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**Boudreau v. United States: Government Immunity under the Flood Control Act of 1928 and the Effect of Outdated Legislation on Society**

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BOUDREAU v. UNITED STATES: GOVERNMENT IMMUNITY UNDER THE FLOOD CONTROL ACT OF 1928 AND THE EFFECT OF OUTDATED LEGISLATION ON SOCIETY

I. Introduction

As far back as 1717, the federal government was involved in projects designed to lessen the damage to property owners in regularly flooded areas.¹ In 1883, the United States increased its efforts to control flooding by adopting the Eads plan, which called for the construction of a series of public works projects along the Mississippi River to prevent flooding and protect river bank property.² Despite the government’s increased efforts, the disastrous flood of 1927 caused severe damage to areas bordering the Mississippi River.³ It was against this backdrop of devastation that Congress began discussing further flood control projects and, more specifically, developed the Flood Control Act of 1928 (the “Act”).⁴

1. United States v. Sponenbarger, 308 U.S. 256, 261 (1939) (discussing early efforts by government to control flooding along Mississippi River). “As early as 1717, small levees were erected in the vicinity of New Orleans.” Id.

2. Id. Floods had contributed to the fertility of the soil, but they also had undermined the security of life and property. Id. at 260. “Until 1883, piecemeal flood protection for separate areas was attempted through uncoordinated efforts of individuals, communities, counties, districts and States.” Id. at 261. Experience had demonstrated that these disconnected levees were incapable of safeguarding an ever increasing population drawn to the valley. Id. “Under . . . the Eads plan, the United States undertook to cooperate with, and coordinate the efforts of the people and authorities of the various river localities in order to effect a continuous line of levees along both banks of the Mississippi for roughly nine hundred and fifty miles . . . .” Id. For a further discussion of the history behind the Eads plan and the flood problems along the Mississippi, see Jackson v. United States, 230 U.S. 1, 6-7, 11-12 (1912).

3. See Sponenbarger, 308 U.S. at 261 (describing devastation caused by flood of 1927). “There were stretches of country [in Arkansas] miles in width and miles in length in which . . . every house, every barn, every outbuilding of every nature, even the fences, were swept away.” Id. (quoting 69 Cong. Rec. 8191 (1928)). “Recurrent floods . . . [and the disastrous flood of 1927] led to the conclusion that levees alone, though continuous; would not protect the valley from floods.” Id.


It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government . . . that investigations and improvements of rivers and other waterways, including watersheds

(1487)
The Flood Control Act of 1928 provided a comprehensive ten-year program for the entire Mississippi Valley. It contained provisions for a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds. This program was the largest public works project undertaken up to that time in the United States. It is clear from the legislative history of the Act that Congress's decision to undertake such an expensive project was based on its desire to protect citizens' property from any future flood disasters and a strong humanitarian concern for those who suffered as a result of the 1927 flood. It is also evident, however, that Congress was equally concerned with protecting the U.S. government from liability for any damages resulting from such a huge public works project. In order to insulate the federal govern-

thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries . . . for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.


5. Sponenbarger, 308 U.S. at 262 (describing flood protection provisions of 1928 Act). The court in Sponenbarger stated:

The 1928 Act . . . accepted the conception . . . that levees alone would not protect the valley from floods. Upon the assumption that there might be floods of such proportions as to overtop the river's banks and levees despite all the Government could do, this plan was designed to limit to predetermined points such escapes of floodwaters from the main channel. The height of the levees at these predetermined points was not to be raised to the general height of the levees along the river. These lower points for possible flood spillways were designated "fuse plug levees." Flood waters diverted over these lower "fuse plug levees" were intended to relieve the main river channel and thereby prevent general flooding over the higher levees along the banks. Additional "guide levees" were to be constructed to confine the diverted flood waters within limited floodway channels leading from the fuse plugs.

Id. at 261-62.

6. Id. at 262.

7. James, 478 U.S. at 606-07 n.8 (noting that early estimates of cost of project were $325 million). "This cost is almost forty times greater than the cost of the Panama Canal." Michael S. Levine, Note, United States v. James: Expanding the Scope of Sovereign Immunity for Federal Flood Control Activities, 37 Cath. U. L. Rev. 219, 226 n.65 (1987) (citing 69 Cong. Rec. 6640 (1928) (statement of Rep. Snell)).


[T]hose of you who just a year ago witnessed the mad rush of the mighty Father of Waters, sweeping like a destroying angel over hundreds of proud cities . . . and millions of acres of fertile fields, or who later visited the stricken area to view the scenes of the greatest peace-time disaster this country has ever experienced, know . . . the horror and agony left in the wake of the 1927 flood.

Id.


I want this bill so drafted that it will contain all the safeguards necessary
ment from liability, Congress included an immunity provision, § 702(c), within the Flood Control Act of 1928.10 This provision ensures that the U.S. government will not be liable for any damage caused by floods or flood waters.11 It is this immunity provision that has been disputed in the

for the federal government. If we go down there and furnish protection to these people—and I assume it is a national responsibility—I do not want to have anything left out of the bill that would protect us now and for all time to come. If one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years.

Id.; see also James, 478 U.S. at 607 (citing remarks of Rep. Snell).

10. 33 U.S.C. § 702(c) (1994). Paragraph two of § 702(c) of the Act, enacted in May 1928 and carried forward through later versions of the Act, contains the immunity provision. Id. It states:

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: Provided, however, That if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h, 702i, 702j, 702k, 702l, 702m, and 704 of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

Id.

11. Id. Government immunity for its own negligence is not a new concept in American legal history. See Rebecca Heintz, Note, Federal Sovereign Immunity and Clean Water: A Supreme Misstep, 24 Env'l. L. 263, 263 (1994) (“[T]he United States has retained the concept of sovereign immunity throughout its legal history.”). The sovereign immunity doctrine holds that the United States cannot be sued without the consent of Congress. Jeremy Travis, Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U. L. Rev. 597, 598-99 (1982). “The practical effect of the sovereign immunity doctrine is that the United States cannot be held liable in damages absent a statutory waiver of the immunity.” Id. at 599.

Sovereign immunity can be traced back to thirteenth century England and ideas of royal supremacy and the concept that the King could do no wrong. 1 William Blackstone, Commentaries 298-99. “The king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness.” Id. at 246. Under this system, a lord could not be sued in his own court without his consent, but he could be sued in the court of a higher lord. Heintz, supra, at 266. The King being the highest lord appeared immune from suit but judicial review of the King’s failure to consent to suit was available. See Travis, supra, at 605 (“A citizen seeking relief from the Crown could direct a petition [of right] to the king . . . . [The petition] required the consent of the sovereign . . . . [P]etitions of right were not refused [however] unless the Chancellor who reviewed them found that there was in fact no ‘right’. . . . Once the petitioner obtained a judgment, the King could not refuse to enforce it.”). Tortious acts, however, could not be attributed to the King through a petition of right but only to his agents. Id. For a discussion of how torts were processed against the King’s agents instead of against the King, see Freder-
federal courts for years.12


The American version of the doctrine of sovereign immunity was defined judicially through a series of Supreme court decisions. Travis, supra, at 608. "There is nothing in the Constitution declaring the federal government immune from suit by its citizens." Heintz, supra, at 267. If a citizen wanted to bring a claim against the colonial government it was made in the form of a petition of grace not a petition of right as under the English system. Travis, supra, at 608. The popular view at the time was that "[i]t is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent." Id. (quoting THE FEDERALIST No. 81, at 508 (Alexander Hamilton) (Henry Cabot Lodge ed., 1908)). The first Supreme Court case dealing with this issue was Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). This case strayed from the popular view and found that citizens of South Carolina could bring suit against the State of Georgia and that this was allowed under the Constitution. Heintz, supra, at 268. For further discussion of Chisholm, see Travis, supra, at 609-11.

After Chisholm, Congress proposed the Eleventh Amendment to the Constitution which purported to withdraw federal jurisdiction over suits against a state brought by citizens of another state for fear that the substantial debts of the Revolution would dry up the states' treasuries. Id. at 610. After the adoption of the Eleventh Amendment, the Supreme Court embraced the doctrine of sovereign immunity. Stevens, supra, at 1125; see also Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary does not authorize such suits."). The judges, however, developed methods of circumventing the immunity. Travis, supra, at 612. For a further discussion of such methods, see Heintz, supra, at 289-70 and Travis, supra, at 612-14. Due to the harshness of the doctrine, Congress has also circumvented its use by revoking the federal government's immunity in a number of situations. Heintz, supra, at 271. For a list of some of these statutes, see Travis, supra, at 602 n.24.

Despite the revocation of the doctrine in some situations, it still "is unquestionably alive and well today" in many situations like flood control. Stevens, supra, at 1126. For a general discussion of the sovereign immunity doctrine, see PAUL BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1339-56 (2d ed. 1973); Engdahl, supra, at 1; Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. PA. L. REV. 515 (1977); Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1 (1963); Stevens, supra, at 1121; Heintz, supra, at 26; Travis, supra, at 597.

12. See Fisher v. United States Army Corps of Eng'rs, 31 F.3d 683, 685 (8th Cir. 1994) (holding that § 702(c) protects government from liability if "governmental control of flood waters was a substantial factor in causing the injury for damages"); Fryman v. United States, 901 F.2d 79, 82 (7th Cir. 1990) (rejecting Ninth Circuit test and holding that test for immunity is whether "flood-control activities increase the probability of injuries"); Boyd v. United States ex rel. United States Army Corps of Eng'rs, 881 F.2d 895, 900 (10th Cir. 1989) (finding Ninth Circuit's "'wholly unrelated' test too broad and concluding that in Tenth Circuit one must show "necessary link" between flood control activity and damages before immunity would apply and that § 702(c) did not shield government from liability associated with operating recreational facility); McCarthy v. United States, 850 F.2d 558, 562 (9th Cir. 1988) (holding that § 702(c) protects Government from liability unless damage or injury is "'wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to
In certain situations, the circuit courts have uniformly applied § 702(c) immunity. They have consistently agreed that government immunity extends to flood control projects beyond those of the Mississippi Valley. They have also agreed that the immunity provision applies even if the government was negligent in causing the damage. Nevertheless, any such authorization" (citation omitted)); Hayes v. United States, 585 F.2d 701, 703 (4th Cir. 1978) (holding that § 702(c) does not apply where operation of flood control project for recreational purposes caused damage); see also Hiersche v. United States, 503 U.S. 923, 925 (1992) (recognizing split in circuits over whether Government is immune under § 702(c) but refusing to settle dispute). The Court in Hiersche stated: "[T]his Court has a duty to resolve conflicts among the courts of appeals. As several scholars have recognized, however, that duty is not absolute. Some conflicts are tolerable. Others can be resolved more effectively by Congress. This is such a case." Id. For a further discussion of the differing views on the application of § 702(c), see infra notes 36-126 and accompanying text.

13. See, e.g., Lenoir v. Porters Creek, 586 F.2d 1081, 1086 (6th Cir. 1978) (citing cases from several different circuits which have consistently agreed that § 702(c) applies to projects beyond Mississippi Valley and also to previously disputed question of governmental negligence). For a list of these and additional cases, see infra notes 14-15 and accompanying text.

14. See Aetna Ins. Co. v. United States, 628 F.2d 1201, 1204 (9th Cir. 1980) (finding that government immunity under § 702(c) extends to projects beyond Mississippi Valley); Lenoir, 586 F.2d at 1086 (same); Callaway v. United States, 568 F.2d 684, 686 (10th Cir. 1978) (stating that Flood Control Act of 1928 was reaffirmed by Act of 1936 that authorized flood control projects throughout the country, thus making 1928 Act applicable to all flood control projects); Clark v. United States, 218 F.2d 446, 451-52 (9th Cir. 1954) (finding that supplemental Acts authorizing expenditures on other rivers incorporate provisions of 1928 Act, therefore making it applicable to areas other than Mississippi); National Mfg. Co. v. United States, 210 F.2d 263, 274 (8th Cir. 1954) (stating that words, "floods or flood waters at any place" support finding that immunity extends beyond Mississippi).

In Lenoir, the court stated: "This view [that § 702(c) applies only to the Mississippi Valley] has not commended itself to those courts which have considered it." Lenoir, 586 F.2d at 1086. "Most persuasive perhaps is the plain language . . . of the Act itself. It applies to floods 'at any place.'" Id. at 1086 n.4.

Additionally, the court in National Manufacturing Co., which was concerned with whether the Act extended to the Kansas River, stated:
The words of the section, "floods or flood waters at any place," in the context of the Act and the succeeding flood control Acts to which the section is extended and which legislate concerning flood control projects throughout the entire country, specifically include the Kansas River and its floods and flood waters. The fact that the words Mississippi River "have lingered on in the successive editions of the United States Code is immaterial."
210 F.2d at 274.

