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Five Categories of Properties

1. Property above the permanent Corps of Engineers High Water Mark.
2. Property below the permanent Corps of Engineers High Water Mark.
3. Mixed Properties.
4. Properties compensated previously by U S.
5. Properties with Flood Insurance.

Legal Issues

1. What is the duty of the Army Corps of Engineers to regulate to prevent flooding?
2. What is the duty of the Army Corps of Engineers to compensate for flood damage?
3. Has the Corps made a permanent or temporary Fifth Amendment physical taking?
4. Has the Corps made a permanent or temporary Fifth Amendment regulatory taking?
5. Has the Corps committed a tort such as trespass?
 - a. If so, is it a compensable tort under the Federal Tort Claims Act?
 - b. What is “sovereign immunity”?
6. What does the Mississippi River Flood Control Act have to do with this Missouri River problem?

Possibilities

1. Tort Claims
2. Flood Insurance Claims. Other Insurance Claims...
 - a. Check your policies!
3. Physical Takings
4. Regulatory Takings

Limitations

1. Doctrine of Sovereign Immunity and Discretionary Acts Exclusion.
2. Law of Nature... What if there were no Dams?
3. Jurisdictional Limitations on Courts.

Trial Practice. Not Just Talk.

Terms

1. **Sovereign Immunity:** “There can be no legal right against the authority that makes the law on which the right depends.” *Kawananakoa v Polyblank*, 205 US 349, 353 (1907).
2. **Federal Tort Claims Act** 28 USCA § 1346, *limited* waiver of the US government’s sovereign immunity. “[T]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances...” 28 USC § 2674. Immunity not waived for discretionary acts, good faith acts or omissions. 28 USC § 2680.
3. **Fifth Amendment Takings Clause.** “nor shall private property be taken for public use without just compensation.”

Physical Taking: Actual Occupation of the Property.

Regulatory Taking: When government does not seize private property, but through regulation of the property deprives the private owner of the beneficial use of that property. Regulatory taking factors: 1) economic impact, 2) interference with investment backed expectations, and 3) character of the government action. *Penn Central v City of New York*, 438 US 104 (1978).

Temporary Action: If a government action constitutes a taking when permanently continued, temporary action of the same nature may lead to a temporary taking.
Arkansas Game and Fish Com’n v US, 637 F.3d 1366 (Fed Cir 2011).

4. **Tucker Act** 28 USCA § 1491, Grants the United States Court of Federal Claims exclusive jurisdiction to render judgments on claims founded upon 1) the Constitution, 2) acts of Congress, 3) regulation of an executive department, 4) contracts with the US, or 5) damages not sounding in tort.
5. **Mississippi River Flood Control Act, (MRFCA)** 33 USC § 702(c). “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place...” Statute creates immunity for Corps of Engineers (COE) from flood control liability. *Oahe Conservancy Sub-District v Alexander*, 493 F Supp 1294 (D SD 1980). Nuisance claim against COE for flooding lands precluded by Mississippi River Flood Control Act. MRFCA purpose to improve navigable waters for flood control created no right for landowners to recover damages against COE. 33 USC § 701a. Also held plaintiffs failed to meet burden of proof that defendant’s operation of dams was arbitrary, capricious, or an abuse of discretion under APA. 5 USC § 706.

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