purposes (as the Government claimed before the trial court), summary judgment on the navigation servitude was in any case improper and should be reversed.

[59] JA 614, lines 1–5.
[60] *See* JA 430–31.

Conclusion

For the reasons stated in this reply, in the Riparian Owners' opening brief, and supporting appendices, the Court should reverse the trial court's decision and remand for further proceedings.

Respectfully submitted,



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Dated: August 23, 2010

United States Court of Appeals
for the Federal Circuit
No. 2010-5084

MILDENBERGER v. UNITED STATES

DECLARATION OF AUTHORITY PURSUANT TO 28 U.S.C. § 1746 AND FEDERAL CIRCUIT RULE 47.3(d)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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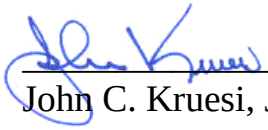
August 23, 2010



John C. Kruesi, Jr.

United States Court of Appeals
for the Federal Circuit
No. 2010-5084

MILDENBERGER v US,

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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via Express Mail, by depositing 2 true copies of each, enclosed in a properly addressed wrapper, in an official depository of the U.S. Postal Service.

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August 23, 2010

CERTIFICATE OF COMPLIANCE WITH FEDERAL CIRCUIT RULE 32(a)(7)

Counsel for Plaintiff-Appellants states that this brief complies with the type-volume limitations of the Federal Circuit Rule 32(a)(7)(B). The brief contains 5,301 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). In addition, counsel for Plaintiff-Appellants states that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in proportionally spaced typeface using Microsoft Word 2003, in 14 font, Times New Roman typeface.

Nancie Marzulla

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