15. See, e.g., Aetna, 628 F.2d at 1204 (finding that § 702(c) immunity extends to government negligence in connection with flood control projects); Callaway, 568 F.2d at 687 (finding that plaintiff's claims for damage caused by floodwaters that resulted from government's negligent construction of integral part of flood control project were barred because immunity provision is broad and covers government negligence); Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1191 (5th Cir. 1975) (finding that consensus has been reached by federal courts that "United States is protected from liability for damages caused by 'floods or flood waters' in connection with flood control projects, even when the govern-
the circuits remain split on the more difficult issue of whether government
immunity attaches under § 702(c) when it is unclear if floods or flood
waters caused the injury within the meaning of the statute.16 This is
the issue that arose in Boudreau v. United States.17 This Note discusses how
the circuit courts have interpreted the immunity provision of § 702(c) since its
enactment in 1928. First, Part II discusses how the United States Supreme
Court and the circuit courts have decided cases similar to Boudreau.18
Next, Part III provides the factual background for the Boudreau decision.19
Part IV analyzes the reasoning of the United States Court of Appeals for
the Fifth Circuit in Boudreau and contains a critical analysis of the Fifth
Circuit's decision.20 Finally, Part V of this Note considers the practical
impact of the Fifth Circuit's decision to allow the government to success-
fully invoke immunity for accidents occurring in multi-purpose flood con-
trol facilities and concludes that the Flood Control Act of 1928 is outdated
and that the burden for correcting outdated legislation lies not with the
judicial system but with Congress.21

II. BACKGROUND

In order to provide a better understanding of the Boudreau decision,
this Part focuses on the background leading up to Boudreau. First, Section
A discusses the legislative history of the Flood Control Act of 1928 and
§ 702(c).22 Next, Section B focuses on the application of § 702(c) prior to

16. See Bailey v. United States, 35 F.3d 1118, 1124 (7th Cir. 1994) (holding that
application of immunity provision depends on whether flood control activities
at project increased probability of injury to plaintiff); Boyd, 881 F.2d at 900 (hold-
ing that immunity never attaches when waters at issue are being used for recrea-
tional purposes); McCarthy, 850 F.2d at 562 (holding that immunity applies so long
as injury is not wholly unrelated to flood control).

17. 55 F.3d 81 (5th Cir. 1995), cert. denied, 116 S. Ct. 771 (1996). At issue in
Boudreau was whether the United States could claim immunity under the Flood
Control Act of 1928 for the alleged negligent acts of the Coast Guard in patrolling
a flood control lake. Id. The court focused on whether the injuries to the plaintiff
were "from or by . . . flood waters." Id. at 83.

18. For a discussion of how the Supreme Court and the circuit courts have
handled the issue, see infra notes 96-126 and accompanying text.

19. For a discussion of the facts of Boudreau v. United States, see infra notes 134-
44 and accompanying text.

20. For a discussion of the reasoning of the Boudreau court, including the
dissenting opinion and a critical analysis, see infra notes 145-231 and accompa-
nying text.

21. For a discussion of the practical impact of the Fifth Circuit's decision, see
infra notes 252-49 and accompanying text.

22. For a discussion of the legislative history of the Flood Control Act of 1928
and § 702(c), see infra notes 25-35 and accompanying text.
the Supreme Court's decision in *United States v. James*.

Finally, Section C discusses the *James* decision and the circuit courts' application of § 702(c) after that landmark decision.

A. The Statute and Its Legislative History

In *Boudreau v. United States*, the Fifth Circuit confronted the application of the Flood Control Act of 1928. Specifically, the court considered the application of § 702(c) of the Act. Section 702(c) contains an immunity provision for federal government involvement in flood control projects. Interpretation of this provision has been a source of controversy among the circuits for a number of years. The relevant text of the statute reads: "No liability of any kind shall attach to or rest upon the United States for any damages from or by floods or flood waters at any place . . ." Legislative history and case law that has interpreted § 702(c) provide an understanding of the purpose of the immunity provision.

The remarks of Representative Snell, Chairman of the House Rules Committee in 1928, indicate that Congress's purpose in enacting § 702(c) was to allow the government to establish federal public works projects near flood prone rivers, while at the same time limit the government's liability resulting from those projects. Representative Snell stated that the bill should include liability safeguards for the federal government so that if it

23. 478 U.S. 597 (1986). For a discussion of how other circuits have applied § 702(c) prior to the 1986 Supreme Court decision in *United States v. James*, see infra notes 36-66 and accompanying text.

24. For a discussion of the only Supreme Court decision that has addressed this issue and the application of § 702(c) by the circuits after that decision, see infra notes 67-126 and accompanying text.

25. *Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995). The issue presented was whether the Flood Control Act of 1928 immunized the United States from liability for the alleged negligence of the Coast Guard Auxiliary in attempting to tow a stranded recreational vessel on a flood control lake. *Id.*

26. *Id.*


28. For a listing of these cases and their holdings, see supra note 12.

29. 33 U.S.C. § 702(c). For the complete text of paragraph two of § 702(c) which contains the immunity provision in question, see supra note 10.

30. See 69 CONG. REC. 6641 (1928) (remarks of Rep. Snell) (discussing proposed provision and concern that Congress help provide flood protection but at same time not be liable for damage caused by such facilities); see also *United States v. James*, 478 U.S. 597, 603-09 (1986) (interpreting immunity provision and its legislative history and concluding that Congress's purpose in enacting immunity provision was "to immunize the Federal Government from liability for damage resulting directly from construction of flood control projects and from flooding caused by factors beyond the government's control"). For a further discussion of the congressional history behind the immunity provision, see infra notes 30-35 and accompanying text. For a further discussion of case law which has interpreted § 702(c) and its congressional history and provides an understanding of the purpose of the provision, see infra notes 36-38 and accompanying text.

endeavored to protect citizens living near flood areas, it would not be responsible for any damages stemming from the flood projects. 32

Additionally, several other representatives indicated a desire to immunize the government from suits arising from government created flood control facilities. 33 These representatives stated that the United States should only be liable for the direct cost of the construction project and for no other expense. 34 This legislative history clearly indicates that it was Congress's intent in creating § 702(c) to allow the government to construct much needed flood control facilities while still retaining immunity from any liability associated with such projects. 35

Case law supports this reading of the immunity provision's purpose. 36 Various courts in several different circuits have all concluded that Congress intended § 702(c) to protect the government from lawsuits arising from government involvement in the construction of flood prevention projects. 37 Despite their agreement on the purpose of the immunity pro-

32. 69 CONG. REC. 6641 (remarks of Rep. Snell).
33. See id. at 6999-7000, 7028 (remarks of Reps. Friar and Spearing). “While it is wise to insert that provision [§ 702(c)] in the bill, it is not necessary, because the Supreme Court of the United States has decided . . . that the government is not liable for any of these damages.” Id. at 7028 (remarks of Rep. Spearing).
34. Id.
35. See id. at 6641, 6999-7000, 7028 (remarks of Reps. Snell, Friar and Spearing respectively).
36. For examples of case law, see infra note 37.
37. See, e.g., Peterson v. United States, 367 F.2d 271, 275-76 (9th Cir. 1966).

In Peterson, the Ninth Circuit stated:

We are unaware of any liability which existed on the part of the United States toward other parties for damages suffered to life or property caused solely by flood or flood waters of a navigable river since no duty was imposed upon the United States, as a sovereign, to control a navigable river simply because such river may be subject to the jurisdiction of the United States under one or more clauses of the Constitution of the United States.

When Section 702c was enacted in 1928, and re-enacted in 1936, the Federal Tort Claims Act had not been enacted, and the United States, broadly speaking, possessed sovereign immunity from actions sounding in tort. Hence, it cannot be asserted that Congress intended Section 702c to be but a declaration of existing law. Rather, it is clear that Congress intended by the enactment of Section 702c in the Act of May 15, 1928 . . . to be an integral part of a plan or policy on the part of the Government to embark on a vast construction program to prevent or minimize the incidences of loss occurring from floods and flood waters by the building of dikes, dams, levees, and related works, and to keep the Government entirely free from liability for damages when loss occurs, notwithstanding the works undertaken by the Government to minimize it.

Id. at 275-76; see also United States v. James, 478 U.S. 597, 608 (1986) (“Congress clearly sought to ensure beyond a doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control.”); R. E. Ritter & Co. v. Department of the Army, Corps of Eng'rs, 874 F.2d 1236, 1239 (8th Cir. 1989) (citing James as support for its reading of § 702(c) analysis); Aetna Ins. Co. v. United States, 628 F.2d 1201, 1203-04 (9th Cir. 1980) (citing Peterson for quote above and stating “[t]hat purpose [stated in Peterson] would not be furthered by
vision, the courts have not applied § 702(c) in a consistent fashion. 38

B. Application of § 702(c) in Cases Prior to the Supreme Court Decision in United States v. James

Circuit court cases interpreting § 702(c) prior to the Supreme Court decision in United States v. James 39 were exclusively cases of flood-damaged property damage resulting from the governmental negligence in the operation of flood control facilities. 40 In all but two of these decisions, the limiting the immunity to single purpose flood control projects, or even to projects in which flood control is a dominant goal.

Further, in National Manufacturing Co., the court stated:
Thus it appears on inspection . . . that when Congress entered upon flood control on the great scale contemplated by the Acts it safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language. The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them. Undoubtedly floods which have traditionally been deemed "Acts of God" wreak the greatest property destruction of all natural catastrophes and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them. Congress included Section 3 in the 1928 Act and carried it forward into the 1936 Act and others with intent to exercise that power completely and to absolutely bar any such federal liability.


38. See, e.g., Bailey v. United States Dep't of the Army, Corps of Eng'rs, 35 F.3d 1118, 1124 (7th Cir. 1994) (holding that immunity provision applies only if activities at project increased probability of injury to plaintiff); Boyd v. United States ex rel. United States Army, Corps of Eng'rs, 881 F.2d 895, 900 (10th Cir. 1989) (holding that immunity provision does not attach when injury results from recreational use of flood control waters); McCarthy v. United States, 850 F.2d 558, 562 (9th Cir. 1988) (holding that immunity provision applies unless injury is "wholly unrelated" to flood control). For a further discussion of Hiersche v. United States and the split among the circuits, see supra note 12 and accompanying text.


40. See, e.g., Portis v. Folk Constr. Co., 694 F.2d 520 (8th Cir. 1982) (involving suit by farm owners whose property was flooded and crops damaged as result of alleged negligence of government in building flood control structure); Morici Corp. v. United States, 681 F.2d 645 (9th Cir. 1982) (involving suit for crop damage allegedly caused by excessively high levels of water in river due to negligent operation of dam and reservoir works by Government); Pierce v. United States, 650 F.2d 202 (9th Cir. 1981) (involving suit by several individuals to recover for damage to land caused by alleged negligent impoundment of waters behind federal flood control dam); Aetna, 628 F.2d at 1201 (concerning suit by insurance company to recover money paid to insureds for damage to their property caused by collapse of dam built under federal flood control project); Burlison v. United States, 627 F.2d 119 (8th Cir. 1980) (involving negligently designed road and drain as part of federal flood control project which caused flood damage to plaintiff's crops); Taylor v. United States, 590 F.2d 263 (8th Cir. 1979) (dealing with flooding damage to plaintiffs' farm caused by Government's alleged negligent operation of
court held that the government was immune under § 702(c). These two cases involved government action unrelated to flood control, and, therefore, the courts held that the immunity provision did not apply.

Cases in the 1950s, 1960s and 1970s dealt with several different aspects of the application of § 702(c) of the Act. These cases dealt with the question of whether the immunity provision extended to areas other than the Mississippi Valley. They also considered the issue of whether the Act

dam downstream from plaintiffs' property; Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978) (concerning suit for damages to flooded pasture lands caused by negligent construction and design of channel flowing through property); Hayes v. United States, 585 F.2d 701 (4th Cir. 1978) (invoking suit by farmer to recover for erosion of river bank and flooding of farm caused by operation of dam's flood gates); Callaway v. United States, 568 F.2d 684 (10th Cir. 1977) (invoking suit by farmers alleging damage to their crops and other property caused by Government negligence); Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184 (5th Cir. 1975) (invoking suit by railroad for damage to its tracks because of washout allegedly caused by negligence of Government in management of flood control facility); Graci v. United States, 456 F.2d 20 (5th Cir. 1971) (concerning suit for damages to property resulting from alleged negligence of Government in construction of Mississippi River-Gulf Outlet); McClaskey v. United States, 386 F.2d 807 (9th Cir. 1967) (invoking suit for injury to motel property allegedly caused by negligent obstruction of creak by Corps of Engineers); Parks v. United States, 370 F.2d 92 (2d Cir. 1966) (invoking suit for property damage caused by alleged Government negligence in construction, maintenance and operation of flood control project); Peterson, 367 F.2d at 271 (dynamiting of ice jam by Government caused flood waters to damage plaintiffs' vessels); Stover v. United States, 332 F.2d 204 (9th Cir. 1964) (flooding damage occurred to property because Government constructed levees broke); Clark v. United States, 218 F.2d 446 (9th Cir. 1954) (flooding caused substantial property damage to town after flood waters broke through embankment built and patrolled by Government for flood control purposes); National Mfg. Co., 210 F.2d at 263 (invoking suit by business owner seeking to recover for damages to his private business alleging that Government negligently lulled him into false sense of security by erroneous weather and flood information disseminated by governmental agency).

41. See Graci, 456 F.2d at 27; Peterson, 367 F.2d at 276. In Graci, the plaintiffs sued the Government for damage to their properties caused by flood waters released because of the Government's alleged negligent construction of the Mississippi River-Gulf Outlet. Graci, 456 F.2d at 22. The court held that because the project in this case was a navigational project and not a flood control project, the immunity provision did not apply. Id. The Government could not claim immunity for its negligence when it was not involved in a flood control project. Id. at 27.

In Peterson, the plaintiffs sued the Government for damage to his property caused by flooding after a group of engineers from the Ladd Air Force Base dynamited an ice jam upstream from plaintiffs' property. Peterson, 367 F.2d at 272. The explosion caused a large accumulation of ice and an immense volume of water to move downstream and damage plaintiffs' property. Id. The court held that the decision to dynamite was wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control. Id. at 275. The court further found that the dynamiting was done to alleviate flood waters in an attempt to prevent further damage to Ladd Air Force Base. Id. Therefore, the court held that under its "wholly unrelated" test, government immunity did not apply. Id. at 276.

