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Traps for the Unwary—The Problems in Seeking Injunctive or Monetary Relief from an Uncompensated Taking by the Federal Government

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Comments

**TRAPS FOR THE UNWARY—THE PROBLEMS IN
SEEKING INJUNCTIVE OR MONETARY RELIEF
FROM AN UNCOMPENSATED TAKING BY
THE FEDERAL GOVERNMENT**

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I. INTRODUCTION

The fifth amendment to the United States Constitution provides that "[P]rivate property [shall not] be taken for public use, without just compensation."¹ On the not too frequent occasions when the federal government fails to adhere to this directive, there are two remedies available—a suit against federal officials to enjoin them from acting to the property owner's detriment, or a suit for damages (commonly referred to as inverse condemnation.) The lawyer for the property owner who has found it necessary to seek one of these remedies will soon discover that the government has available a large battery of defenses and other stratagems with which to thwart his success. It is the purpose of this article to delineate these defensive devices and, hopefully, to suggest some ways in which they might be overcome.²

II. INJUNCTIONS AGAINST OFFICERS

It is exceedingly difficult to enjoin an officer who is ostensibly carrying out a government project, and, in view of the magnitude of the problems which may be presented if such a suit is lost, it is perhaps the wiser course to bypass the injunction entirely, seeking relief in damages.

¹ U.S. CONST. amend. V.

² This article will deal with the defenses raised by the government once a suit has been brought against it. Two excellent articles discussing the remedies available against the government are *Developments in the Law, Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827 (1957) and Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. L. Q. 210. The latter article contains extensive citations to cases wherein the various remedies have been sought. It is not, however, limited to remedies against the Federal Government, but discusses state cases at length.

A. THE UNITED STATES AS AN INDISPENSABLE PARTY:

Generally, in a suit which involves federal interests, the United States is a necessary party to the action. Thus a key defense in an action to enjoin a federal officer, where the United States is not named as a defendant, is that the United States is an indispensable party which has not been joined. Furthermore, the United States *cannot* be joined because it cannot be sued without its consent, and it has not consented to be sued for an injunction. Therefore, unless there is available some relief against the named defendant to which the United States need not be a party, the suit must fail in its entirety.³

In suits involving claims of interference by the United States with private water rights, it is frequently argued that the limited consent given in the McCarran Act⁴ allows the United States to be joined as a party defendant in a suit for an injunction. However, the McCarran Act does not apply unless the case is one "involving a *general* adjudication of all the rights of various owners on a given stream."⁵ This, of course, is seldom the case in a suit by an individual property owner.

B. THE SOVEREIGN CANNOT BE BURDENED:

While the defense that the United States is an indispensable party is undoubtedly a key defense of the government in suits for injunctions, the courts often do not reach or examine the question in this form. Rather, the government concentrates its main emphasis on the concept of sovereign immunity and the courts' opinions are similarly oriented.

The concept of sovereign immunity is not without its detractors. However, no matter what argument is used to justify it, its basic proposition is that the sovereign cannot be subject to any burden originating in the courts—the courts cannot direct the sovereign. While suits are often brought against officers in the hope that an order directed to the officer will not be regarded as burdening the

³ *E.g.*, *Mine Safety Appliances Co. v. Forrester*, 326 U.S. 371 (1945); *Ward v. Humble Oil & Refining Co.*, 321 F.2d 775 (5th Cir. 1963).

⁴ 66 Stat. 560 (1952), 43 U.S.C. § 666 (1964). Under this provision the United States consents to be joined in any suit for the adjudication of the rights to the use of the waters of a river system or other source and in some cases to suits for the administration of those rights. For a general discussion of the McCarran Act see Comment, *Adjudication of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 CALIF. L. REV. 94 (1960).

⁵ *Dugan v. Rank*, 372 U.S. 609, 618 (1963).

sovereign, the hope is seldom, if ever, realized. More often than not, a suit for an injunction is lost on the grounds that while the government is not a named party, the suit is nevertheless one against the government and the government has not waived its immunity. The property owner thus finds that the government's immunity from suit extends to its officers—the government cannot be sued through its officers.⁶

This extension of immunity proceeds on the theory that when acting pursuant to their constitutionally granted statutory authority, the officers act as agents of the sovereign. Thus, their acts are the government's⁷ and any suit against them is deemed a suit against the sovereign. If the officer is acting outside his statutory authority he is not acting for the government, but acting on his own behalf, and the suit may be maintained against him individually.⁸ The same situation pertains if his authority is unconstitutionally granted. As a result, in many suits which are founded on the theory that the government does not authorize its officers to do unlawful acts, it is argued that an officer's acts constitute an illegal interference such as a trespass.⁹ It would seem, however, that such an approach is doomed to failure so long as the officers are authorized to engage in the activity which makes the acts complained of necessary. If the officers are authorized to engage in such activity the ensuing act cannot be deemed to be unauthorized or illegal but results rather in a legal taking, the proper remedy for which is a suit for damages.¹⁰ This is true even though the act itself was not specifically authorized and normally would constitute an illegal interference.

While injunctions are denied most frequently on the grounds that the officers were acting within their statutory authority, and that this authority was constitutionally granted, it may be unnecessary for the courts to consider these two arguments. In *Larson v. Domestic & Foreign Corp.*,¹¹ after setting forth these two exceptions to the general rule that the sovereign's immunity is ex-

⁶ Two noteworthy articles dealing with officers and sovereign immunity are Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962).

⁷ *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

⁸ *Id.* at 689-90.

⁹ *E.g.*, *Andrews v. White*, 121 F. Supp. 570 (E.D. Tenn. 1954), *aff'd per curiam*, 221 F.2d 791 (6th Cir. 1955).

¹⁰ A prime example of this is *Dugan v. Rank*, 372 U.S. 609 (1963).

¹¹ 337 U.S. 682 (1949).

tended to its officers acting in the course of their official duties, the Court said in a footnote:

Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.¹²

The principle of this footnote goes to the heart of the sovereign immunity doctrine, allowing no burden to be cast on the sovereign. If it is found that a burden is present, the suit fails, the court never needing to consider whether the officer's acts are constitutionally authorized.

If the rule set forth in this footnote is ever widely applied, a suit to enjoin an officer will be virtually impossible to maintain, for the sovereign must almost always take affirmative action to comply with an injunction. Even if a simple negative injunction is sought, the sovereign will have to act affirmatively to alter the conduct of a project which it has begun. In addition, there frequently will be some disposition of Government property.¹³ Although the principles set forth in the *Larson* footnote have been applied only a few times and in a rather equivocal manner,¹⁴ the

¹² 337 U.S. at 691 n. 11.

¹³ In this respect consider the situation in *Dugan v. Rank*, 372 U.S. 609 (1963) and *Turner v. Kings River Conservation Dist.*, 360 F.2d 184 (9th Cir. 1966). Both cases involved attempts by lower riparian and overlying landowners to compel the federal officers in charge of certain dams to operate the dams in such a manner that the flow past the lower riparian property would be equivalent to that prior to the construction of the dams. To achieve their ends the landowners brought suits to enjoin the officers from operating the dams in certain specified ways which allegedly interfered with the plaintiffs' rights. If the injunctions had been granted, not only would the government have had to act affirmatively in its operation of the dams, but there would have been a disposition of stored water in which the government had basis for a claim of property rights and an expenditure of federal funds in complying with the order.

