

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
South Carolina Public Service Authority) ASBCA No. 53701
)
Under Contract No. DACW60-77-C-0005)

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OPINION BY ADMINISTRATIVE JUDGE REED ON
GOVERNMENT'S MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT
AND
APPELLANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT ON ENTITLEMENT

The United States of America, Department of the Army, acting through a contracting officer (CO) of the U.S. Army Engineer District, Charleston (the government or the Corps), and the Chairman, South Carolina Public Service Authority ("Santee Cooper," the Authority, or appellant) entered into Contract No. DACW60-77-C-0005 (the contract). Under the contract, the government generally agreed to construct and retain ownership for up to fifty years of canal and hydropower facilities near St. Stephen, South Carolina that would discharge water from Lake Moultrie on the Cooper River through the canal and power station into the Santee River.

Following fifty years of ownership by the government and operation of the facilities by the Authority, or sooner if the parties agree, the facilities will be divested by the government to the Authority. The primary government purpose of this so-called Cooper

River redirection project is to alleviate excessive shoaling in Charleston Harbor, into which the Cooper River flows, thereby enhancing navigation and avoiding the costs of maintenance dredging in the harbor.

Cooper River flows had earlier been increased by appellant. Water was diverted from the Santee River to the Cooper River and through the Authority's power station. Cooper River redirection project facilities were to be employed in conjunction with existing power facilities of the Authority as a means of offsetting the loss of electric generating capacity caused by redirecting water back to the Santee River thereby reducing the water available for appellant's existing power facilities.

In 1993, landowners on or near the Santee River, below the redirection tailrace canal, filed a lawsuit against the Authority in a South Carolina court alleging inverse condemnation, negligence, and trespass. The landowners claimed that flooding along the Santee River attributable to the redirection had damaged their properties. The Authority successfully removed the lawsuit to a United States District Court but unsuccessfully attempted to bring the government into the litigation. Appellant then filed a claim with the CO contending that the contract required the government to reimburse the Authority for the cost of defending the litigation and for any damages adjudged, in effect a claim for indemnification. The claim was denied by the CO. This appeal followed.

First, the government has moved to dismiss a part of the Authority's appeal as time-barred. Second, the government seeks dismissal of the Authority's claim for any damages that may be incurred as a consequence of the litigation, which the government characterizes as "uncertain future costs." Third, the government asks the Board to dismiss for failure to state a claim or to grant summary judgment on the grounds of sovereign immunity or based on affirmative defenses under the contract related to appellant's alleged fault or negligence.

Appellant opposes the government's motions and has submitted a cross-motion for summary judgment on entitlement to contractual indemnification. By its motion, the Authority suggests that the government assumed all risks of all third-party claims arising out of the redirection project, including reimbursement of the Authority's costs incurred to defend itself against such claims and any damages or extra costs arising out of such claims except for costs that are the result of the Authority's negligence or fault. The Authority argues that there is no triable issue as to those defenses.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. The Cooper River is the principal tributary flowing into Charleston Harbor, South Carolina. The Santee River empties into the Atlantic Ocean south of Georgetown, South Carolina and north of Charleston, South Carolina. Prior to 1939, the rivers flowed independently of one another. (*Sauders v. South Carolina Public Service Authority*, 856

F. Supp. 1066, 1067-68 n.4-5 (D.S.C. 1994); *South Carolina Public Service Authority*, ENG BCA No. 5564, 91-2 BCA ¶ 23,760 at 118,993 (findings 1-3))

2. In 1934, the South Carolina General Assembly created the Authority as a corporate State agency for the purpose of developing the Santee and Cooper Rivers for navigation and for producing, distributing, and selling electric power. Beginning in 1939, pursuant to License No. 199 (the license) issued by the Federal Power Commission (FPC, now the Federal Energy Regulatory Commission (FERC)), as approved by the Secretary of War (now Secretary of the Army, hereinafter the Secretary), under the Secretary's authority to regulate navigation, appellant began constructing dams, reservoirs, canals, and hydropower plants known as the Santee-Cooper project. In a report to Congress, to be described below, the government summarized that Article 12 of the license makes the licensee liable for all damages to others as a result of the project, Article 15 reserves the right in the Secretary to regulate pool levels in the interest of navigation, and Article 17 reserves the right in the United States to use impounded water for navigation in such amount as may be determined by the Secretary. (856 F. Supp. 1067-68 n.3; 91-2 BCA at 118,993 (findings 3-4); R4, tab C-2/1)

3. The Santee-Cooper project dammed the Santee River by erecting Wilson's Landing Dam (a/k/a Santee Dam), a spillway, and a small hydropower plant. This reduced the flow of the Santee River downstream of the dam to a minimum of 500 cubic feet per second (cfs), although the spillway is capable of releasing up to 800,000 cfs when necessary. The spillway was placed to drain "any flood flows in excess of the storage capacities of Lakes Marion and Moultrie" and "flood flows in excess of capacity of the Pinopolis hydroplant" (the lakes and the hydroplant will be described below). The balance of the Santee River's average pre-diversion flow, about 15,000 cfs, created Lake Marion and was diverted through a canal to the Cooper River basin. (856 F. Supp. 1067-68; 91-2 BCA at 118,994 (finding 5); R4, tab C-2/1 at 14, tabs C-2/8, /12)