42. Graci, 456 F.2d at 27; Peterson, 367 F.2d at 276. For a discussion of these decisions, see supra note 41 and accompanying text.

43. See Lenoir, 586 F.2d at 1086 (holding that statute applies to areas other than Mississippi and citing numerous cases to support holding); Clark, 218 F.2d at
applied to governmental negligence. Additionally, they addressed whether the Act applied to nonnatural, man-made floods. Most of the courts held that the Act applied in these situations. In these cases, however, the fact that the damage was caused by flood waters from flood control facilities was not disputed. Therefore, the issue in Boudreau of whether the damage was caused "by or from flood waters" never arose.

Until the early 1970s, the circuits had been consistent in their analysis of § 702(c) and its application to cases which involved property damage caused by flooding of a federal flood control project.

In the late 1970s and early 1980s, the circuits began developing separate tests for the application of § 702(c) immunity. The Ninth Circuit, in Aetna v. United States, developed one such test. The Ninth Circuit

451-52 (holding that § 702(c) applied to other areas besides Mississippi because supplemental acts authorizing expenditures on other rivers incorporated § 702(c)); National Mfg. Co., 210 F.2d at 274 (holding that § 702(c) is extended to cover flood control projects throughout entire country and that fact that words Mississippi River "‘have lingered on in the successive editions of the United States Code’" is immaterial) (quoting Stephan v. United States, 319 U.S. 423, 426 (1943)).

44. See Callaway, 568 F.2d at 687 (holding Government immune despite negligent construction of bridge embankment which caused damage to plaintiff’s property); Florida E. Coast Ry. Co., 519 F.2d at 1191 (holding Government is immune from damage caused "by floods or flood waters" even when Government’s own negligence caused or aggravated losses); Graci, 456 F.2d at 27 (finding that Government negligence connected with flood control falls under § 702(c) immunity); McClaskey, 386 F.2d at 808 (holding that § 702(c) provides government immunity from liability for its negligence); Stover, 332 F.2d at 206 (holding that statute applied whether government was negligent or not and that it covered even ordinary negligence).

45. See, e.g., Aetna, 628 F.2d at 1204 (holding § 702(c) applies to floods caused by Government negligence and not solely natural conditions); Parks, 370 F.2d at 92 (holding that § 702(c) immunity was not limited to floods of natural origin).

46. For cases and specific holdings, see supra notes 14-15, 43-45 and accompanying text.

47. E.g., Taylor v. United States, 590 F.2d 263 (8th Cir. 1979); Callaway, 568 F.2d at 684; Hayes v. United States, 585 F.2d 701 (4th Cir. 1978); Florida E. Coast Ry. Co., 519 F.2d at 20; McClaskey, 386 F.2d at 807; Parks, 370 F.2d at 92; Stover, 332 F.2d at 203; Clark, 218 F.2d at 446; National Mfg. Co., 210 F.2d at 263.

48. See Boudreau v. United States, 53 F.3d 81, 82-83 (5th Cir. 1995) (stating issue was whether Flood Control Act of 1928 provided immunity for United States from liability for alleged negligence of Coast Guard Auxiliary in attempting to tow stranded recreational vessel on flood control lake), cert. denied, 116 S. Ct. 771 (1996).

49. For a discussion of these cases and their holdings, see supra notes 40-48 and accompanying text.

50. See, e.g., Aetna, 628 F.2d at 1203 (drawing on its reasoning in previous case of Peterson v. United States, Ninth Circuit developed "wholly unrelated" test to determine when to apply § 702(c) immunity); Taylor, 590 F.2d at 266 (relying on "from or by" wording in statute, court developed "substantial factor" test to determine applicability of § 702(c)); Hayes, 585 F.2d at 703 (holding that its test would be whether damage was result of operation of facility as flood control facility).

51. 628 F.2d 1201 (9th Cir. 1980).

52. Id. at 1203.
held that the immunity provision did not apply when the damage complained of was "wholly unrelated to any act of Congress authorizing expenditure of federal funds for flood control." In Aetna, the plaintiff insurance company sued the Government to recover money paid to landowners because of the 1976 collapse of the Teton Dam, a federal flood control project. The court found the Government immune from suit holding that although the Teton Dam project was not exclusively dedicated to flood control, flood control was one of the purposes of the project. Therefore, the Government was immune from a negligence suit because the damage was not "wholly unrelated" to any act of Congress authorizing expenditure of federal funds for flood control. The Ninth Circuit has consistently applied this test in later cases.

The Eighth Circuit's test for applying the immunity provision was similar to the Ninth Circuit's test, but its standard was not as difficult for a

53. Id. (citing Peterson v. United States, 367 F.2d 271, 275 (9th Cir. 1966)). The Aetna court stated that the narrow question before it was whether the damage at issue was related to government flood control activities. Id.

54. Id. at 1202. In Aetna, the plaintiff insurance company alleged that the Government's design and construction of the Teton Dam was negligent and that the government's negligence caused the dam's collapse. Id. After the dam collapsed, Congress responded by providing direct compensation to injured parties but expressly excluded claims of insurance carriers like Aetna for reimbursement of claims paid to their insureds. Id. at 1203. Congress further provided that "an insurer could exercise 'any right of action against the United States to which it may be entitled under any other laws for payments made to [insureds] . . . .'" Id. (quoting Teton Dam Disaster Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211).

55. Id. The court in Aetna is not without support on this point as evidenced by the fact that several other courts have also reached this conclusion. See, e.g., Reese v. South Fla. Water Management Dist., 59 F.3d 1128, 1130 (11th Cir. 1995) (finding that plaintiff was barred from suit even though water which caused injury was not released by United States exclusively for purposes of flood control); Morici Corp. v. United States, 681 F.2d 645, 648 (9th Cir. 1982) (finding that determinative factor was whether purpose of project authorized by Congress was flood control, and if flooding was related to use of that project then immunity attaches); Pierce v. United States, 650 F.2d 202, 203 (9th Cir. 1981) (finding if injury resulted from operation of federal project for flood control purposes, Government immunity is complete); McClaskey v. United States, 386 F.2d 807 (9th Cir. 1967) (finding that although project which caused damage was also built for navigational purposes, Government could still claim immunity because flood control was also purpose of project).

56. Aetna, 628 F.2d at 1202, 1204.

57. See McCarthy v. United States, 850 F.2d 558, 562 (9th Cir. 1988) (applying "wholly unrelated" test to case of swimmer who was rendered quadriplegic after accident in federal flood control facility); Morici, 681 F.2d at 645 (holding that plaintiff's damages were related to use of project for flood control purposes and therefore immunity attached); Pierce, 650 F.2d at 202 (holding that Government's decision to impound waters behind dam was not "wholly unrelated" to any act authorizing federal funds for flood control and therefore, Government was immune from liability for damages caused by negligent flooding). For a discussion of later Ninth Circuit cases and their holdings, see infra notes 78-87 and accompanying text.
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plaintiff to meet. In Taylor v. United States, the Eighth Circuit stated: The bar against federal liability for damages is made to apply wherever floods or flood waters have been substantial and material factors in destroying or damaging property. The Taylor case involved alleged governmental negligence in the operation of a dam that caused flooding of the plaintiff's property. The Taylor court held that the Government was immune because the flooding was a substantial factor in causing the damage.

Finally, the Fourth Circuit, in Hayes v. United States, developed a test that was also fairly consistent with the Ninth Circuit's test, although again it was worded differently. This circuit granted immunity when the damage was a result of the operation of the facility as a flood control project.

58. E.g., Taylor v. United States, 590 F.2d 263, 266 (8th Cir. 1979).
59. 590 F.2d 263 (8th Cir. 1979).
60. Id. at 266. For a discussion of how the Eighth Circuit has applied this test in its later cases, see infra notes 88-93 and accompanying text.
61. Taylor, 590 F.2d at 264. In Taylor, the plaintiffs owned a farm located between two dam projects and upstream from a reservoir connected to one dam. Id. at 265. During a severe rainstorm many rivers became flooded near plaintiffs' property. Id. The plaintiffs alleged that the government, during this time period, wrongfully and negligently operated the dam and reservoir impoundment above the legally authorized water level. Id. They contended that this caused the impoundment waters of the reservoir to back up and cause crop damage on their property. Id.
62. Id. at 266. The court did not apply the more demanding "wholly unrelated" test developed by the Ninth Circuit. Additionally, the court rejected the plaintiffs' argument that the water which caused damage to their property was backwater and that § 702(c) did not grant the government immunity from the tort of trespass by backwater impoundment injury. Id. The court stated:

Backwater is a body or accumulation of water resulting from an obstruction or opposing current. Floodwater has been defined as "water which has overflowed the natural banks of the stream in its natural channel, and which is contained by a system of levees," flood has been defined as "water which inundates an area of the surface of the earth where it ordinarily would not be expected to be."

Id. at 266-67 (citation omitted). The court applied these definitions and concluded that the plaintiffs' distinction between floodwaters and backwaters was not valid for the purposes of § 702(c). Id. at 267. The court stated: "We can see no rational distinction between floodwaters and backwaters that would lead to a different result in this case." Id.
63. 585 F.2d 701 (4th Cir. 1978).
64. Id. at 703.
65. Id. In Hayes, the plaintiff brought suit against the Government for damage to his farm caused by the Government's operation of the flood gates of a dam upstream from plaintiff's farm. Id. at 701. The court held that "it [is] not inconceivable that all or some of the releases [which caused damages to plaintiff's property] were solely for the purpose of promoting recreational uses of the impounded waters and not in the least in aid of the operation of the dam as a flood control facility," and, therefore, the immunity provision may not apply. Id. at 702. The court remanded the case because it believed that although it may be assumed that all of the releases of water, or most of them were incidental to the dam's operation as a flood control facility, it was not proper for the lower court to dismiss the case based on Rule 12(b)(6). Id. This was especially true when, as here, dismissal was
The court stated, however, "[i]f the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702(c)."66 This statement became a source of controversy because no other circuit had made the distinction between recreational use and flood control use.

C. The Supreme Court’s Decision in United States v. James and the Cases that Followed

1. The Supreme Court Decision

In 1986, the United States Supreme Court heard its first case dealing with government immunity for flood control damage.67 The case consolidated two separate appeals from decisions of the Fifth Circuit involving the drowning deaths of recreational users of flood control projects.68 United States v. James was the first case in which the plaintiffs' claim was for personal injury damages and not property damage.69 In James, the court premised merely on an assumption. Id. The court remanded the case to determine why the releases were in fact made. Id. The court was concerned with the purposes for the release of the waters which caused the damage because its test for application of the immunity provision depended on whether the facility was being used for flood control purposes. Id. at 703.

66. Id. at 702-03.
67. United States v. James, 478 U.S. 597 (1986); see also Arthur Baron, United States Immunity at Flood Control Projects from Claims for Injuries, 11 Am. J. TRIAL ADVOC. 417, 421 (1988) (indicating that this was first case before Supreme Court on this issue).
68. James, 478 U.S. at 597. The litigation arose from a series of accidents that occurred in the reservoirs of federal flood control projects in Arkansas and Louisiana. Id. In both accidents, recreational users of the reservoirs were injured or drowned when they were swept through retaining structures after those structures were opened by the United States Corps of Engineers to control flooding. Id. In the Arkansas case, the district court held that even though the Government had "willfully and even maliciously failed to warn of a known danger," it was immune from damages under § 702(c). Id. at 600. In the Louisiana case, the district court dismissed the case despite the Government conceding that "it negligently failed to warn the decedent." Id. at 601-02. In doing so, the court held that the Government was immune under § 702(c) from personal injury damages resulting from floods or floodwaters in the negligent operation of flood control projects. Id. The Court of Appeals for the Fifth Circuit heard the consolidated appeal and reversed the district court's judgments. Id. In so doing, the Fifth Circuit held that Congress intended § 702(c) to shield the Government from:

[liability for damage resulting directly from construction of flood control projects and from liability for flooding caused by factors beyond the Government's control, but that Congress had not intended "to shield the negligent or wrongful acts of government employees" ... including the failure "to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land."

Id. (quoting James v. United States, 760 F.2d 590, 599, 603 (5th Cir. 1985)).

69. Levine, supra note 7, at 232. "The applicability of § 702(c) immunity to actions brought against the government to recover for personal injuries was considered for the first time in James v. United States." Id. For a discussion of property damage cases which arose before James, see supra note 40 and accompanying text.
Supreme Court made a number of conclusions about § 702(c) immunity later would cause confusion among the circuits. The Supreme Court held that the terms “flood and flood waters” in § 702(c) applied “to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.” The Court dismissed the plaintiffs’ argument that even if § 702(c) granted immunity in flood control projects, the Government was not entitled to immunity in this case because government employees’ mismanagement of recreational activities, wholly unrelated to flood control, caused the injuries. The Court stated, “[w]e think . . . that the manner in which to convey warnings, including the negligent failure to do so, is part of the ‘management’ of a flood control project.” Based upon this reasoning, the Court held that the Government was immune from liability.

In addition, the Court specifically held that § 702(c) could be used to bar recovery for personal injury claims against the Government. Justice

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70. See James, 478 U.S. at 597, 604-12 (analyzing language and purpose of § 702(c)). One of the most confusing parts of the James decision was the conclusion the Court made that the phrase “management of a flood control facility” included the manner in which the operator conveyed warnings to the public. Id. at 610. The Court determined that this even included the negligent failure to do so. Id.

71. Id. at 605. The Supreme Court found these words to be unambiguous. Id.

72. Id. at 609-10. The alleged mismanagement by government employees was in their failure to post warnings of the danger from the current caused by the open flood gates. Id. at 597.