¹⁴ *Seiden v. Larson*, 188 F.2d 661 (D.C. Cir. 1951), *overruled* *West Coast Exploration Co. v. McKay*, 213 F.2d 582 (D.C. Cir. 1954); *American Dredging Co. v. Cohrane*, 190 F.2d 106, 108 (D.C. Cir. 1951); cf. *Ballaine v. Alaska Ry.*, 259 Fed. 183 (9th Cir. 1919).

The holding of the *Seiden* case which applied the *Larson* footnote met with some disfavor and was partially overruled in *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 596 (D.C. Cir. 1954). Three out of the eight judges sitting in the *West Coast* case expressly adhered to the doctrine of the *Larson* footnote as applied in *Seiden*. The principle of the *Larson* footnote was also applied in *American Dredging* but the *West Coast* court allowed this decision to stand. The court in *West*

government has recently used them as the basis for its argument in *Dugan v. Rank*¹⁵ and much more directly, in *Turner v. Kings River Conservation Dist.*¹⁶ In *Dugan*, it appears that the court's opinion might well have turned on this proposition.¹⁷ However, in *Turner*, the court rejected the argument. Although it recognized that the Supreme Court in *Dugan* had, by applying the principles articulated in the *Larson* footnote, found the decree sought would operate against the United States and could not be granted, the *Turner* court nevertheless declared that the *Dugan* decision turned on the fact that the officers there involved did not come within either of the exceptions to the general rule of sovereign immunity. It can be argued, however, that Mr. Justice Clark used the two well known exceptions simply to buttress the decision with additional reasons why the property owner could not prevail. In light of this, the government most likely will continue to use the rule of the *Larson* footnote, and it is not inconceivable that it may gain a greater viability than it currently has.

Another factor in the success or failure of a suit for an injunction is the range of the officer's discretion in connection with his authorized acts. It is held that a reasonable exercise of discretion in carrying out his functions is necessarily within his authority to act.¹⁸ Thus, a suit for an injunction cannot lie against an officer for the doing of an act which involves only discretion.

Finally, congressional intent frequently is involved in the question of whether an officer can be enjoined. As in *Larson*, *Dugan*

Coast, in overruling *Seiden* addressed itself only to a specific interpretation of the way the *Seiden* court had applied the footnote to property. The *West Coast* court said the footnote did not make resort to the normal exceptions to sovereign immunity automatically unnecessary whenever government property was involved and that the two exceptions were not of less force because of the footnote. It said further that the application of the footnote suggested here is extreme. *Ballaine*, although it preceded *Larson* by thirty years and was a suit for tort damages, is of interest as it is illustrative of the application of the type reasoning based on the *Larson* footnote to the general area of sovereign immunity extended to officers or entities distinct from the government itself. A suit against the railroad was held to be a suit against the United States, in part because a judgment would interfere with United States property.

¹⁵ 372 U.S. 609 (1963).

¹⁶ 360 F.2d 184 (9th Cir. 1966).

¹⁷ 372 U.S. at 620-21.

¹⁸ See *Ickes v. Fox*, 300 U.S. 82 (1937); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949); *Seiden v. Larson*, 188 F.2d 661 (D.C. Cir. 1951), overruled on a different point 213 F.2d 582 (D.C. Cir. 1954); *Atchley v. Tennessee Valley Authority*, 69 F.Supp. 952 (N.D. Ala. 1947).

and *Turner*,¹⁹ it is argued that Congress did not intend that its duly authorized projects should be subject to interruption by private suits to enjoin. It is argued that as the sovereign cannot be burdened, the judiciary cannot interfere with the executive. This argument was ably articulated in *Larson* where the court said:

[I]t is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain a government from acting or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as a representative of the community as a whole cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "the interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief." *Decatur v. Pauling*, 14 Pet. 497, 516 (1840).²⁰

The courts have become quite fond of the phrase used in *Larson*, "the Government . . . cannot be stopped in its tracks"²¹ and it seems that there is no reason why a citizen should be allowed to stop the wheels of government when his constitutional rights can be adequately protected by other remedies such as suits for compensation.²²

While there are other defenses available to the government,²³

¹⁹ 337 U.S. 682 (1949); 372 U.S. 609 (1963); 360 F.2d 184 (9th Cir. 1966).

²⁰ 337 U.S. 682, 704 (1949).

²¹ *Id.*

²² See *Malone v. Bowdoine*, 369 U.S. 643 (1962).

²³ These defenses, which are pretty much separate from the concept of sovereign immunity can best be described as follows:

State law is generally not binding on the federal government. Unless Congress has specifically provided that it shall be binding an argument that an officer was outside his statutory authority because he acted contrary to state law is fruitless. *E.g.*, *Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 198 (9th Cir. 1966), *Arizona v. California*, 373 U.S. 546, 586-88 (1963); *United States v. Public Utilities Comm'n*, 141 F.Supp. 168 (N.D. Cal. 1956) *aff'd* 355 U.S. 534 (1958). Even if Congress has provided that the United States shall be bound, a violation necessary to an officer's conduct of an authorized project might be within his authority.

Further, a constitutional attack on a portion of the authorization for a project will not succeed for if a part is constitutional, the courts will not look further for purposes which may be unconstitutional. *E.g.*, *Anderson v. Seeman*, 252 F.2d 321 (5th Cir. 1959). This was a case where the authorization for the top 25 feet of a dam was attacked.

The doctrine of "intervening public use" as developed in state courts is a good defense against an injunction after a public project is underway even if the property owner did not know of the project, see

the defense of sovereign immunity carries the great weight of the government's victories and appears in virtually every suit to enjoin a federal officer. The landowner's only hope of overcoming this defense is to prove conclusively²⁴ that the officer was acting outside his statutory authority or that his authority was unconstitutionally granted.²⁵ It is a rare day when a property owner makes

Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 76 P.2d 681 (1935); and is occasionally used by the federal government.

Frequently use is made of the defense that the government cannot be estopped by the misrepresentations of its agents, for the true facts—specifications, regulations, etc.—are a matter of public record. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); Dwyer, *Responsibility of the Federal Government for Acts of Its Officials*, 11 ROCKY MT. MIN. L. INST. 395 (1966); See Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 67, 67-74 (1963). However, some doubt has been cast on the validity of the doctrine. *Moser v. United States*, 341 U.S. 46 (1951); see *Monogahela Navigation Co. v. United States*, 148 U.S. 312 (1893) together with *Lewis Blue Point Oyster Cultivation v. Briggs*, 229 U.S. 82 (1913) and *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1921). *Compare Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

In the past, a mandatory injunction (used to avoid a district court's lack of jurisdiction to grant original writs of mandamus) would occasionally fail as being too closely akin to a suit for mandamus. This problem is eliminated by 28 U.S.C. § 1361 (1964). *But see*, *Fed. R. Civ. P. 81(b)*; 7 J. MOORE, *MOORE'S FEDERAL PRACTICE* § 81.07 (2d ed. 1955).

Failure to join a superior officer who is an indispensable party has been fatal, *Webster v. Fall*, 260 U.S. 507 (1924), but 28 U.S.C. § 1391(e) makes his joinder easy and the government seldom raises the issue anymore. Further, though the correctness of the holding is open to some question, *Stewart v. Penny*, 238 F. Supp. 821, 826 (D. Nev. 1965) has held that mere Justice Department participation in defense of the suit is sufficient to eliminate the problem. Likewise, *Fed. R. Civ. P. 25(d)* has made it impossible for a cause to fail for lack of timely substitution of parties when a defendant officer dies or leaves office.

²⁴ The magnitude of the plaintiff's task in this regard cannot be over-emphasized. His burden is affirmative and heavy indeed. Not only must he prove either that the authority was unconstitutionally granted or that the officer was acting outside his statutory authority, he must place in his complaint the specific statutory limitation of authority on which he relies. It is not sufficient that he merely allege that the officer was outside his authority. *Malone v. Bowdoine*, 369 U.S. 643, 648 n. 9 (1962).

²⁵ One intriguing argument to support a claim that an officer acted outside his statutory authority or under authority unconstitutionally granted is that since the taking is without compensation it is unconstitutional and unauthorized. Appealing though it may be, such a "bootstrap" argument will not prevail. In *Hurley v. Kincaid*, 285 U.S. 95 (1932) the court held that an uncompensated taking in pursuit of an authorized project was not a sufficient ground to sustain an injunction and that the plaintiff must sue for damages if he hopes to get any

this proof and successfully maintains a suit to enjoin a government officer from acting. Thus, very few federal projects are burdened with the delays of injunctions—the government is seldom “stopped in its tracks.”

Admittedly, the prospect of an injunction may be tempting to a property owner—especially where he feels a particular attachment to the land or the business he conducts on it. However, unless there is an absolute certainty that the necessary proof can be made, the injunction should be scrupulously avoided for one who seeks an injunction and loses may well be barred from any other relief.²⁶ Usually the property owner's rights can be adequately upheld by a monetary award, and while not without problems of its own, a suit for compensation after the taking offers far greater promise of relief than does the suit for injunction.

It is thus evident that the road to an injunction is extremely hazardous and the property owner will often lose because he has sought the wrong remedy. In such a situation about all he can do is hope that he is still able to seek the correct remedy, compensation under the Tucker Act.²⁷

III. THE INJUNCTION—TUCKER ACT PROBLEM:

Frequently, as in *Dugan v. Rank*,²⁸ an unsuccessful suit for an injunction will take a good many years. Then when the property owner attempts to bring a suit for compensation under the Tucker Act he will find himself barred by the six year statute of limitations.²⁹

The fact that a property owner can refrain from seeking an injunction seems to comprise his only hope of avoiding this problem while remaining within the court system. It is axiomatic that it is not permissible to sue for both an injunction and compensation in

relief. The existence of the right to sue for compensation is sufficient to answer the claim of an unconstitutional taking. See, e.g., *Dugan v. Rank*, 372 U.S. 609 (1963) (dictum); *Malone v. Bowdoine*, 369 U.S. 643 (1962).

²⁶ See text *infra*, part III.

²⁷ Act of March 3, 1887, Ch. 359, 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.).

²⁸ 372 U.S. 609 (1963); it should be noted that fifteen years elapsed between the time the complaint was filed and the Supreme Court dismissed for lack of consent to sue the United States.

²⁹ 28 U.S.C. §§ 2401 & 2501 (1964); for a brief discussion of the problem, see Morreale, *Federal—State Conflicts over Western Water Rights—A Decade of Attempted Clarifying Legislation*, 20 *RUTGERS L. REV.* 423, 503 (1966).

the same action. While normally relief may be sought in the alternative, when this is done it is essential that the defendant on each count be the same. With the federal government involved, the defendant must be an officer if there is to be any hope of getting an injunction, but the proper defendant in a suit for damages or compensation is the United States. If the jurisdictional amount³⁰ has forced a suit in the alternative into the Court of Claims, injunctive relief will be precluded by the court's lack of jurisdiction to grant specific relief.³¹ There might be an additional problem in that such a suit might be considered to be two separate suits, one of which would be barred by the pendency of the other, for the Tucker Act provides that if any suit against the United States or its officers is pending in any other court, the Court of Claims, at least, is without jurisdiction to hear the case.³² This provision would also make it impossible to initiate separate suits simultaneously and delay the damage suit until a decision was reached in the suit for an injunction. One ray of hope for incourt relief from the problem in some cases is that it has been held, as in *United States v. Dickinson*,³³ that the statute of limitations does not run until the taking is complete—the damage is done for good and all time. Applying these holdings it may be possible to argue that the extent of the damage cannot be ascertained until it is known whether the government will be allowed to continue on the course it is following and that, therefore, the statute of limitations does not begin to run until a decision has been reached in the injunction suit.³⁴ However, it appears most likely that the plaintiff

³⁰ 28 U.S.C. § 1346(a)(2) (1964).

³¹ See 2 M. VOLZ, WEST'S FEDERAL PRACTICE MANUAL § 2733 (1960).

³² 28 U.S.C. § 1500 (1964).

³³ 331 U.S. 745 (1947); see also *Avery v. United States*, 330 F.2d 640 (Ct. Cl. 1964).

³⁴ One suggested solution to this problem is a congressional enactment tolling or completely abolishing the statute of limitations while the property owner seeks an injunction. See Morreale, *supra*, note 29. It seems, however, that such an enactment would only encourage property owners to waste their time with injunction suits they can have little hope of winning. There is no indication that such suits are going to become any easier to win and every indication that success will become even more elusive. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 27.0, at 145 (Supp. 1965).

Other than the gratification of a personal desire to retain the land, which desire he has placed above the greater public good, the property owner can have little reason for seeking an injunction. There is no constitutionally based reason for encouraging injunction suits as it is possible to adequately protect the property owner's rights through a slight reinterpretation to bring about a sensible and equitable application of existing law. As noted *infra*, recent cases have opened the

whose unsuccessful suit for an injunction has extended beyond the statute of limitations has little recourse but to go to Congress for relief either in the form of a private bill or by obtaining a special waiver of the statute of limitations.³⁵

IV. DAMAGES:

The property owner who has suffered an uncompensated loss by reason of the government's activities may bring a suit for damages against the government under either the Tucker Act³⁶ or the Federal Tort Claims Act,³⁷ or against the agents and entities carrying out and administering the government's activities.

A. TAKING AND THE TUCKER ACT:

By far the most certain way for the uncompensated property owner to obtain relief is to bring a suit under the Tucker Act seeking compensation for a taking.³⁸

1. *The Statute of Limitations; Jurisdiction:*

The property owner's first, and most obvious, concern in a Tucker Act suit is to make certain that he complies with the six

door for the development of a more enlightened view by the courts in the area of compensation. If this opening is ignored and the bar turns its efforts toward an alteration of the statute of limitations, no real progress will be made, for an alteration of the statute will have no effect on the loss ratio in injunction suits. The only thing accomplished will be that property owners will continue to go to needless expense litigating suits they cannot win and (because the injunction suit has depleted the property owner's resources or will to fight) the courts will not hear as claims for compensation the suits which by virtue of their substantial equities would bring to bear on the courts pressure for equitable decisions in the Tucker Act suits. So long as it is possible to protect the property owner's rights by means short of injunction, he should not be allowed to stop the wheels of government, placing his own self interest above that of the public.

³⁵ As was done by Congress in *United States v. Goltra*, 312 U.S. 203 (1941). Possibly on rare occasions special equities will persuade the court to ignore the statute of limitations. As an example of this, see *Gardner v. Panama Railroad Co.*, 342 U.S. 29 (1951), which, although it involves a tort claim, no injunction being sought, is illustrative of the unusual equities which might lead to this result.

³⁶ Act of March 3, 1887, Ch. 359, 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C., especially 28 U.S.C. §§ 1491 & 1346(a) (2) (1964)).

³⁷ Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C., especially 28 U.S.C. 1346(b) (1964)).