73. Id. at 610. This conclusion caused confusion and inconsistent holdings among the circuits. Compare Fryman v. United States, 901 F.2d 79, 81 (7th Cir. 1990) (finding that “management” language used in James decision was too broad to be applied literally), with McCarthy v. United States, 850 F.2d 558, 563 (9th Cir. 1988) (applying James “management” language literally to bar suit by recreational user who was paralyzed after diving into shallow flood control lake because no signs had been posted warning of danger). For further discussion of the confusion caused by the James decision, see supra notes 70-72 and accompanying text.

74. James, 478 U.S. at 612. The Court stated: “We therefore follow the plain language of § 702c, a section of the 1928 Act that received careful consideration by Congress and that has remained unchanged for nearly 60 years, and hold that the Federal Government is immune from suit in this type of case.” Id.

75. Id. at 605. The Court stated:

On its face, this language [contained in the statute] covers the accidents here. . . .

Although the Court of Appeals found . . . that the word “damage” was ambiguous because it might refer only to damage to property and exclude damage to persons, the ordinary meaning of the word carries no such limitation. Damages “have historically been awarded both for injury to property and injury to the person—a fact too well-known to have been overlooked by the Congress . . . .” Moreover, Congress’ choice of the language “any damage” and “liability of any kind” further undercuts a narrow construction.

Id. at 604-05 (citations omitted); see also Levine, supra note 7, at 236 (noting that majority in James held that § 702(c) bars recovery for personal injury claims).
Powell, writing for the majority, stated that "'In the absence of a clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive'" and found that to the plain meaning of the statute, damage would include personal injuries. The extension of the immunity provision to cover personal injuries has greatly added to the difficulty experienced by the circuit courts when attempting to interpret and apply James in later cases.

2. Circuit Court Application of the Immunity Provision Since James

The application of James to later circuit decisions resulted in a split among the courts. The Ninth Circuit elected to follow the James decision and its previous decisions on this issue that were consistent with James. In the Ninth Circuit, government immunity applied when one of the purposes of the Act authorizing the project at issue was flood control. It followed that if the purpose of the Act was flood control, than the injury could not be "wholly unrelated" to any Act of Congress authoriz-

The dissent severely criticized the majority's position on the definition of damage under the statute. James, 478 U.S. at 614-18 (Stevens, J. dissenting). The dissent's main point was that the statute contained the word "damage" and not "damages" as the majority suggested. Id. at 616 (Stevens, J., dissenting). The dissent noted, "The word 'damage' traditionally describes a harm to property (hence 'property damage'), rather than harm to the person (usually referred to as 'personal injury')." Id. at 614 (Stevens, J., dissenting). The dissent further stated that this understanding of the word "damage" was the preferred definition around the time Congress drafted the Act. Id. (Stevens, J., dissenting). The dissent concluded therefore, that the authorities that the majority relied on to support its conclusion that the statute covered personal injuries did not apply to this situation because the word in the statute was "damage" and not "damages." Id. at 615-16 (Stevens, J., dissenting). Even the authorities used by the majority differentiated between the meanings for the two words. Id. at 616 (Stevens, J., dissenting). The dissent concluded that "[t]he Court thus provides no basis for thinking that Congress used damage other than in its common, preferred usage to mean property damage. If 'plain meaning' is our polestar, the immunity provision does not bar respondents' personal injury suits." Id. (Stevens, J., dissenting). For a more detailed discussion of both the majority and dissent's positions on this issue, see Levine, supra note 7, at 236-39.


77. See Fryman, 901 F.2d at 82 (applying James and holding that § 702(c) would bar suit if flood control activities increased probability of injury); Boyd v. United States, 881 F.2d 895, 900 (10th Cir. 1989) (considering application of James and holding that there must be link between flood control activities and injuries before § 702(c) would bar plaintiff's suit); McCarthy, 850 F.2d at 862 (applying James and holding that § 702(c) barred plaintiff's suit unless injuries were "wholly unrelated" to any act of Congress authorizing expenditures of federal funds for flood control); see also Hiersche v. United States, 503 U.S. 923, 925 (1992) (mem.) (describing split among circuits but leaving it to Congress to resolve).

78. See, e.g., McCarthy, 850 F.2d at 562 (holding consistently with previous Ninth Circuit decisions that government is immune unless injury is wholly unrelated to flood control).

79. Id.; see Hiersche, 503 U.S. at 925 (describing how different circuits have handled issue and stating that "in the Ninth Circuit, if flood control was one of the
In *McCarthy v. United States*, the plaintiff dove into Lake Lewisville, a federal flood control project in Texas, and broke his neck when his head struck the bottom of the lake. The plaintiff claimed that the Government was liable because it failed to post warning signs and encouraged swimming and diving knowing of the danger. Relying on *James* and previous decisions, the Ninth Circuit found no difference between personal injury and property damage and held that § 702(c) immunity applied. The court stated that, "the immunity provision of §702c does not apply when the damage or injury is 'wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization.'" The court held that purposes of the act of Congress authorizing the project itself, the immunity applies).

80. *McCarthy*, 850 F.2d at 663; *Aetna Ins. Co. v. United States*, 628 F.2d 1201, 1205 (9th Cir. 1980).
81. 850 F.2d 558 (9th Cir. 1988).
82. *Id.* at 559. The dam in *McCarthy* was constructed in connection with a flood control project. *Id.* It was a multi-purpose project with recreation as one of its uses. *Id.* McCarthy dove into waist deep water and fractured his neck, rendering him a quadriplegic. *Id.*
83. *Id.* at 559-60. McCarthy's complaint alleged that: the defendant constructed, maintained, operated and controlled the premises; the defendant had observed but failed to prohibit swimming and diving at that location; the premises were dangerous and defective in several particularly described respects; and the defendant knew of the dangers but, despite such knowledge, encouraged the public to dive there without any warnings of the danger. *Id.* The facts of the case show that the construction maintenance and operation of the parks around the perimeter of the lake by the Army Corps of Engineers was authorized by a statute, 16 U.S.C. § 460d (1982), and that the Park where plaintiff was injured did not have a designated swimming area. *Id.*
84. *Id.* at 561. The court specifically pointed out the *James* court's broad reading of the statute and the way the statute "outlines immunity in sweeping terms." *Id.* (citing *James*, U.S. at 605). The court relied on the definitions of "damages" and "floodwaters" articulated in *James* to conclude that the injury here fell within the statute. *Id.* An interesting ancillary argument which has not come up in other cases was made by the injured party, McCarthy. *Id.* McCarthy tried to persuade the court that his injury did not result from an active operation of the flood control facility and, therefore, is distinguishable from the injuries in *James*. *Id.* The court rejected this argument, stating that the record indicated that there was ongoing monitoring and discharge of water levels at the lake where McCarthy was injured and that this may be considered active flood control operations. *Id.* The court further stated: "Given the difficulty of distinguishing between the active and passive operations of federal flood control facilities, particularly since a passive condition is invariably the result of other active forces which have gone before, we decline to adopt the distinction urged by McCarthy." *Id.*
85. *Id.* at 562 (quoting Peterson v. United States, 367 F.2d 271, 275 (9th Cir. 1966)); see also *Dawson v. United States*, 894 F.2d 70, 74 (3d Cir. 1990) (following Ninth Circuit's "wholly unrelated" test as appropriate way to determine § 702(c) immunity). *Dawson* was a consolidation of two cases in which swimmers drowned in a federal flood control project. *Id.* at 72. In the first case, the victim was swimming at the Somerfield North Recreation area of Yougogiheyen Lake, when he suddenly disappeared. *Id.* His body was found later after a search. *Id.* In the
because Congress authorized the project in McCarthy for flood control purposes and injury was related to the use of that project, the Government was immune from liability for the injuries sustained by the plaintiff under § 702(c). In McCarthy, the Ninth Circuit concluded that its "wholly unrelated" test, developed in pre-James cases, was consistent with its interpretation of the James decision.

The Eighth Circuit also determined that James was consistent with its previous decisions. In Zavadil v. United States, the plaintiff sued the United States for negligence after he broke his neck by hitting a submerged concrete boat ramp while diving into Lake Lewis and Clark, part of a federal flood control project. The court noted that at the time of the plaintiff's accident the Government was monitoring the water level in the lake for flood control and navigational purposes. The Zavadil court relied on James and Ninth Circuit decisions and concluded that, "[s]ince governmental control of these waters was a substantial factor in causing the Zavadils' injuries the United States is immune from liability." The court adhered to its "substantial factor test" but also relied on and fol-

second case, another recreational user was swimming in the same area when he disappeared in eighteen feet of water. Id. The court examined the different approaches taken by the various circuits and concluded that the Ninth Circuit's "wholly unrelated" test was the correct interpretation of James. Id. at 73-84. The court stated it was aware of the confusion and difficulty in trying to apply the statute, however, it stated that it must reach a result that was consistent with James. Id. at 73 n.2. The Dawson court held that the plaintiffs were barred from Recovery against the United States because their injuries could not be found to be "wholly unrelated" to flood control. Id. at 73.

86. McCarthy, 850 F.2d at 562-63 (finding that Lake Lewisville was constructed under River and Harbor Act of 1945 in interest of flood control, court concluded that immunity could apply).

87. Id. at 562; see Morici Corp. v. United States, 681 F.2d 645, 646 (9th Cir. 1982) (stating immunity statute would not apply when damage was "wholly unrelated" to any act of Congress authorizing expenditure of federal funds for flood control); Pierce v. United States, 650 F.2d 202, 203 (9th Cir. 1981) (same); Aetna v. United States, 628 F.2d 1201, 1203 (9th Cir. 1980) (same); Peterson v. United States, 367 F.2d 271, 275 (9th Cir. 1966) (same).

88. See, e.g., Zavadil v. United States, 908 F.2d 334, 335-36 (8th Cir. 1990) (stating that James was controlling and then reiterating "substantial factor" test developed prior to James decision).

89. Id.

90. Id. at 335. The lake in Zavadil was formed by the Gavins Point Dam which was built and operated by the Government. Id.

91. Id. at 336. Having determined this, the court concluded that the lake's waters were contained in a federal flood control project for purposes of or related to flood control as per the James opinion. Id.

92. Id.; see also Henderson v. United States, 965 F.2d 1488, 1492 (8th Cir. 1992) (applying substantial factor test but finding that Government's control of flood waters was not "substantial factor" in causing death of recreational fisherman who was swept away by flood waters released by Government because waters were released to generate hydroelectric power and not to control flooding); Dewitt Bank & Trust Co. v. United States, 878 F.2d 246 (8th Cir. 1989) (using substantial factor test to determine when § 702(c) immunity attaches in case of swimmer who was paralyzed after diving into flood control lake and striking his head on bottom).
ollowed the analysis set out in *James*.93

In 1994, in the case of *Fisher v. United States Army Corps of Engineers*,94 the Eighth Circuit again faced the issue of whether § 702(c) immunity applies in cases involving personal injury rather than property damage caused by government negligence in the operation of a multi-purpose flood control facility.95 The *Fisher* court followed *Zavadil* and concluded that the Government was immune.96 The dissent created some doubt, however, as to how the Eighth Circuit might handle these cases in the future.97 The dissent argued that the court should perform a more thorough analysis of the immunity provision's application to cases involving personal injury caused by government negligence in designated recreational areas of flood control projects.98

The dissenting opinion in *Fisher* is not without support from other circuit court decisions.99 The Tenth Circuit has not closely followed the Supreme Court's decision in *James* or the Ninth Circuit's interpretation.100 In *Boyd v. United States*,101 the Tenth Circuit dealt with the application of § 702(c) to a case involving personal injury allegedly caused by government negligence in the operation of a flood control facility.102 In *Boyd*, a recreational boat hit and killed the plaintiff's husband who was

94. 31 F.3d 683 (8th Cir. 1994).
95. *Id.* at 684. In *Fisher*, the plaintiff was swimming and diving in a designated recreational area of a flood control reservoir owned and operated by the Army Corp of Engineers. *Id.* No lifeguard was present, and the shallow areas were not marked. *Id.* The plaintiff dove into shallow water, hit his head on either a submerged object or the bottom of the reservoir and broke his neck. *Id.* The plaintiff sued the government, alleging that the government was negligent in its operation of the recreational area because it failed to post warning signs, provide a lifeguard, check the shifting profile of the bottom of the reservoir or ban swimming at the reservoir. *Id.*
96. *Id.* at 685. The court applied the substantial factor test to this case as it had previously done in *Zavadil*. *Id.* at 684. The court reasoned that Fisher was injured after diving into shallow water at a reservoir and that the shallow water was a result of the government's operation of that flood control project. *Id.* at 685. Therefore, the court concluded that "governmental control of flood waters was a substantial factor in causing Fisher's injuries and the government is immune from liability under section 702c." *Id.*
97. See *id.* (Gibson, J., dissenting) (suggesting that court probe more deeply into application of statute to recreational use).
98. *Id.* (Gibson, J., dissenting). The dissent believed that in this case, flood control purposes had nothing to do with the accident, that the accident occurred due to use of the reservoir for recreational purposes and, therefore, the government should not be immune. *Id.* (Gibson, J., dissenting).
99. See *Boyd v. United States Army, Corps of Eng'rs*, 881 F.2d 895 (10th Cir. 1989) (holding that § 702(c) immunity does not apply in recreational injury cases).
100. See *id.* at 900 ("[W]e cannot agree that Congress intended to stretch the shield of flood control immunity to the limits contemplated by the 'wholly unrelated' standard.").
101. *Id.*
102. *Id.* at 896.
snorkeling in Tenkiller Lake, part of a flood control project also designated as a state park.\textsuperscript{103} The Tenth Circuit took note of the statute’s broad language as interpreted by the Supreme Court, but declined to agree with the “wholly unrelated” test developed from it by the Ninth Circuit.\textsuperscript{104}