³⁸ See 28 U.S.C. § 1491 (1964); U.S. CONST. amend. V; on Tucker Act suits for property damage see generally 6 J. SACKMAN, NICHOLS' *THE LAW OF EMINENT DOMAIN* § 29 (rev. 3d ed. 1965).

year statute of limitations.³⁹ If he is suing in a District Court rather than the Court of Claims, he must make certain that he has complied with the district court's jurisdictional requirements.⁴⁰

2. *The defense that there has been no "taking":*

Before the property owner can recover under the Tucker Act for damage to his property rights, it is imperative that he prove the government has "taken" his property. If there is no "taking", the property owner may recover no compensation. The government's defenses in seeking a holding that there has not been a compensable taking can be categorized into the three rather broad groups: (1) That there is no contract upon which to base a claim for compensation, (2) That the conditions giving rise to compensation under the fifth amendment have not been met and (3) That the existence of prior government interests negates the idea of a "taking." This third group, while incorporating some of the characteristics of a no taking defense, also has some of its own.

a. *No Contract:*

The Tucker Act provides that there is

jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulations of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.⁴¹

Although it has so provided from its inception,⁴² the courts for a long time looked only at that portion of the act referring to contracts and held that there was no compensable taking without some sort of an agreement on the part of the government that it would pay for the property taken. This agreement could be found, if at all, in the form of an implied contract,⁴³ but it was necessary that the contract be implied in fact, not in law.⁴⁴

While the viability of the implied contract doctrine is largely vitiated today, it still appears occasionally, and one who attempts to rely on it as the sole basis of a suit for compensation will find

³⁹ 28 U.S.C. §§ 2401 & 2501 (1964).

⁴⁰ Particularly 28 U.S.C. § 1346(a) (2) (1964), which provides that a claim brought in a district court cannot exceed \$10,000.

⁴¹ 28 U.S.C. § 1491 (1964).

⁴² Act of March 3, 1887, Ch. 359, 24 Stat. 505 (1887).

⁴³ E.g., *Tempel v. United States*, 248 U.S. 121 (1918); *Hill v. United States*, 149 U.S. 593 (1893).

⁴⁴ *Hickman v. United States*, 135 F.Supp. 919 (W.D. La. 1955).

time has not eased his problems. Although the factors which were relied on by the government to disprove an implied contract are separated for discussion, in fact they were intertwined and created a cohesive weapon which the government wielded with great effect.

As a contract is generally indicative of some understanding between parties, the courts have often held that in the absence of an intent on the part of the government to "take" there could be no implied contract.⁴⁵ While this intent necessary to establish an implied in fact contract might be inferred from the surrounding facts and circumstances, the doing of a single isolated act is not sufficient.⁴⁶ On the other hand the same act done a number of times might be indicative of an intent to continue doing the act⁴⁷ and the intent to take necessary to an implied in fact contract established.

There is no contract implied in fact if the act of the government is done under a claim of right, for such a claim is inconsistent with an intent to take private property.⁴⁸ Nor for much the same reason is there a contract implied in fact if the appropriation of the property was by mistake.⁴⁹

A "taking" under an implied contract theory requires that both the government and the official actually doing the taking have definite authority to take.⁵⁰ The government indicates its decision to act by granting authority, and thus, absent any authority, there is no intent to take and no implied contract. At most, there would have been a tort. However, the act on the part of the official can later be ratified to give it the character of a compensable taking.⁵¹

⁴⁵ *E.g.*, *John Horstman Co. v. United States*, 257 U.S. 138 (1921); *Tempel v. United States*, 248 U.S. 121 (1918); see *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 337 (1922) (Mr. Justice Brandeis, dissenting); but see *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922). It should be noted that this view contrasts with the more modern view, pertaining to constitutional takings, that authority to do that which necessarily interferes with private property constitutes authority to take that property even though there is no direct intent to take.

⁴⁶ *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

⁴⁷ *Id.*

⁴⁸ *Id.* at 332 (Brandeis dissenting); *Tempel v. United States*, 248 U.S. 121 (1918). In the same vein, see the discussion on prior government interests *infra*.

⁴⁹ *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 332 (1922) (Justice Brandeis dissenting).

⁵⁰ *Id.* at 332; *Vansant v. United States*, 75 Ct. Cl. 562 (1932); *United States v. North American Co.*, 253 U.S. 330 (1920).

⁵¹ *United States v. North American Co.*, 253 U.S. 330 (1920).

If the taking remains unauthorized, the property owner might be able to recover his property by an action in ejectment.⁵² Lack of authority to take is, however, probably no longer a problem, for it seems that authority to do that which necessarily results in interference with private property is sufficient authority to support a claim of "taking."⁵³ Thus the importance of specific authority as indicative of intent and indeed the requirement for an intent to take, are for the most part relegated to the archives of history.

Finally, there is no taking by implied contract (or otherwise) if the plaintiff has no condemnable property right.⁵⁴ If there is no such property right, the plaintiff is not deprived of anything and no recovery can be allowed. What constitutes a condemnable property right is open to question. It has been held, however, that rights such as contract rights⁵⁵ are condemnable property rights, and this would tend to indicate that those with less than full title in land might be able to recover compensation for damage to their interests.

b. *The Fifth Amendment Taking:*

In the 1920's and 30's, the courts began to recognize claims based directly on the Constitution, holding that a claim for just compensation for property taken for a public use was founded solely on the Constitution⁵⁶ and therefore came under the purview of the Tucker Act.⁵⁷ With the development of this doctrine, it has become unnecessary to prove an implied contract.⁵⁸ It is of course still necessary to prove that there has been a taking.

⁵² See *United States v. Lee*, 106 U.S. 196 (1892); compare *Malone v. Bowdoine*, 369 U.S. 643 (1962) in which ejectment was disallowed on the grounds that compensation was an available remedy. While not based on intent, a concept of authority is also applicable in the case of a constitutionally based taking, (see *supra* note 44) and if authority is lacking, an action for ejectment might still be possible.

⁵³ See, e.g., *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950); *United States v. Causby*, 328 U.S. 256 (1946); *Dugan v. Rank*, 372 U.S. 609, 623 (1963) (dictum).

⁵⁴ *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 & 511 (1945). The principle here is equally applicable in a claim founded on the constitution and the problem should receive serious consideration in preparing the lawsuit.

⁵⁵ *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1921); see also *Lynah v. United States*, 292 U.S. 559 (1934).

⁵⁶ E.g., *Jacobs v. United States*, 290 U.S. 13 (1933). This principle was, however, recognized as long ago as 1893 in the dissent to *Hill v. United States*, 149 U.S. 593, 600 (1893).

⁵⁷ 28 U.S.C. § 1491 (1964).

⁵⁸ *Jacobs v. United States*, 290 U.S. 13 (1933).

Some of the problems encountered in proving that there was a taking under the implied contract doctrine recur in the area of constitutional takings.⁵⁹ However, there are also a number of other arguments available to the government.

The government's central argument in support of the contention that there has been no fifth amendment taking is the argument that there has been no invasion. An invasion is an essential prerequisite to finding a fifth amendment taking, and virtually the entire area is permeated by this concept. This invasion must be a physical invasion of the plaintiff's property by something tangible. It results either from an entry of the government, its entities or its projects onto the property or from the entry of the products or creations of the projects, provided they are sufficiently connected with the government's activity. While "invasion" and "taking" are really separate concepts, there seems to be a subliminal tendency on the part of the courts to equate them. Thus, if it is found that there has been no "invasion," it will be held that there was no "taking".⁶⁰ The courts have not, however, been entirely uniform in applying the invasion doctrine. In *United States v. Causby*,⁶¹ the

⁵⁹ These are the doctrines of "no condemnable property right" and "a single isolated act." The requirement of intent occasionally appears, but it is limited strictly to a requirement of an intent to do an act which results in a taking. This intent is satisfied by the mere authorization of a project which necessarily interferes with private property rights; thus intent is of little importance today in proving a taking. See *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950); *United States v. Causby*, 328 U.S. 256 (1946).

⁶⁰ The courts' insistence on strict adherence to the doctrine of invasion frequently leads to some rather ludicrous results. In *Franklin v. United States*, 101 F.2d 459 (6th Cir. 1939) while the decision turned on the doctrine of consequential damages, the court found there was no invasion. The plaintiff had owned a one-fourth interest in a 1100 acre farm well above the high water mark on the east bank of the Mississippi River. The Army Corps of Engineers built a series of dikes on the west bank of the river and within a year erosion had deposited the major portion of the plaintiff's farm in the Gulf of Mexico; yet the court held that there had been no invasion. Similar results have been reached in aviation cases of a more recent vintage such as *Avery v. United States*, 330 F.2d 640 (Ct. Cl. 1964). In this case, one of the plaintiffs had a house so situated beyond the end of a jet runway as to get the full blast of the jet exhaust during runup and takeoff. The house was rendered virtually uninhabitable, yet it was held that there was no invasion and no taking. However, on a few occasions, the courts have taken a more enlightened view. In *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950), the Court found there was an "invasion" when the Government's dam several miles upstream from the claimant's land deprived the claimant of water, which he otherwise would have had, by halting beneficial floods.

⁶¹ 328 U.S. 256 (1946).

pioneer aviation case, the Court found that there was an invasion and taking when aircraft flew below the floor of the navigable airspace and thus invaded the plaintiff's property.⁶² In *Griggs v. County of Allegheny*,⁶³ the floor of the navigable airspace had been lowered so that aircraft on takeoff and landing were no longer below it.⁶⁴ However, recovery was allowed on the ground that the invasion of that airspace adjacent—albeit, super adjacent—to the property owner's land adversely affected the use of the land and constituted a taking. While it would seem from this that the only real basis for recovery could be the inconvenience and discomfort caused by the noise and disturbance of low flying aircraft,⁶⁵ the courts still refuse to allow recovery if there is no actual invasion even though there is decline in the value of the property.⁶⁶

While recent decisions such as *Griggs*⁶⁷ have not yet eliminated the requirement for an actual physical invasion they might well have opened the door for its demise in the not too distant future. Should this occur it is not at all unlikely that those defenses, such as the failure of the government to exercise a proprietary right, consequential damage, and indirect damage, which are closely related to invasion might also fade from the scene. The task of the property owner seeking compensation for a taking on constitutional grounds would then be greatly simplified.

Closely allied to the concept of invasion is the idea that the government has not "taken" property within the meaning of the fifth amendment until it exercises a "proprietary right" over it. In the past, it has been held that an act by the government does not result in a compensable taking if it merely inconveniences the

⁶² At common law, the landowner was considered to own from the center of the earth unto the heavens. However, times change and in the Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926), Congress declared the national sovereignty over the country's airspace and granted to all citizens the right of free transit through the country's navigable airspace which it defined as that "airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce . . ." In *United States v. Causby*, 328 U.S. 256, 266 (1946), the court held, in effect, that by virtue of this act the landowner owned up to the floor of the navigable airspace and flights at lower altitudes were an invasion of his property.

⁶³ 369 U.S. 84 (1962).

⁶⁴ Federal Aviation Act of 1958, 72 Stat. 731 (1958).

⁶⁵ But see Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1391-96 (1965).

⁶⁶ E.g., *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), this case did note that if the property destruction had been total there might be recovery; *Avery v. United States*, 330 F.2d 640 (Ct. Cl. 1964).

⁶⁷ 369 U.S. 84 (1962).

property owner, the government acquiring no rights in the property.⁶⁸ If the government acquires no rights, it has taken nothing for which it is bound by the Constitution⁶⁹ to pay compensation. The notable weakness of this argument is that while the government may have received no specific benefit, the property owner has suffered a very real loss, his property being taken from him in value if nothing else. It is taken even though it has simply disappeared, and so far as can be determined, the destruction of a person's private property is now as valid a basis for a claim of compensable taking as is its adverse use by the government.

Perhaps second only to the concept of invasion and closely related to it as a defense to a suit for compensation is the doctrine of consequential or incidental damages. If the damage is merely a consequence of, or incidental to, the lawful activities of the government, there is no taking.⁷⁰

The defense of consequential damage depends largely upon intervening factors. If outside factors intervene between the government's lawful act and the damage, and the damage would not have occurred without them, the damage is merely "consequential" or "incidental" to the act and, without more,⁷¹ there is no taking and therefore, no liability.

This defense also ignores the government's true role in the property owner's loss. But for the government's acts, he would still have his property. Since lawful activity by the government is inherent in the concept of a compensable taking, it would seem that so long as there is such activity to benefit the public and this activity results in a diminution of an individual's property, there has been a taking for a public use, and the property owner should be compensated under the fifth amendment without regard to the number of intervening factors involved.

It may not be impossible to achieve this result for the courts have been inconsistent in their application of the doctrine and unable to agree on what really constitutes an "intervening factor." Often the astute property owner can take advantage of this con-

⁶⁸ *E.g.*, *Vansant v. United States*, 75 Ct. Cl. 562 (1932).

⁶⁹ U.S. CONST. amend. V.

⁷⁰ *E.g.*, *Franklin v. United States*, 101 F.2d 459 (6th Cir. 1939); *Goodman v. United States*, 113 F.2d 914 (8th Cir. 1940).

⁷¹ In *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962) the court said by way of dictum that if the destruction of the property is total, compensation might be allowed despite the fact the damage was consequential.

fusion. In *United States v. Dickinson*,⁷² a government dam, built in the lawful pursuit of navigational improvement, had backed up water, which in turn caused erosion of the plaintiff's land. In spite of the fact that some of the circuit courts and the Supreme Court have held similar erosion to be consequential damage,⁷³ the Court here held that it was not. In *Cotton Land Co. v. United States*,⁷⁴ involving what many courts would consider to be intervening factors,⁷⁵ the court added to the confusion. It implied that merely by doing an act which resulted in the loss of value of the plaintiff's land, the government became bound to pay, and further found the consequential damage defense inapplicable if the contributing factors could have been foreseen, indicating that, in such a case, the damage naturally results from the government's acts. The court held the damage was not consequential saying:

[T]he Government built its public improvement. The plaintiffs lost their land. The loss resulted naturally from the improvement. . . . [T]he plaintiffs are entitled, under the constitution, to be compensated.⁷⁶

Finally, in the rather old case of *Pumpelly v. Green Bay Co.*, the Court, in an enlightened moment, indicated, although indirectly, that there should be compensation for consequential injuries.⁷⁷

It would seem from the confusion and inconsistency surrounding the consequential damage defense that the courts, at least to some extent, are aware of its weaknesses. Thus, it might well be that the property owner taking advantage of the inequities and inconsistent precedent can overcome the defense by appealing to the court's sense of fundamental fairness.

The concepts of remote and indirect damage as a defense are

⁷² 331 U.S. 745 (1947); see also *United States v. Lynah*, 188 U.S. 445 (1903) *overruled in part*, 312 U.S. 592. *Lynah*, however, was a contract case.