The court stated that § 702(c) immunity was created to protect the Government from liability associated with flood control, not liability associated with the operation of a recreational facility.\textsuperscript{105} The Tenth Circuit required a sufficient nexus between the injury and flood control activities before the immunity provision would attach, but it declined to specify every conceivable situation in which the link could be established.\textsuperscript{106}

\begin{itemize}
\item \textsuperscript{103} Id. at 896, 899. The plaintiff alleged that the area of the lake in which her husband was snorkeling was held out to be, and generally known to be used for, swimming, diving and snorkeling. Id. The plaintiff sued the government alleging that it was negligent in failing to warn swimmers in the area that boats were permitted or, alternatively, that it was negligent in not zoning the area so as to restrict the entry of boats. Id. at 896.
\item \textsuperscript{104} Id. at 900. The court stated, “There is some broad language in James, but the Court appeared to distinguish cases where damages occur in waters not being actively used for flood control purposes, by twice noting that the district and appellate courts in that case had found that the waters were being released for flood control purposes at the time of the accident.” Id. (citation omitted). It was this language in James that led the Tenth Circuit to conclude that the “wholly unrelated” test was too broad an interpretation of James. Id. The Tenth Circuit in Boyd stated:
\begin{quote}
[We] cannot agree that Congress intended to stretch the shield of flood control immunity to the limits contemplated by the ‘wholly unrelated’ standard. This standard essentially creates a ‘but for’ connection between flood control activity and damages occurring at a flood control project . . . . Such a connection between flood control activity and recreational injuries is too attenuated to warrant the invocation of section 702(c).
\end{quote}

Id. The court further stated that there had been no evidence presented to show that Congress intended § 702(c) to cover the situation in Boyd. Id.\textsuperscript{105}
\item \textsuperscript{105} Id.; see also Holt v. United States, 46 F.3d 1000, 1004 (10th Cir. 1995) (following Boyd and requiring that there be link between flood control activities at project and injuries suffered by plaintiffs before § 702(c) would bar recovery); Williams v. United States, 957 F.2d 742, 744-45 (10th Cir. 1992) (setting up two step test for application of § 702(c)). The Williams two part test is as follows: (1) whether there is flood control project that triggers Act and (2) if nexus exists between flood control activities and injuries sustained. Id.
\item \textsuperscript{106} Holt is the most recent Tenth Circuit decision on this issue and it continues to follow the holding in Boyd. Holt, 46 F.3d at 1005. In Holt, the plaintiff’s parents were killed when their car slid on ice that formed on the highway as a result of government employees’ negligence. Id. at 1002. The employees released flood waters from a nearby dam and then failed to clear the hazard on the roadway caused by the frozen water. Id. The court held that the there was a sufficient nexus between the flood control activity, release of flood waters which froze on the highway, and the injury, death as a result of the car skidding on the ice, so that the government would be immune from this suit. Id. at 1005.
\item In Williams, the Tenth Circuit, in addition to supporting the nexus test created in Boyd, rejected the broad language asserted in James regarding the definition of floodwaters under the statute. Williams, 957 F.2d at 744. The court stated: “Immu-
The Tenth Circuit stands alone in its approach to § 702(c) immunity, although the Fourth Circuit has indicated that it may eventually follow the Tenth Circuit's analysis. The Fourth Circuit, however, has not addressed this issue since its holding in Hayes v. United States, decided in 1978. As previously discussed, the Hayes case involved property damage that was the result of alleged governmental negligence in the operation of flood gates at a flood control facility. The court was concerned with the purpose of the operation of the facility and concluded that if the damage was shown to have been caused by the operation of the facility for recreational purposes and not flood control, § 702(c) would not protect the Government from liability.

The Seventh Circuit got its post-James opportunity to address this issue in Fryman v. United States. In Fryman, the plaintiff struck his head on an unidentified submerged hazard while diving into Lake Shelbyville, a flood control project also used for recreation. The plaintiff was a quadriplegic as a result of this accident. The Seventh Circuit discussed the James decision and stated, "James was so broadly written that it cannot

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107. See Hayes v. United States, 585 F.2d 701, 702-03 (4th Cir. 1978) (holding plaintiff may be able to avoid absolute bar of § 702(c) if his injury was result of operation of project as recreational facility without regard to its flood control aspects).

108. Id. The plaintiff brought suit after a nearby riverbank eroded and his farm was flooded. Id. at 702. The plaintiff’s farm was located downstream from a flood control facility and the plaintiff alleged that the damages were caused because of the negligent operation of the facility’s flood gates. Id.

109. Id.

110. 901 F.2d 79 (7th Cir. 1990).

111. Id. at 80. The plaintiff and his brother were swimming in a federal flood control facility which was used for boating, waterskiing, swimming and fishing in addition to flood control. Id. at 79.

112. Id. at 80. The plaintiff brought suit against the Government alleging that it acted negligently and maliciously in not posting warning signs or closing the water to recreation. Id. He claimed his injury was inflicted by a combination of the hidden object and the failure of the Corps to warn him. Id. at 80-81.
be applied literally." The Seventh Circuit also concluded that the Tenth Circuit's holding in Boyd was too narrow. Therefore, the Seventh Circuit developed its own test that falls somewhere between James and Boyd. The Seventh Circuit determined that the immunity provision applied if the flood control activities of the project increased the probability of injuries such as those experienced by the plaintiff in Fryman. In Fryman's case, the court granted immunity based on its own test, holding specifically that "flood control activities [at the lake] increased [the] probability that [the] diver would suffer injury."117

The Fifth Circuit, the circuit by which Boudreaux is bound, has little precedent on this issue. The Fifth Circuit has followed the Ninth Circuit and the James decisions. In Mocklin v. Orleans Levee District, the plaintiffs were the parents of a young boy who drowned in a lake which was being dredged to make flotation channels. The plaintiffs sued the Government, claiming that the dredging caused their son's death. The

113. Id. at 81. The court gave the example of what a literal interpretation of the "management" language would look like. Id. The court stated, the "management of a flood control project" includes building roads to reach the beaches and hiring staff to run the project. If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree-trimmer's car should careen through some picnickers, these injuries would be "associated with" flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard to conceive that they are "damage from or by floods or flood waters" within the scope of §702(c).

114. Id. In Boyd, the Tenth Circuit held that § 702(c) immunity did not apply at all to liability associated with the operation of a recreational facility. Boyd v. United States, 881 F.2d 895, 900 (10th Cir. 1989). The Seventh Circuit did not accept the Tenth Circuit's reasoning and stated that if the Tenth Circuit was correct, "then James was wrong on its own facts, for it grew out of recreational boating, and in James no less than in Boyd, the deaths could have been prevented by closing the lake to recreational boating." Fryman, 901 F.2d at 81.

115. See Fryman, 901 F.2d at 82 (rejecting both Boyd and James approaches and stating its test as to when § 702(c) would apply).

116. Id.; see also Bailey v. United States, 35 F.3d 1118, 1124 (7th Cir. 1994) (following Fryman and stating "[i]f . . . evidence establishes that the flood control activities or characteristics of [the flood control project] . . . rendered injuries . . . more likely than they would be in a non-flood control lake, then . . . Fryman would entitle the government to immunity").

117. Fryman, 901 F.2d at 79.

118. For a discussion of Fifth Circuit precedent on this issue, see infra note 201 and accompanying text.

119. See Mocklin v. Orleans Levee Dist., 877 F.2d 427, 430 (5th Cir. 1989) (following both Supreme Court and Ninth Circuit decisions).

120. Id.

121. Id. at 428. The lake was being dredged so that barges with the necessary supplies to construct levees along the lake could get through. Id.

122. Id. The plaintiffs claimed their child slipped from a sand bar caused by the dredging into one of the flotation channels and drowned. Id.
debate in *Mocklin* centered around whether the injury was caused “by or from floods or flood waters” as § 702(c) required. The court concluded that the channels were part of a flood control project, and, therefore, the Government was immune. The court relied on the *James* decision that held if the project was a flood control project then all the waters contained in it were flood waters. Because all the waters were flood waters within the meaning of the statute, the immunity provision covered any liability caused by these waters.

As the Fifth Circuit was confronted with the case of *Boudreau v. United States*, it is apparent that it had some background on this issue upon which to rely. It is also evident, however, that that background has not produced a consistent rule for the courts to follow. The statute and its legislative history show a strong intent by Congress to protect citizens from flood damage but at the same time show Congress’s desire to immunize the United States from any liability associated with flood control facilities. The only Supreme Court case on this issue, *United States v. James*, has caused confusion among the Courts of Appeals. Additionally, there was very little case law in the Fifth Circuit to help guide the *Boudreau* court in its decision.

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123. *Id.* at 429-30.
124. *Id.* at 430.
125. *Id.* at 429-30. The court in *Mocklin* concluded that the flotation channel in which the plaintiffs alleged the drowning occurred properly can be said to contain water related to flood control and, therefore, the channels were inescapably part of a flood control project. *Id.*
126. *Id.*
127. For a complete discussion of the cases and legislative history leading up to the decision in *Boudreau*, see *supra* notes 26-126 and accompanying text.
128. For a description of the background leading up to the *Boudreau* decision and the inconsistent rulings handed down by the circuit courts, see *supra* notes 67-126 and accompanying text.
131. See, e.g., Zavadil v. United States, 908 F.2d 334 (8th Cir. 1992) (interpreting *James* and holding that § 702(c) immunity applied when governmental control of waters was “substantial factor” in bringing about injuries); Fryman v. United States, 901 F.2d 79 (7th Cir. 1990) (interpreting *James* and holding that § 702(c) applied if flood control activities at project “increased the probability” of injuries sustained by plaintiff); Boyd v. United States, 881 F.2d 895 (10th Cir. 1989) (interpreting *James* and holding that “but for” connection between flood control activity and recreational injuries was not what *James* intended and that statute was not designed to protect Government from liability associated with recreational facility); McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988) (interpreting *James* and holding that § 702(c) immunity applied unless injuries were “wholly unrelated” to flood control).
132. See *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (providing only Fifth Circuit decision on point after *James*). For a further discussion of the Fifth Circuit precedent before and after *James*, see *infra* note 201 and accompanying text.
considered Boudreau v. United States.133

III. FACTS

In Boudreau v. United States, the United States Court of Appeals for the Fifth Circuit addressed the issue of whether the Flood Control Act of 1928 provided the United States with immunity from liability for the alleged negligence of the Coast Guard Auxiliary in attempting to tow a stranded recreational vessel on a flood control lake.134 The flood control project in this case was a multi-purpose project, and at the time of the injury, the lake was being used for recreational purposes.135

On July 5, 1992, Mr. Daniel Boudreau and a friend took Boudreau’s boat out on Lake Lewisville located in Denton County, Texas.136 The pair experienced engine trouble and called the Coast Guard Auxiliary for assistance, who told them to anchor the boat.137 Upon arrival the Coast Guard gave instructions and secured a tow line.138 While the Coast Guard attempted to tow the boat, Boudreau was severely injured.139 The government and Boudreau disputed whether the conditions on the lake contributed to the accident.140 Boudreau claimed that the immunity provision of § 702(c) did not apply because the Coast Guard Auxiliary’s responsibilities on the lake consisted only of water safety management and

134. Id. at 82.
135. Id. at 84. Many of the projects involved in these types of cases are multi-purpose projects. See McCarthy, 850 F.2d at 559 (“Lewisville Lake [where the accident occurred in Boudreau] is a multi-purpose project lake that has flood control as one of its purposes.”); see also Dewitt Bank & Trust Co. v. United States, 878 F.2d 246, 246 (8th Cir. 1989) (stating Merisach Lake, which was used as dam as well as beach, was multi-purpose project).
136. Boudreau, 55 F.3d at 82.
137. Id.
138. Id. at 82 n.2. Observing that winds were at least 30 knots, with waters of three to four feet, the Coast Guard vessel operator, Thomas Spalding, directed Boudreau and his friend to put on life jackets. Id.
139. Id. “After securing a tow line, [Boudreau was instructed by the Coast Guard] to either lift anchor or cut the anchor line.” Id. Boudreau attempted to lift the anchor. Id. While doing so, the anchor line broke free and swung into Boudreau’s leg, causing severe injury. Id.
140. Id. at 82 n.3. “The Government maintains that the anchor line broke free when the wind and waves [of lake Lewisville] hit the SIMPLE PLEASURE [Coast Guard Boat], causing it to turn sharply and pull the tow line. Boudreau denies that the conditions on the Lake contributed to the accident.” Id.
were, therefore, unrelated to flood control. The Fifth Circuit disagreed and affirmed the decision of the District Court for the Northern District of Texas. The district court held that the Government was immune from any liability associated with Boudreau’s accident, specifically determining that the Coast Guard Auxiliary’s activity was “associated with flood control.” The Fifth Circuit based its decision on the only Supreme Court precedent available and on decisions of several other circuits that dealt with similar issues.

IV. ANALYSIS

This Part provides both a narrative and a critical analysis of the Boudreau decision. Section A of this Part discusses the majority and dissenting opinions in Boudreau. Section B analyzes the Boudreau opinion in relation to other court opinions and concludes that the better reasoned opinion is that of the Tenth Circuit, and therefore, Boudreau was incorrectly decided.