⁷³ *Bedford v. United States*, 192 U.S. 217 (1904); see also *Franklin v. United States*, 101 F.2d 459 (6th Cir. 1939).

⁷⁴ 75 F. Supp. 232 (Ct. Cl. 1948).

⁷⁵ The government constructed and was operating a dam. The lake created by the dam was five miles south of the plaintiff's property; however, as the lake filled, the river lost its velocity. As a result it deposited large quantities of sand and silt which it had picked up when it was released from a dam further upstream. Over the years the deposits of silt moved upstream towards the plaintiff's property. As the silt was deposited, the elevation of the river bed rose. As the river bed rose, the water level rose. As the water rose, the river overflowed and the plaintiff's land was flooded.

⁷⁶ 75 F. Supp. at 235.

⁷⁷ 80 U.S. 166, 179-81 (1871).

closely related to and almost an integral part of the defense of consequential damage and subject to the same infirmities and confusion as it is. If the injury occurs distant from the Government's activity, there is no taking.⁷⁸ Similarly, if the damage is not a direct and necessary result of the government's activity, the property owner cannot recover.⁷⁹

As evidenced by *Cotton*,⁸⁰ the element of foreseeability runs throughout the defenses of "consequential," "remote," and "indirect" damages, and it is perhaps for this reason alone that they are viable. It has often been held that if the damage could not reasonably have been foreseen at the time the project was undertaken, there has been no compensable taking.⁸¹ This defense, it seems, stems from a desire to stabilize government planning and to make planning for projects a more certain endeavor. When it is remembered that inverse condemnation is, in reality, a remedy for the government's failure to institute condemnation proceedings, the reasoning behind the defense can be more easily understood. The landowner who has fallen victim to the foreseeability argument is considered to be in no worse position than he would otherwise be in for he could never have expected the government to take steps to acquire his property by condemnation if the harm to the property were not foreseeable. When the damage is truly unforeseeable, it becomes simply part of the price that the property owner must pay for living in a progressive and dynamic society. It is only when there is activity for the public good that is calculated or should have been calculated to damage the property owner that he is entitled to claim his property has been taken for a public use and that he should be compensated. If this were not so, the burden of undertaking projects highly beneficial to society could rapidly grow out of proportion to the benefit rendered. Then the government, forced to bear this burden, would find it necessary to cease or drastically cutback such undertakings and the loss to society would be enormous.⁸²

Turning away from the defenses centered about the requirement for an invasion, we find that there is no relief for a mere

⁷⁸ *E.g.*, *Christman v. United States*, 74 F.2d 112 (7th Cir. 1934).

⁷⁹ *Sanguinetti v. United States*, 264 U.S. 146 (1924).

⁸⁰ 75 F. Supp. 232 (Ct. Cl. 1948).

⁸¹ *E.g.*, *Cotton Land Co. v. United States*, 75 F. Supp. 232 (Ct. Cl. 1948) (the damage was foreseeable); *John Horstmann Co. v. United States*, 257 U.S. 138 (1921) (the damage was not foreseeable).

⁸² To the same effect, see *Fitts, Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801, 826 (1940-1941).

temporary invasion.⁸³ The doctrine of the temporary invasion is not to be confused with the doctrine of partial taking, although both may result from an invasion which lasts for only a limited period of time. While a temporary invasion is noncompensable, not resulting in a taking, the partial taking is a "taking" for which compensation is awarded. A partial taking can arise when there is an invasion resulting in complete deprivation of total or partial use of the property for a period of time and the use is then restored by an affirmative act of the government. On the other hand, a temporary invasion exists if the invasion is only infrequent and perhaps intermittent, correcting itself—the land being returned to its normal state with no outside assistance. The invasion in this case will have done no more than cause the landowner some inconvenience, and not have impaired his customary use of the land.⁸⁴ Even if this situation is a direct and foreseeable result of the government's activity, temporary invasion still may constitute a valid defense, for there is no actual appropriation of the property to public use,⁸⁵ the property owner having suffered no real damage.

Suits in inverse condemnation are necessarily retrospective in nature, and thus the government can use with tremendous effect the defense that the damages claimed are merely speculative. This defense is based on the rule that the property owner must show his property has been "taken." There is no taking until the damage is done. There can be no compensation for damage which has not occurred and may never occur.⁸⁶ The mere fact that the government's activities have placed a property owner in a position where he might in the future be damaged in some way does not meet the requirement that there be a "taking." Nor can the speculative damage defense be defeated by damage occurring after the

⁸³ See, e.g., *Matthews v. United States*, 87 Ct. Cl. 662, 720 (1938); *Sanguinetti v. United States*, 264 U.S. 146 (1924) (This, however, was a contract case).

⁸⁴ Although no cases articulating it have been found, the distinction between these two concepts is important for when there is a complete deprivation of the use of the property for a period of time and the use is then restored by the government, there is a "taking." However, when the invasion is only temporary in the sense indicated, it appears that there is no taking and no compensation. Unfortunately, the courts themselves frequently confuse the two concepts, holding that a temporary invasion is a partial taking and that a partial taking is a temporary invasion.

⁸⁵ See *Goodman v. United States*, 113 F.2d 914 (8th Cir. 1940). While this case supports the proposition that temporary invasion constitutes a defense in the face of direct, foreseeable results, the court seems somewhat confused as to the true nature of a temporary invasion.

⁸⁶ See *United States v. Sponenbarger*, 308 U.S. 256 (1939).

action has commenced. The property owner must have a valid claim at the commencement of the suit.⁸⁷ It would seem, however, that where the government's acts subject the property to future damage and thereby reduce its value the damage is no longer speculative—that a taking has occurred and compensation should be paid.

Finally, the "single isolated act" defense is again involved in fifth amendment takings as well as under implied contracts.⁸⁸ A single act which results in no continuing damage does not constitute a "taking." At most it would be a tort, compensable perhaps under the Federal Tort Claims Act.⁸⁹

c. Prior Government Interests:

When prior government interests are present, the government already has a prior right in the property involved and cannot "take" that which the property owner does not have. The government need not recognize private, state-created interests which are inferior to its own. These government interests most frequently take the form of servitudes and the most common of these is the navigational servitude. Under its power to control navigation⁹⁰ the government has a servitude over all the navigable waterways in the United States, and what it does in the exercise of its right does not result in a compensable taking of that which is subject to the servitude.⁹¹ It has even been argued that the scope of this navigational servitude is not limited to acts done to improve navigation, but that the servitude gives the government power to do whatever it desires with the waters of a navigable stream without being required to pay compensation.⁹² Of course if this reasoning were to be followed there would be no compensation allowed for government activities dealing with virtually any of the navigable waters

⁸⁷ *Court of Marion County v. United States*, 53 Ct. Cl. 120 (1918).

⁸⁸ *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965); see *B Amusement Co. v. United States*, 180 F. Supp. 386 (Ct. Cl. 1960); cf. *Moore v. United States*, 185 F. Supp. 399 (N.D. Tex. 1960).

⁸⁹ Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.); *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953) noted that a single act, while not a taking, might in or under proper circumstances give rise to a claim under the F.T.C.A.

⁹⁰ Compare U.S. CONST. art. I, § 8, with *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁹¹ *Monongahela Bridge Co. v. United States*, 216 U.S. 177 (1910); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *Gibson v. United States*, 166 U.S. 269 (1897); but see, *United States v. Chicago, M., St. P. & P. Ry.*, 113 F.2d 919 (8th Cir. 1940) *rev'd*, 312 U.S. 592 (1941).