A. The Analysis of the Boudreau court

1. The Majority Opinion

In Boudreau v. United States, the Fifth Circuit examined the application of § 702(c) of the Flood Control Act of 1928 to a personal injury claim against the Government arising out of the recreational use of a flood control lake. The court began its analysis by looking to the statute and the wording of § 702(c). The pertinent text states: “No liability of any kind

141. Id. at 84. Boudreau based this argument on a portion of the Supreme Court opinion James which stated, “[i]f the plaintiff could prove damage . . . as a result of the dams operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702(c).” Id. (quoting United States v. James, 478 U.S. 597, 605 n.7 (1986)). Boudreau argued that the Coast Guard’s activities had to do with the recreational use of the Lake and not flood control. Id.

142. Id. at 84-86.

143. Id. at 84. “Relying on James, the district court concluded that the Auxiliary’s management of the flood control lake established the requisite nexus between Boudreau’s injury and flood control.” Id. at 84.

144. See generally id. (basing its decision on consideration of the decision in James and decisions of Ninth, Seventh and Tenth Circuits).

145. For a discussion of the majority and dissenting opinions in Boudreau, see infra notes 148-99 and accompanying text.

146. For a discussion of the analysis of the Boudreau decision and its relation to other circuit decisions, see infra notes 203-31 and accompanying text.

147. Boudreau, 53 F.3d at 82. An ancillary issue involving whether Lake Lewisville was a flood control lake was settled when the plaintiff conceded the point. Id.; see also McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (finding that Lake Lewisville is flood control lake). This was a threshold issue because applicability of the immunity provision is contingent on the injury having occurred “from or by floods or flood waters.” See 33 U.S.C. § 702(c) (1994) (requiring that damage be “from or by floods or flood waters” before immunity provision will apply).

148. Boudreau, 53 F.3d at 82.
shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . . .”\(^{149}\) The court applied the language of the statute to the facts of *Boudreau* and concluded that the issue before it was whether Boudreau’s injuries were “from or by . . . flood waters.”\(^{150}\) In order to resolve this issue, the court looked to its previous decision in *Mocklin v. Orleans Levee District* and the Supreme Court’s decision in *United States v. James*.\(^{151}\) The Fifth Circuit noted that in *James*, the Supreme Court interpreted § 702(c) broadly on the basis of the language and legislative history of the statute.\(^{152}\) The court stated, “[i]ndeed, the Court observed in *James* that ‘[i]t is difficult to imagine broader language.’”\(^{153}\) The court then noted, however, that there was disagreement among the circuits regarding the application of § 702(c), notwithstanding the *James* decision.\(^{154}\) The Fifth Circuit then concluded that based on the specific facts of the case and the Supreme Court precedent, there was a sufficient association between the Coast Guard Auxiliary’s activities and flood control to justify government immunity.\(^{155}\)

The most important facet of the court’s reasoning was its reliance on the Supreme Court’s conclusion in *James*, that “‘management of a flood control project’” was to be included “within the ambit of activity associated with flood control.”\(^{156}\) The appellant challenged this conclusion by argu-

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149. *Id.* (citing 33 U.S.C. § 702(c)).

150. *Id.* at 82-83. Before continuing its discussion of the issue presented, the court gave a framework for its analysis. *Id.* at 83. The court stated: “Guiding our decision is the general principle that ‘no action lies against the United States unless the legislature has authorized it.’ Concomitantly, there must be a ‘clear relinquishment of sovereign immunity to give jurisdiction for tort actions.’” *Id.* (quoting Dalehite v. United States, 346 U.S. 15, 30-31 (1953)).

151. *Id.; see Mocklin v. Orleans Levee Dist., 877 F.2d 427, 428-29 (5th Cir. 1989)* (relying on United States v. James, 478 U.S. 597 (1986) and broad reading of statute by Supreme Court in that case).

152. *Boudreau*, 53 F.3d at 83. The Fifth Circuit further stated: “The breadth of the Court’s interpretation of § 702(c) is undeniable.” *Id.*

153. *Id.* (quoting United States v. James, 478 U.S. 597, 604 (1986)).

154. *Id.* at 83; *see Hiersche v. United States, 503 U.S. 923 (1992)* (noting split among circuits but refusing to settle it). The Fifth Circuit then gave three examples of this split using the Seventh, Ninth and Tenth Circuits. *Boudreau*, 53 F.3d at 84. The court acknowledged that the Ninth Circuit applied the “wholly unrelated” test to determine when § 702(c) immunity applied and that the Tenth Circuit, in *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989), would not “stretch the shield of flood control immunity to the limits contemplated by that test.” *Id.* (citation omitted). The court also noted the Seventh Circuit’s increased probability test which was utilized by the *Bailey* court. *Id.* For a further discussion of the Seventh Circuit’s test, see *supra* notes 110-17 and accompanying text.

155. *Boudreau*, 53 F.3d at 85. The court stated that in the Fifth Circuit, such a decision was to be based on a fact specific analysis. *Id.* at 83 (citing Mocklin v. Orleans Levee Dist., 877 F.2d 427, 429-30 (5th Cir. 1989) (applying fact-specific analysis)).

156. *Id.* at 84. The Supreme Court in *James* stated that “‘the manner in which to convey warnings, including the negligent failure to do so, is part of the “management” of a flood control project.’” *Id.* at 84 n.10 (quoting *James*, 478 U.S. at 610).
ing that the Coast Guard Auxiliary’s responsibilities on the lake were unrelated to flood control because they only involved water safety management. In making this argument, the appellant relied on a footnote in James citing a case that the court noted appeared to support Boudreau’s argument. The court explicitly rejected this argument, however, stating that the footnote was internally inconsistent. The court also reasoned that Boudreau could not rely on the footnote because it was in reference to whether the waters, at issue in James, “clearly [fell] within the ambit of the statute and it did not concern when immunity would not bar liability for injury from flood waters.” As additional support for its conclusion, the Fifth Circuit analogized its factual situation to that of the James case. The court reasoned that the “creation of the flood control project resulted in the Army Corp of Engineers being responsible for providing water safety patrols at the Lake.” The Corps of Engineers fulfilled that responsibility by reaching an agreement with the Coast Guard to perform that function. The court concluded that the case before it was very similar to the James case because in each case the

In James, actions were brought against the United States to recover for the deaths of recreational boaters who drowned when they were swept through discharge points of reservoirs on federal flood control projects after discharge gates were opened, without warning, to alleviate potential flooding. James, 478 U.S. at 597. The James court found the Government immune from liability, concluding that the negligent failure of the Government employees to warn recreational users of the dangers was part of the “management” of a flood control project. Id. at 609-10.

“Relying on James, the district court [in Boudreau] concluded that the Auxiliary’s management of the flood control lake established the requisite nexus between Boudreau’s injury and flood control.” Boudreau, 53 F.3d at 84. The district court based its decision “on the fact that the alleged negligence was by the Coast Guard Auxiliary, which is part of the government’s management of Lake Lewisville and serves to control the waters in a variety of capacities.” Id. The Fifth Circuit relied upon the district court’s reasoning in concluding that the Coast Guard Auxiliary was involved in the “management” of a flood control project at the time the injury occurred and, therefore, the government was immune. Id. at 86.

157. Boudreau, 53 F.3d at 86.

158. Id. at 84. Boudreau relied on footnote seven of the James opinion containing a string cite which included the decision of the Fourth Circuit in Hayes v. United States, 585 F.2d 701, 702-03 (1978). Boudreau, 53 F.3d at 84. The parenthetical following the cite quoted a portion of the Hayes decision which read: “If the plaintiff could prove damage . . . as a result of the dam’s operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of section 702(c).” Id.

159. Id. at 85. In the same footnote, the Supreme Court also cited Morici v. United States, 681 F.2d 645, 647-48 (9th Cir. 1982), for the proposition that immunity is available unless the Government’s activity is “wholly unrelated” to flood control. Id. Morici specifically rejected the Hayes approach. Boudreau, 53 F.3d at 84 (citing Morici, 681 F.2d at 647-48). This contradiction made the footnote appear internally inconsistent to the Fifth Circuit. Id.

160. Boudreau, 53 F.3d at 84.

161. Id. at 85.

162. Id.

163. Id. The court listed the relevant portion of the agreement as follows:
Government's responsibilities toward the public arose because of the establishment of a flood control project, and in each case the Government's activities were properly considered part of the "management of a flood control project."\textsuperscript{164}

The final argument made by Boudreau was that even if the Coast Guard's activities were part of the management of a flood control project, Boudreau's specific injury was completely unrelated to flood control.\textsuperscript{165} The Fifth Circuit again rejected Boudreau's argument, but noted that at least one circuit, the Seventh Circuit, had suggested that "management of a flood control project" may well be insufficient, standing alone, to allow for §702(c) immunity.\textsuperscript{166} The Fifth Circuit stated that even assuming that the Seventh Circuit was correct and something more is required, Boudreau would still meet the test for immunity.\textsuperscript{167} Since Boudreau's injury resulted from a boating accident on flood control waters involving the government's patrol of those waters, it was impossible for the Fifth Circuit to say that Boudreau's injury had nothing to do with the "management" of flood waters.\textsuperscript{168} The court added that the case was safely removed from the realm of cases in which "management of a flood control project" would not be enough to trigger §702(c) immunity.\textsuperscript{169} Therefore, the Fifth Circuit affirmed the decision of the United States District Court for the Northern District of Texas.\textsuperscript{170}

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The Memorandum of Agreement between the Corps of Engineers and Coast Guard reads in part:

1. Responsibility[

   A. Both the U.S. Army Corps of Engineers and the U.S. Coast Guard are responsible for administering water safety programs on inland lakes under their concurrent jurisdictions . . . .

2. Purpose of Agreement.

   A. Recognizing the above responsibilities, it is hereby granted that the purpose of this agreement is to facilitate water safety patrols by local U.S. Coast Guard Auxiliary . . . .

\textit{Id.} at 85 n.14.

\textsuperscript{164} \textit{Id.} at 85. The Fifth Circuit stated: "Therefore, just as, under the facts in James, the Government had the responsibility to warn of dangerous water conditions, the Government had the responsibility under the facts in this case to provide water safety patrols." \textit{Id.} For a more detailed description of the facts of the James case, see supra note 68 and accompanying text.

\textsuperscript{165} Boudreau, 53 F.3d at 84. Boudreau's injury occurred while he was using the lake for recreational purposes. \textit{Id.} at 82. For the complete factual situation in Boudreau, see \textit{supra} notes 134-44 and accompanying text.

\textsuperscript{166} Boudreau, 53 F.3d at 85. The court referred to the Seventh Circuit's opinion in Fryman v. United States, 901 F.2d 79, 81 (7th Cir. 1990). Boudreau, 53 F.3d at 85. The Seventh Circuit gave an example of when management of flood control may not be enough to trigger §702(c) immunity. \textit{Id.} For the full statement of the Seventh Circuit's example, see \textit{supra} note 113.

\textsuperscript{167} Boudreau, 53 F.3d at 86.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.}
2. The Dissenting Opinion

The dissenting judge in *Boudreau* took a somewhat different approach and relied more on statutory analysis to decide the case.\(^{171}\) The dissent began by analyzing the wording of § 702(c).\(^{172}\) The dissent recognized, as did the majority, that the language of § 702(c) is very broad and that the Supreme Court supported a broad reading of the language.\(^{173}\) The dissent noted, however, that in *James*, the Supreme Court specifically emphasized the word “any” as being very broad.\(^{174}\) The dissent, therefore, rejected the majority’s over-reliance on the provision’s broad language to support its conclusion that Boudreau’s injury was sufficiently related to flood control.\(^{175}\) In rejecting the majority’s conclusion, the dissent stated that the *Boudreau* case did not turn on any language from § 702(c) that is modified by the word “any.”\(^{176}\) The *Boudreau* case turned on whether the damages were caused “from or by floods or flood waters.”\(^{177}\) The legislature placed the word “any” in the provision in order to modify the kind of damages covered by the provision, the kind of liability covered as well as the places covered.\(^{178}\) Therefore, the dissent argued, the majority was incorrect to rely on the Supreme Court’s declaration about the broadness of this language because the *Boudreau* case did not turn on this particular language.\(^{179}\)

The dissent then turned to what it deemed was the question at hand: whether the damages to Boudreau were “from or by floods or flood wa-

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\(^{171}\) *Id.* (Smith, J., dissenting).

\(^{172}\) *Id.* (Smith, J., dissenting). “[A]s with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself.” *Id.* (Smith, J., dissenting) (citing Touche Ross & Co. v. Remington, 442 U.S. 560, 568 (1979)).

\(^{173}\) *Id.* (Smith, J., dissenting) (citing United States v. James, 478 U.S. 597, 604 (1986)). The dissent stated: “The Supreme Court acknowledged, and the majority emphasizes, the broad nature of this language [§ 702(c)].” *Id.* (Smith, J., dissenting).

\(^{174}\) *Id.* (Smith, J., dissenting).

\(^{175}\) See *id.* (Smith, J., dissenting) (arguing that *Boudreau* did not turn on language modified by word “any” such as “any damage,” “any kind of liability” or “any place,” it turned on whether injuries were “from or by floods or flood waters” and, therefore, reliance on Supreme Court conclusion regarding statute’s broad sweeping language was inappropriate).

\(^{176}\) *Id.* (Smith, J., dissenting).

\(^{177}\) *Id.* (Smith, J., dissenting).

\(^{178}\) See 33 U.S.C. § 702(c) (1994) (specifically statute states, “any damage,” “any kind of liability” and “any place”). The statute states: “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 . . . .” *Id.* (emphasis added). The word “any” was put into the statute to modify damage, kind of liability and place. *Id.* These words were not at issue in *Boudreau* because *Boudreau* concerned whether the plaintiff’s injuries were caused by flood waters. *Boudreau*, 53 F.3d at 86 (Smith, J., dissenting).

\(^{179}\) *Boudreau*, 53 F.3d at 86 (Smith, J., dissenting).
The dissent stated that it assumed that the circumstances of the case involved "floods or flood waters" within the meaning of the statute so that it could focus on the real disagreement, the meaning of "from or by." Therefore, the only question remaining before the dissent was whether the damage was caused by these waters. The dissent concluded that immunity under § 702(c) did not apply because, "there was no reasonable construction of the plain language of this provision by which the damage in this case was 'from or by' flood waters." In reaching this conclusion, the dissent relied heavily on the specific facts of the case. The dissent did not dispute the fact that Boudreau's injury was the result of a Coast Guard rescue attempt on a flood control lake. The dissent, however, asserted that water did not cause Boudreau's injury, except that "but for" the existence of the water, Boudreau would not have been injured. For the dissent, the "but for" connection was not strong enough to trigger § 702(c) immunity. The dissent stated, "[t]his type of connection . . . [was] too tenuous to be supported by a rational construction of 'from or by.' " The dissent criticized the majority's holding as too broad on this point because the connection the majority relied on was between Boudreau's injury and flood control, not the injury and flood waters as the dissent believed the statute clearly required.

The dissent's final criticism concerned the majority's reading of the

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180. Id. (Smith, J., dissenting).
181. Id. (Smith, J., dissenting). The dissent noted that the fact that the circumstances of Boudreau involved "floods or flood waters" might be disputed as it had been in other similar cases. See Denham v. United States, 646 F. Supp. 1021, 1026-27 (W.D. Tex. 1986) (concluding that plaintiff's injury, sustained from flood control project's use as recreational facility, was not subject to immunity provision of § 702(c)), aff'd, 834 F.2d 518 (5th Cir. 1987); see also United States v. James, 478 U.S. 597, 605 n.7 (1986) (noting in Hayes decision that if plaintiff could show his injuries were result of recreational facility operation and not flood control, he would avoid the bar of § 702(c), but also noting dispute about this in other circuit cases).
182. Boudreau, 53 F.3d at 86 (Smith, J., dissenting). "The simple question is whether the damages in this case were 'from or by floods or flood waters.' " Id. (Smith, J., dissenting) (emphasis added).
183. Id. (Smith, J., dissenting).
184. See id. (Smith, J., dissenting) (looking specifically at how accident on lake occurred and concluding that water had nothing to do with Boudreau's injury).
185. Id. (Smith, J., dissenting). For a complete discussion of the facts of Boudreau, see supra notes 135-45 and accompanying text.
186. Boudreau, 53 F.3d at 86 (Smith, J., dissenting).
187. Id. (Smith, J., dissenting).
188. Id. (Smith, J., dissenting).
189. Id. at 86-87 (Smith, J., dissenting). The dissent stated: "The majority admits [that the 'but for' connection is too tenuous] by holding that the relevant nexus [required by the statute] is between the injury and 'flood control,' not flood waters." Id. at 86 (Smith, J., dissenting). Section 702(c) reads: "No liability . . . for damage from or by floods or flood waters . . . ." 33 U.S.C. § 702(c) (1994) (emphasis added). It does not include damage from flood control. Id.
Supreme Court opinion in *James*.\(^{190}\) The majority concluded that if Boudreau's injury was related to the management of a flood control project, the Government was immune from liability.\(^{191}\) The dissent argued that there was no language to support this conclusion in the statute and that the majority gleaned its conclusion from a misreading of the *James* decision.\(^{192}\) The dissent noted that under the majority's reading of the management language from *James*, the negligent failure to warn a motorist of a road hazard, resulting in an accident within the confines of a recreational area that is part of a flood control project, would give rise to § 702(c) immunity because such a failure to warn is part of the "management" of a flood control facility.\(^{193}\) The dissent argued that the management language of the *James* decision must be construed in light of the facts of *James* and, therefore, not extended beyond those facts.\(^{194}\) The dissent noted that the *James* case passed over the threshold issue of whether the injuries were caused by flood waters while the *Boudreau* case had not.\(^{195}\) The dissent criticized the majority for taking language from the *James* decision out of context and misapplying it in the *Boudreau* case.\(^{196}\)

The final point argued by the dissent was that the Supreme Court had not rewritten the language of the statute through its decision in *James*, and therefore, no court should construe the *James* decision as holding that the statute now read that government immunity extended to, "any damage related to the management of a federal flood control project."\(^{197}\) Such a

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190. *Boudreau*, 55 F.3d at 87 (Smith, J., dissenting).
191. Id. at 86.
192. See id. at 87 (Smith, J., dissenting) (stating that "[t]he word 'management' appears nowhere in the relevant provision of § 702(c)" and insinuating that majority misread *James* Court's holding on this point). *James* involved the drowning of recreational users of flood control projects after the users were swept through retaining structures opened to release water to control flooding. United States v. James, 478 U.S. 597 (1986). In *James*, it was clear that the accidents were caused by flood waters, and therefore, the Supreme Court was not concerned with the issue that faced the court in *Boudreau*. See *Boudreau*, 53 F.3d at 87 (Smith, J., dissenting) (determining issue was whether injuries were caused from or by floods or flood waters which was not case in *James* where it was clear drownings were caused by flood waters).
193. *Boudreau*, 53 F.3d at 87 (Smith, J., dissenting). The majority explicitly rejected the contention that its holding would be extended as far as that suggested by the Seventh Circuit in *Fryman v. United States*, 901 F.2d 79 (7th Cir. 1990). *Boudreau*, 53 F.3d at 87. For the full text of the Seventh Circuit's example, see supra note 113. After discussing the Seventh Circuit's example, the majority stated: "In any event, if the foregoing represents an over-application of § 702c, the present case is safely removed from that realm." *Boudreau*, 53 F.3d at 86.
194. *Boudreau*, 53 F.3d at 87 (Smith, J., dissenting).
195. Id. (Smith, J., dissenting). "This threshold is simply not met in this case." Id. (Smith, J., dissenting).
196. Id. (Smith, J., dissenting). "This passage from *James*, [which contains the management language relied on by the majority], must be construed in light of the facts of *James* and the plain language of § 702(c)." Id. (Smith, J., dissenting).
197. Id. (Smith, J., dissenting). "[T]he Supreme Court acknowledged that the language of 702(c) is broad: it did not indicate, however, that the provision
reading would be incorrect according to the dissent.\textsuperscript{198} In the dissent’s opinion, the majority misread the statute and the \textit{James} opinion leading it to reach an incorrect holding.\textsuperscript{199}

B. The \textit{Boudreau} Court’s Failure to Recognize the Harm of Outdated Legislation and Its Disappointing Decision to Continue the Injustice.

In \textit{Boudreau}, the Fifth Circuit was given the opportunity to speak directly and clearly on an issue that had caused controversy among the circuits.\textsuperscript{200} There is little precedent in the Fifth Circuit concerning the issue of the application of § 702(c) to cases where it is unclear whether the injuries were caused “from or by flood waters” within the meaning of the statute.\textsuperscript{201} Therefore, the court wasted an opportunity to take a stand on the issue and make clear how it would decide such cases in the future. The court had a chance to forge a path toward change—to make a statement regarding an antiquated statute—but instead it chose to fall in line with the ranks.\textsuperscript{202} In light of the way the circuits have ruled on this issue, the

should be read as ‘any damage related to the management of a federal flood control project.’” Id. (Smith, J., dissenting).

198. Id. (Smith, J., dissenting).

199. Id. (Smith, J., dissenting).

200. See Hiersche v. United States, 503 U.S. 923 (1992) (mem.) (discussing split in circuits on application of § 702(c)). For a further discussion of how the different circuits have applied § 702(c), see supra note 12, 77-126 and accompanying text.

201. See, e.g., Mocklin v. Orleans Levee Dist., 877 F.2d 427 (5th Cir. 1989) (existing as only Fifth Circuit case dealing with this issue after \textit{James}). The early cases in the Fifth Circuit dealt with property damage and were concerned with issues such as whether § 702(c) covered all types of floods, natural and man-made. See, e.g., Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184 (5th Cir. 1975) (holding that § 702(c) covered damages from all floods not just from natural floods). For a discussion of cases in other circuits which have also reached this conclusion, see supra note 45 and accompanying text.

The only other Fifth Circuit case dealing with the § 702(c) immunity provision was \textit{Graci v. United States} in which the court held did not involve damage caused by flood waters from a flood control facility, and therefore, § 702(c) did not apply. Graci v. United States, 456 F.2d 20 (5th Cir. 1971). For a further discussion of the facts and reasoning in \textit{Graci}, see supra note 41.

The only recent case in the Fifth Circuit to speak on this issue was much clearer; there the court easily found the injuries were caused “from or by flood waters” because the waters caused the victim to drown. Mocklin, 877 F.2d at 430.

202. \textit{Boudreau}, 53 F.3d at 82 (affirming lower court’s holding that United States was immune from liability under § 702(c) for negligence of Coast Guard in its safety measures on multi-purpose lake). The \textit{Boudreau} court had the opportunity to make a decision for the circuit on how it would stand on these types of cases since there was no significant precedent on this issue in the Fifth Circuit. For a further discussion of the lack of precedent in the Fifth Circuit, see supra note 201 and accompanying text. The Fifth Circuit could have followed the Tenth Circuit in its decision not to allow governmental immunity in cases where the damage or injury was associated with the operation of waters in a recreational facility. Boyd v. United States Army Corps of Eng’rs, 881 F.2d 895, 900-01 (10th Cir. 1989). For a further discussion of \textit{Boyd} and the Tenth Circuit’s rationale, see supra notes 101-06 and accompanying text. Instead, the \textit{Boudreau} court chose to fit the case into the
Fifth Circuit's decision to affirm the district court's holding and follow the majority of circuits is not surprising, but is nevertheless disappointing.

The Boudreau court relied heavily on the Supreme Court's decision in James and the reading of that opinion proffered by the Ninth Circuit and followed by several other circuits.\textsuperscript{203} As previously noted, the Ninth Circuit construed the James decision to require the application of government immunity if the damage claimed was not "wholly unrelated" to flood control.\textsuperscript{204} The Fifth Circuit did not explicitly apply the "wholly unrelated" test, but concluded that because James had included "management" of a flood control facility within the ambit of activity associated with flood control, and the Coast Guard was performing those "management" functions, there was a sufficient nexus between the injury and flood control to support governmental immunity.\textsuperscript{205} Using Ninth Circuit terminology, Boudreau's injury would not be considered "wholly unrelated" to flood control.\textsuperscript{206} This analysis is not entirely sound. In James, the Court stated that the failure to convey warnings about the dangers associated with the flood control project were part of the "management of a flood control facility."\textsuperscript{207} The Court, however, was merely dismissing the plaintiff's argument that the failure to give warnings about potential flood control related dangers in a recreational facility was unrelated to flood control.\textsuperscript{208} By using this language, the Court did not eliminate the statutory requirement that the injuries be the result of "floods or flood waters."\textsuperscript{209}

\textsuperscript{203} Boudreau, 53 F.3d at 83-85. For a complete description of the Boudreau court's analysis, see supra notes 69-87 and accompanying text.

\textsuperscript{204} McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988) (applying "wholly unrelated" standard); Morici Corp. v. United States, 681 F.2d 645 (9th Cir. 1982) (same); Pierce v. United States, 650 F.2d 202 (9th Cir. 1981) (same); Aetna Ins. Co. v. United States, 628 F.2d 1201 (9th Cir. 1980) (same); Peterson v. United States, 567 F.2d 271 (9th Cir. 1966) (same). For a description of the Ninth Circuit cases and their holdings, see supra notes 52-57, 78-87 and accompanying text.

\textsuperscript{205} See Boudreau, 53 F.3d at 86 (concluding Boudreau's injury resulted from boating accident on flood control waters involving Government's patrol of those waters by Coast Guard and therefore, immunity applied).

\textsuperscript{206} See McCarthy, 850 F.2d 558 (holding that immunity applied unless injury was "wholly unrelated to flood control"). Therefore, using the McCarthy court's language, Boudreau's injury was not "wholly unrelated" to flood control.

\textsuperscript{207} United States v. James, 478 U.S. 597, 610 (1986).

\textsuperscript{208} Id. In James, respondents argued that "even if § 702(c) is intended to grant immunity in connection with flood control projects, the Federal Government is not entitled to immunity here because their injuries arose from government employees' alleged mismanagement of recreational activities wholly unrelated to flood control." Id. at 609-10.