⁹² *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 756 (1950) (Mr. Justice Douglas dissenting).

of the United States, and probably their tributaries, no matter what the purpose of those activities and no matter what effect they had on property owners. So far the cases relying on an exercise of the navigational servitude have generally been limited to activities dealing directly with navigation, and the degree to which the servitude will be extended is a question for the future. However, at least one case has held that the government's power over navigable waters is "as broad as" the needs of commerce—as broad as the commerce power itself.⁹³

3. *Other Tucker Act Problems:*

a. *When the property owner reclaims:*

It has been argued that where the property owner is able to reclaim the property damaged by the government, there is no "taking." This defense has, however, been disallowed,⁹⁴ as well it should be, for even if the property owner's loss is not as great as if the property were unreclaimed, this mitigation of the loss has been through his own effort and expense and his property to the extent of these expenditures has been taken for a public use. If the government would have been liable except for the reclamation, it should be liable, although perhaps for a reduced amount, despite the reclamation. The government should not be allowed to escape liability entirely, merely because the property owner has gone to the trouble and expense of reducing his loss. If, however, the owner's total loss including his expense and labor is less than it would have been absent his efforts to mitigate, the government would undoubtedly be liable for no more than the actual loss.

b. *When the property owner is both injured and benefited:*

On occasion the government's activity, undertaken in the hope of alleviating a problem causing injury to landowners, will have the result of alleviating the one problem but creating another which also causes damage. If in such a case the owner's benefit, his total gain, outweighs his damage, or if there is no secondary problem but the original danger persists to a lesser extent, the courts will set off the gain against the loss and find that there is no compensable taking.⁹⁵

c. *When recovery of interest is sought:*

There is a diversity of opinion as to whether interest may be

⁹³ *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

⁹⁴ *United States v. Dickinson*, 331 U.S. 745 (1947).

⁹⁵ *E.g.*, *United States v. Sponenbarger*, 308 U.S. 256 (1939).

allowed on claims brought under the Tucker Act. A number of cases applying a series of enactments originating in the old Judicial Code⁹⁶ have held there can be no interest on claims against the government unless it is provided for by contract or an express act of Congress.⁹⁷ However, other cases have held that in the case of a claim based on a Constitutional taking, interest is a part of the "just compensation" required by the fifth amendment.⁹⁸

d. *When the property owner seeks to counterclaim against the United States:*

There can be no counterclaim under the Tucker Act in a suit brought by the United States. If an owner has a Tucker Act claim against the government, he must raise it in a separate suit.⁹⁹

e. *When a claim sounds in tort:*

Finally, a suit under the Tucker Act may not be brought unless it is founded on one of the grounds specifically enumerated in the act.¹⁰⁰ In the past, the most frequent example of the problem thus created has been that the court has no jurisdiction to render a judgment against the government on an action sounding in tort.¹⁰¹ While the Court of Claims still has no jurisdiction over actions sounding in tort, the resulting difficulty is less since the passage of the Federal Tort Claims Act,¹⁰² as there is no longer any need to attempt to recover under the Tucker Act for injuries which might not amount to a taking but which probably are a tort.¹⁰³

B. ACTIONS AGAINST OFFICERS:

In addition to suits against the government under the Tucker Act, a property owner may maintain a damage action against a

⁹⁶ These are 36 Stat. 1087 § 177; 28 U.S.C. § 284 (Old); and 28 U.S.C. § 2516 (1964).

⁹⁷ *E.g.*, *United States v. North American Co.*, 253 U.S. 330 (1920).

⁹⁸ *See, e.g.*, *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 762 (1950) (Mr. Justice Douglas dissenting); *Jacobs v. United States*, 290 U.S. 13 (1933); *Seaboard Airline Ry. v. United States*, 261 U.S. 299 (1923). *But see* *United States v. Goltra*, 312 U.S. 203 (1941).

⁹⁹ *E.g.*, *United States v. Double Bend Mfg. Co.*, 114 F. Supp. 750 (S.D. N.Y. 1953). *But see* *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959).

¹⁰⁰ 28 U.S.C. § 1491 (1964).

¹⁰¹ *E.g.*, *Christman v. United States*, 74 F.2d 112 (7th Cir. 1934).

¹⁰² 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C., especially 28 U.S.C. § 1346(b) (1964)).

¹⁰³ *See infra* part (IV, E).

government officer in his individual capacity. This, however, is subject to many of the same difficulties encountered in attempting to sue an officer for an injunction; the officer will not be held liable unless it can be proven that he was acting not for the government, but on his own behalf.¹⁰⁴ Also, the officer may avail himself of some of the defenses available to the government.

C. ACTIONS AGAINST GOVERNMENT CONTRACTORS:

An action might be maintained against a private contractor hired by the government. However, these contractors are generally considered to be acting on behalf of the government, and they have available the government's defenses.¹⁰⁵ It has also been held that if the contractor's actions result in a compensable taking, the proper remedy is a Tucker Act suit against the government for compensation, not a suit against the contractor.¹⁰⁶

D. ACTIONS AGAINST GOVERNMENT CORPORATIONS:

Suits against government corporations present a different problem, and they cannot be joined with Tucker Act suits against the United States.¹⁰⁷ A government corporation characteristically has certain attributes of both a private corporation and the government. The acts creating most government corporations, such as the Tennessee Valley Authority,¹⁰⁸ contain provisions authorizing them to sue and be sued. However, this does not create equality between private and government corporations in this regard. The latter still retain many of the defenses available to the government and its agencies.¹⁰⁹ If the United States is the real party in interest, or the judgment would necessarily affect it, sovereign immunity will extend to the corporation.¹¹⁰ Further, since the regulations governing federal corporations are published, the corporation may take advantage of the defense that estoppel may not be invoked against the government.¹¹¹ However, at least insofar as administration is

¹⁰⁴ See *Yearsley v. Ross Constr. Co.*, 309 U.S. 18 (1940); *Randall v. Brigham*, 74 U.S. 523 (1868) (a state case).

¹⁰⁵ *Yearsley v. Ross Constr. Co.*, 309 U.S. 18 (1940).

¹⁰⁶ *Yearsley v. Ross Constr. Co.*, 309 U.S. 18 (1940); *Schaefer Brewing Co. v. United States*, 121 F. Supp. 322 (E.D.N.Y. 1954).

¹⁰⁷ *Lynn v. United States*, 110 F.2d 586 (5th Cir. 1940).

¹⁰⁸ Tennessee Valley Authority Act of 1933, Ch. 32, 48 Stat. 58 (1933-1934); 16 U.S.C. §§ 831-831d (1964).

¹⁰⁹ See *Atchley v. Tennessee Valley Authority*, 69 F. Supp. 952 (N.D. Ala. 1947).

¹¹⁰ *Ballaine v. Alaska N. Ry.*, 259 F. 183 (9th Cir. 1919).

¹¹¹ *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). This is discussed *supra* note 23.

concerned, the federal corporation is an entity separate from the government and any attempt to proceed against it by injunction or mandamus must be directed to its own officers and not to their governmental counterparts.¹¹²

E. FEDERAL TORT CLAIMS ACT:

The Federal Tort Claims Act¹¹³ gives the federal courts limited jurisdiction over tort claims against the government, and might afford relief in cases which once would have been dismissed as sounding in tort. However, if the United States could not have been liable for a taking when the interference complained of was non-negligent, the mere existence of the Federal Tort Claims Act does not render it liable simply because the act claimed to be a taking was done negligently.¹¹⁴

Further, unlike the Tucker Act, the Federal Tort Claims Act is subject to a two year statute of limitations,¹¹⁵ and there is no concurrent jurisdiction between the Court of Claims and the district courts. Tort claims must be brought in the district courts¹¹⁶ or presented to the proper administrative authorities.¹¹⁷ The Court of Claims does, however, when both parties consent, have appellate jurisdiction over district court decisions on tort claims.¹¹⁸ The act also provides numerous exceptions to the tort jurisdiction,¹¹⁹ and the courts have engaged in rather detailed interpretations limiting its application. One result is that there is no government liability for a deliberate nonnegligent tort, and the claim must involve either an act of misfeasance or nonfeasance.¹²⁰ In interpreting the discretionary act exception¹²¹ of the Tort Claims Act the court in

¹¹² See *United States ex rel Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1 (1927).

¹¹³ 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C., especially 28 U.S.C. § 1346(b) (1964)).

¹¹⁴ See *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950).

¹¹⁵ 28 U.S.C. § 2401(b) (1964).

¹¹⁶ 28 U.S.C. § 1346(b) (1964).

¹¹⁷ 28 U.S.C. § 2672 (1964).

¹¹⁸ 28 U.S.C. § 1504 (1964).

¹¹⁹ 28 U.S.C. § 2680 (1964).

¹²⁰ See *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953).

¹²¹ 28 U.S.C. § 2680(a) (1964) provides that the grant of jurisdiction under the Federal Tort Claims Act does not extend to "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Dalehite v. United States,¹²² held that the exception applies to all acts from the initial planning level down to the lowest level where there is room for policy judgment and decision, and that the acts of subordinates following directions of superiors who exercised discretion are not actionable.¹²³ This very effectively limits the scope of the government's liability, but the Court further held that there is no absolute liability under the Federal Tort Claims Act.¹²⁴ There was a slight modification of the *Dalehite* holding in *Indian Towing Co. v. United States*,¹²⁵ where the court held the discretionary act exception does not apply if there is a positive duty to use due care.

Thus, the Federal Tort Claims Act is ringed with restrictive provisions and one hoping to bring a successful suit under it must be wary of its limitations.

V. OTHER:

A. EJECTMENT:

An action for ejectment against a federal officer is akin to a suit for an injunction and subject to much the same defense. Ejectment was allowed in *United States v. Lee*,¹²⁶ but in *Malone v. Bowdoin*,¹²⁷ it was disallowed. In *Malone*, the Court avoided overruling *Lee*, noting that at the time *Lee* was decided, there was no way for the property owner to obtain compensation. Thus, it seems likely that so long as compensation is available, an action for ejectment will not succeed. If a Tucker Act suit is lost on the grounds that the entry was in excess of constitutional statutory authority, then perhaps a suit for ejectment would succeed if it did not im-

¹²² 346 U.S. 15 (1953).

¹²³ *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950) held that legislative determinations to construct projects and administrative decisions as to how to proceed are discretionary. See generally cases collected in Annot., 99 A.L.R.2d 1016, 1030-37 (1965).

¹²⁴ This is also articulated in *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953).

¹²⁵ 350 U.S. 61 (1955). A lighthouse had failed causing a tugboat to run aground. The court held that the coast guard having exercised its discretion in erecting a lighthouse had engendered a justifiable reliance on the light and therefore had a positive duty to use due care to maintain it or give warning of its failure. Having failed to do so, it was liable.

¹²⁶ 106 U.S. 196 (1882). This was an action to recover from government officers, possession of land constituting the Lee estate and which was within the boundaries of Arlington Cemetery.

¹²⁷ 369 U.S. 643 (1962). This was an action to eject a United States Forest Service officer who was occupying, in his official capacity, land claimed by the plaintiff.

pose a burden on the sovereign.

B. MANDAMUS:

For many years, an original action for mandamus could be brought only in the District of Columbia.¹²⁸ However, a recent enactment¹²⁹ allows original actions in the nature of mandamus to be brought in any district court. It should be noted, however, that the writ of mandamus itself has been abolished in the federal district courts,¹³⁰ and it is only actions in the nature of mandamus, perhaps for a mandatory injunction, which may be brought.

VI. CONCLUSION:

When as a result of the activities of federal officials, private property is harmed or threatened with harm, no provision being made for compensation, the owner's attorney must choose between seeking an injunction or suing for damages. If the attorney makes the wrong choice, the property owner may well be precluded from any relief.

An action to enjoin a federal officer is at best a risky proposition, seldom resulting in a decision favorable to the plaintiff. Should he lose, he then may well be unable to institute a suit for damages. While a suit for damages also has its definite problems, the greatest of which is proving that there has been a taking, the plaintiff is much more frequently successful in this type of suit than in a suit for an injunction. The courts as evidenced by their decisions are in conflict as to the proper treatment of damage suits. The Supreme Court in a few cases¹³¹ seems to have subliminally recognized that the key taking defense, invasion, is wrongly and inequitably applied. Should this defense fall, as well it might if subjected to increasingly frequent and well directed attacks by able lawyers, it will probably carry with it virtually every "taking" defense with the exceptions of foreseeability and prior federal rights. The defense of prior federal rights is applicable in only a limited number of situations where no recovery could be achieved under any theory, and the defense of foreseeability should not in this day

¹²⁸ *Alley v. Craig*, 97 F.Supp. 576 (S.D. Me. 1951); see *Marshall v. Crotty*, 185 F.2d 622, 626 (1st Cir. 1950); *Knapp v. Lake Shore & M. S. Ry.*, 197 U.S. 536 (1905).

¹²⁹ 28 U.S.C. § 1361 (1964).

¹³⁰ *FED. R. CIV. P.* 81(b); 7 J. MOORE, *MOORE'S FEDERAL PRACTICE* § 81.07 (2d ed. 1955).

¹³¹ *E.g.*, *Griggs v. County of Alleghany*, 369 U.S. 84 (1962); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

of scientific and engineering advance, when computers are capable of predicting almost anything, pose much of an obstacle to the damaged property owner. Compensation will be readily available. The property owner will need prove no more than that legitimate federal activity for the public good has resulted in a loss through damage to or destruction of his property. While it is true that such a course of action aimed at making compensation more readily available will not recover the property itself for the sentimental or self interested landowner, it will encourage the property owner to vindicate his rights through suits for damages and enable the government to carry out its projects for the greater public good without the delay, expense and harassment which might result from following a course tending to increase rather than, as is happening today, diminish the success met with in suits for injunctions.

The lawyer who chooses the damages road will not only benefit from the potential ease with which a suit for damages may be won, and advance the effort to encourage such suits over injunctions, but he will find that he has given himself far greater freedom of advocacy than if he had sought an injunction. He is afforded an opportunity to argue the basic justice of his client's claim rather than being forced to fit the claim into an uncomfortable mold.

Should a damage suit be lost, the lawyer has the comfort of knowing that his client may not be in such an irreversible position as he would be in if a suit to enjoin had been lost. When the damage suit is lost, the court may well have laid the foundation for specific relief in the form of an injunction or ejectment by finding that the interference was not a compensable taking because it was without statutory authorization, or unconstitutional. Should this occur, the lawyer's only real problem would be to prove that specific relief will not "burden the sovereign." As he would be in equity, he would not find himself barred by the statute of limitations which might confront him had he first sued for an injunction and lost.

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