\textsuperscript{209} Boudreau, 53 F.3d at 87 (Smith, J., dissenting). The statute requires that the damage be "from or by floods or flood waters" at any place. 33 U.S.C. § 702(c) (1994).
Further, the facts of *James* were different from the facts in *Boudreau*\(^\text{210}\). In *James*, the deaths of the recreational users were clearly caused by flood waters, as the victims would not have drowned in the retaining structures had the structures not been opened to release water to control flooding.\(^{211}\) In contrast, in *Boudreau*, the appellant was injured because of the alleged negligence of the Coast Guard in towing his boat, not because of the operation of the lake for flood control purposes.\(^{212}\) In *James*, the Supreme Court determined that immunity applied because the plaintiff’s injuries were the direct result of the release of flood waters for flood control purposes, which the immunity provision, on its face, was designed to cover.\(^{213}\) This is the threshold issue that the *Boudreau* court avoided.\(^{214}\) The dissent in *Boudreau* seems to have captured this point well, stating: “[T]he Supreme Court acknowledged that the language of section 702(c) is broad; it did not indicate, however, that the provision should be read as any damage related to the management of a federal flood control project [is covered by the immunity provision].”\(^{215}\)

Even if the “management” language can be read into the statute as the *Boudreau* court held, that should not end the analysis. The Seventh Circuit in *Fryman v. United States*, gave a very interesting example of how far the courts could extend the “management” language in order to protect the government from suit.\(^{216}\) The Seventh Circuit recognized that management of flood control included building roads to beaches and hiring personnel to manage and maintain them.\(^{217}\) The court explained that if employees were negligent and allowed a tourist’s car to be damaged by a pothole, the government would be immune because such negligence was “associated with flood control.”\(^{218}\) The Seventh Circuit then noted that it was hard to conceive how this would be “damage from or by floods or flood waters” within the scope of § 702(c).\(^{219}\)

In *Boudreau*, the Fifth Circuit noted this example, but simply dismissed its relevance to the case before it.\(^{220}\) The court stated that it would leave open the question of whether this example should influence future

\(^{210}\) For a discussion of the facts of *James*, see *supra* note 66. For a discussion of the facts of *Boudreau*, see *supra* notes 134-45 and accompanying text.

\(^{211}\) *James*, 478 U.S. at 597.

\(^{212}\) *Boudreau*, 53 F.3d at 82.

\(^{213}\) *James*, 478 U.S. at 604.

\(^{214}\) See *Boudreau*, 53 F.3d at 86-87 (Smith, J., dissenting) (implying that threshold issue is whether injuries were caused by floods or flood waters and this was not proved by *Boudreau*).

\(^{215}\) Id. at 87. (Smith, J., dissenting).

\(^{216}\) *Fryman* v. *United States*, 901 F.2d 79, 81 (7th Cir. 1990). For a description of the example offered by the Seventh Circuit, see *supra* note 113.

\(^{217}\) *Fryman*, 901 F.2d at 81.

\(^{218}\) Id.

\(^{219}\) Id.

\(^{220}\) *Boudreau*, 53 F.3d at 85-86. The majority felt that its holding could not be extended as far as the Seventh Circuit’s example suggested. *Id*. 

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decisions. The court then concluded that Boudreau was safely removed from the realm of cases which could fit into that overly broad example, and that its holding in Boudreau would not extend immunity to such situations. It is difficult to see how the court reached this conclusion.

The Seventh Circuit correctly recognized that if the court is willing to extend immunity to cover injuries which are somehow related to the "management of a flood control facility," one must include injuries resulting from traffic accidents at the facility within that classification. The Fifth Circuit attempted to narrow the language in the James decision through its holding in Boudreaux, but as the Seventh Circuit pointed out, "it [is] hard to conceive how a decision interpreting [§ 702(c)] could have been more broadly written... . . . James was so broadly written that it cannot be applied literally." By failing to address the full implications of the "management" language in James, the Fifth Circuit opened the door to the extension of government immunity to those situations contemplated by the Seventh Circuit.

The position taken by the Tenth Circuit is better reasoned. The Tenth Circuit has broken away from the other circuits and their interpretations of James. The Tenth Circuit, in Boyd, concluded that Congress intended to shield the Government from liability associated with flood control operation, not liability associated with the operation of a recrea-

221. Id.

222. Id. at 86. The majority did not give any clear reason why the example was an over-application; it simply concluded that it did not have to concern itself with the example given by the Seventh Circuit. Id. The majority felt that unlike the example, Boudreaux was not a case where one could say that management had nothing to do with the injuries. Id. On the contrary, Boudreaux's injury resulted from a boating accident on flood control waters. Id. The majority felt that this was far removed from the Seventh Circuit's example of a traffic accident on a beach road. Id. The court concluded that Boudreaux's injuries were therefore related to the management of a flood control project, but to further emphasize this conclusion, the court noted the government's position on how the accident occurred. Id. The court commented:

The Government notes that, but for the creation of the flood control project... Boudreaux could not have been injured there. Although causation is disputed, the conditions on the Lake and the location of Boudreaux's vessel certainly made an accident of this nature more probable. For example, not only did the accident occur at a flood control lake, it occurred in an area that would not have been submerged without flood control. Furthermore, it is evident from the record that the waves, high winds, and other conditions on the lake could have contributed to the accident.

Id. at 86 n.15.

223. Fryman, 901 F.2d at 81.

224. Id.

225. See Boyd v. United States, 881 F.2d 895, 900 (10th Cir. 1989) (holding that Tenth Circuit would not stretch to "wholly unrelated" test and that § 702(c) immunity would not apply in recreational situations). For additional discussion of the Tenth Circuit's opinions on this issue, see supra notes 98-105 and accompanying text.
tional facility. The court, therefore, held that the requisite nexus between flood control activities and injuries was not established in the case of a snorkeler who was hit and killed by a recreational boat in a flood control facility. The Tenth Circuit recognized that the James Court "appeared to distinguish cases where damages occurred in waters not being actively used for flood control purposes, by twice noting that the district and appellate courts in that case had found that the waters were being released for flood control purposes at the time of the accident."

The Tenth Circuit also noted that the James Court cited the Fourth Circuit's decision in United States v. Hayes, which stated that a plaintiff could avoid the absolute bar of § 702(c) if he could show his injury was a result of the facility's operation as a recreational facility and not a flood control facility. The Tenth Circuit took the position that the Court in James required a connection between flood control activities and injury before immunity would apply, but that the James holding could not be extended as far as the Ninth Circuit had ventured through its "wholly unrelated test." Where the injury occurs as a result of the use of a flood control project for recreational purposes, it is difficult to see how a plain reading of the statute can result in the imposition of immunity. Therefore, following the Tenth Circuit's more reasonable reading of James, Boudreau was not decided correctly and should be reversed.

V. Impact

The Fifth Circuit's Boudreau decision will be an influential decision, not only within the Fifth Circuit, but also among the other circuits as they confront the issue of government immunity in flood control situations. The Fifth Circuit, however, did not establish any bright line rule to guide courts in making future decisions. The Fifth Circuit's decision was very broad and will therefore lead to reinterpretation each time a similar case is brought before the court. The Fifth Circuit's decision will simply per-

227. Id. at 896, 900; see also Holt v. United States, 46 F.3d 1000, 1005 (10th Cir. 1995) (concluding that requisite nexus was shown in case of car accident on ice covered highway next to flood control facility); Williams v. United States, 957 F.2d 742, 744-45 (10th Cir. 1992) (stating it would apply nexus test but flood control facility in this case does not trigger application of § 702(c)).
228. Boyd, 881 F.2d at 900.
229. 585 F.2d 701 (4th Cir. 1978).
231. Id. The "wholly unrelated" test required a "but for" analysis between the flood control activities and recreational injuries. Id. The court felt that: "Such a connection between flood control activity and recreational injuries is too attenuated to warrant the invocation of § 702(c)." Id.
232. For a discussion of the holding of the Fifth Circuit in Boudreau, see supra notes 143-44 and accompanying text.
233. The Fifth Circuit based its holding on the Supreme Court's holding in James. Boudreau v. United States, 53 F.3d 81, 83 (5th Cir. 1995), cert. denied, 116 S. Ct. 771 (1996). The James decision was very broad, so broad that the Seventh Cir-
petuate an injustice which has continued for a number of years.234

First, the Fifth Circuit, by merely falling in line with other circuits’ interpretations of Supreme Court precedent, continued to allow an outdated statute to govern an area of law where it should no longer apply.235 When Congress enacted the Flood Control Act in 1928, flooding was an extremely important and immediate problem.236 At the time of its enactment, however, other possible purposes of flood control projects, such as power generation, recreation and conservation were not considered.237 Additionally, no consideration was given to the Act’s possible impact on the then nonexistent federal liability for personal injury and death caused by the negligent operation of such projects.238 In the older cases, the statute served its purpose.239 The courts appropriately barred suits to recover for property damage caused by the government’s negligent operation of flood control facilities.240 Times have changed, however, and today the statute does not function as well as it did in the past.241 “Section

circuit felt it could not be applied literally. Fryman v. United States, 901 F.2d 79, 81 (7th Cir. 1990). The Supreme Court decision has therefore not been uniformly followed by every circuit creating a split among the circuits. For a discussion of the circuit split, see supra note 12. It follows that the broad decision in Boudreau also leaves room for differences in interpretation.

234. See Hiersche v. United States, 503 U.S. 923, 926 (1992) (mem.) (stating that § 702 is obsolete legislative remnant and is nothing more than “engine of injustice”).

235. For a discussion of the Fifth Circuit’s interpretation of Supreme Court precedent, see supra notes 151-64 and accompanying text.

236. For background on the Flood Control Act of 1928 and the events leading up to its enactment, see supra notes 1-10 and accompanying text.

237. Hiersche, 503 U.S. at 925.

238. Id. For a further discussion of sovereign immunity, see supra note 11 and accompanying text.

239. For a discussion of these cases and their holdings, see supra notes 41-49 and accompanying text.

240. Portis v. Folk Constr., 694 F.2d 520 (8th Cir. 1982) (barring recovery against government for property damage caused by negligent operation of flood control facilities); Morici Corp. v. United States, 681 F.2d 645 (9th Cir. 1982) (same); Pierce v. United States, 650 F.2d 202 (9th Cir. 1981) (same); Aetna Ins. Co. v. United States, 628 F.2d 1201 (9th Cir. 1980) (same); Burlison v. United States, 627 F.2d 119 (8th Cir. 1980) (same); Taylor v. United States, 590 F.2d 263 (8th Cir. 1979) (same); Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1977) (same); Hayes v. United States, 585 F.2d 701 (4th Cir. 1978) (same); Callaway v. United States, 568 F.2d 684 (10th Cir. 1978) (same); Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184 (5th Cir. 1975) (same); McClasskey v. United States, 386 F.2d 807 (9th Cir. 1967) (same); Parks v. United States, 370 F.2d 92 (2d Cir. 1966) (same); Stover v. United States, 332 F.2d 203 (9th Cir. 1964) (same); Clark v. United States, 218 F.2d 446 (9th Cir. 1954) (same); National Mfg. Co. v. United States, 210 F.2d 263 (4th Cir. 1954) (same).

241. Compare Fryman v. United States, 901 F.2d 79 (7th Cir. 1990) (exemplifying modern case which developed one interpretation of how § 702(c) applied to case involving injuries sustained at multi-purpose facility), with Boyd v. United States, Army Corps of Eng’rs, 881 F.2d 895 (10th Cir. 1989) (providing different application of § 702(c) to similar situation as that which occurred in Fryman), and
702(c) now plays a role no one could have anticipated in 1928.242 Cases causing controversy in the courts today are those like Boudreau, involving accidents occurring at flood control facilities which are being used for other purposes in addition to flood control.243 This old legislation is no longer applicable to all the situations which have and will come before the courts.244

Second, the broadness of the Boudreau decision allows future courts to extend the immunity provision to situations it was never intended to reach. At least one circuit has stated that Congress never intended the statute to address liability for accidents occurring in projects operated as recreational facilities.245 Because Boudreau involved an accident resulting from the recreational use of a flood control facility, it fell beyond the statutes reach.246 Nevertheless, the court found a way to read the James decision and other circuit court precedent to allow the Government to claim immunity in such situations.

Finally, the Boudreau decision will have a serious impact on future litigants who have suffered severe injury because of governmental negligence in the operation or management of multi-purpose flood control facilities. These litigants face the prospect of having their case dismissed by the Fifth Circuit, although dismissal would be based upon a statute that was never intended to cover such cases.247 Moreover, these litigants will never be able to recover for personal injuries even when the injuries were clearly the result of the government's negligence in the care, upkeep and operation of a recreational facility.

Although Boudreau seems to be just another case in a sea of cases involving flood control and government immunity, it makes a clear statement regarding the action taken by our judicial system when interpreting outdated legislation. Perhaps the real solution to this problem lies with

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242. Fryman, 901 F.2d at 80.
243. See, e.g., Reese v. South Fla. Water Management Dist., 59 F.3d 1128 (11th Cir. 1995) (involving accident occurring at multi-purpose flood control facility); Fisher v. United States, 31 F.3d 683 (8th Cir. 1994) (same); Dawson v. United States, 894 F.2d 70 (3d Cir. 1990) (same); Fryman, 901 F.2d at 79 (same); Boyd, 881 F.2d at 895 (same); Mocklin v. Orleans Levee Dist. 877 F.2d 427 (5th Cir. 1989) (same); McCarthy, 850 F.2d at 558 (same). For a discussion of some of these cases and others, see supra notes 77-126 and accompanying text.
244. See Hiersche, 503 U.S. at 926 (stating that legislation is "obsolete" and "engine of injustice").
245. Boyd, 881 F.2d at 900. "Congress' concern was to shield the government from liability associated with flood control operations, not liability associated with operating a recreational facility." Id. (citation omitted).
246. For a narrative discussion of the majority opinion in Boudreau, see supra notes 148-70 and accompanying text.
247. See Boyd, 881 F.2d at 900 (determining statute was not designed to cover liability associated with recreational facility).
Congress. After all, it is Congress's duty to address outdated legislation that needs to be repealed or amended. This responsibility should not fall upon the shoulders of the courts. Unfortunately, without further guidance from Congress, the courts are forced to develop their own interpretations of § 702(c) in order to achieve justice for those who have been wronged by the government's negligence.

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248. See Hirschel, 503 U.S. at 926 (indicating Congress, and not Supreme Court, should solve split among circuits).

249. Id. The Hirschel Court stated: "Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained." Id.