4. The diverted Santee River water and the Cooper River were dammed by the Authority at Pinopolis Dam, thereby creating Lake Moultrie. Water stored in Lakes Marion and Moultrie was used to generate power at Pinopolis Dam by way of the adjacent Jefferies hydroelectric plant (a/k/a Pinopolis hydroplant). After passing through the Jefferies plant, the water flowed down the Cooper River and into Charleston Harbor. (856 F. Supp. at 1067-68; 91-2 BCA at 118,994 (findings 5-6); R4, tab C-2/8)

5. Prior to the Santee-Cooper project, the average flow of the Cooper River at Pinopolis was 72 cfs. When appellant began hydropower operations in 1942, the average flow of the Cooper River increased to about 15,000 cfs, with a maximum flow of about 27,500 cfs. The increased flow down the Cooper River caused increased shoaling in Charleston Harbor. Such shoaling resulted in greater dredging and spoil disposal requirements to maintain harbor depths for navigation. (856 F. Supp. at 1068; 91-2 BCA at 118,994 (findings 7-8))

6. The solution to the problem of increased shoaling in Charleston Harbor was the so-called Cooper River redirection project to be constructed by the government. Government studies indicated that a redirection canal from Lake Moultrie to the Santee River, with a new hydropower plant on that canal, near St. Stephen, South Carolina, would allow for decreased flow through Pinopolis Dam and the Jefferies powerhouse, thereby reducing shoaling in Charleston Harbor. The new St. Stephen hydropower facility would compensate for the lost generating capacity at the Jefferies plant, where flow would be restricted to an average of 3,000 cfs, later increased by agreement of the parties to a 4,500 cfs weekly average flow with a 5% operational variance. (856 F. Supp. at 1067-69; 91-2 BCA at 118,994 (findings 9-10); R4, tab C-2/14)

7. In 1968, the Secretary submitted to Congress a report of the Chief of Engineers, U.S. Army, recommending implementation of the redirection project. The report and attachments were published as Senate Document No. 88, 90th Congress, 2d Session (1968) (S. Doc. No. 88). S. Doc. No. 88 included, among other things, a report from the Chief of Engineers to the Secretary. In his cover letter dated 29 December 1967, the Chief of Engineers addressed, in pertinent part, the costs of the redirection project.

2. . . . The District and Division Engineers estimate the Federal construction cost at \$35,381,000, which includes provisional fish and wildlife features. Annual charges are estimated at \$1,687,000, including \$191,000 for operation and maintenance. A net power betterment presently estimated at \$417,000 annually to be subtracted from this amount would bring the net annual charges to \$1,270,000. Annual benefits [savings from less government-funded maintenance dredging in Charleston Harbor] are estimated at \$2,750,000 and the benefit-cost ratio is 2.2 based on a 50-year period of analysis.

3. . . . The . . . Secretary . . . acting through the Chief of Engineers, would be authorized to determine and enter into agreement with [the Authority], for apportionment of costs between the United States and [the Authority] The Board [of Engineers for Rivers and Harbors] includes the recommendations that the Secretary . . . acting through the Chief of Engineers, be authorized to negotiate with [the Authority] for a limitation of releases from Pinopolis Dam to Cooper River . . . and to reimburse the Authority for the cost involved, provided that reimbursement shall not exceed estimated average attendant reductions in the Federal cost of maintenance of Charleston Harbor as determined by the Secretary

....

6. In connection with the further detailed studies of the gated structure provided for in the recommendation of the Board [of Engineers for Rivers and Harbors] it also will be appropriate with respect to division of costs for that structure to take into account any mitigation of damages . . . which may be associated with possible surges [on the Santee River] resulting from power operations. Accordingly, I recommend that the Chief of Engineers be authorized to establish the most appropriate division of costs for the proposed gated structure [between Federal and non-Federal interests].

S. Doc. No. 88 further addressed, *inter alia*, certain downstream effects on the Santee River of the proposed diversion project, including the possible future need for a gated structure on the South Santee River. The structure would be used to control salinity on the North and South Santee River¹ and would be a key component of a proposed new National Wildlife Refuge. S. Doc. No. 88 also spoke to increased flows on the Santee River to be expected upon operation of the diversion project, as follows:

While flows of great magnitude have often been spilled into the Santee River during the life of the Santee-Cooper project, these flows are of short duration. . . . Operation of the [St. Stephen power plant] would force a reestablishment of the previous [pre-Santee-Cooper project] regimen. Average flow will be that of pre[-]Santee-Cooper except for the 3,000 cfs [later increased to 4,500 cfs as indicated above] released to Cooper River at Pinopolis. Daily [St. Stephen] powerhouse releases into Santee River would, however, vary considerably from the average (vary between zero flow off-peak and about 24,500 cfs full peaking, versus average flow for power of about 12,500 cfs).

Government studies summarized in S. Doc. No. 88 noted that the “[h]ydraulic characteristics of the non-tidal Santee [River] are similar to those existing pre[-]Santee-Cooper.” “Increased flood flow subsequent to diversion will have little significance from the viewpoint of damages.” A chart in S. Doc. No. 88 and other record evidence indicate that the water elevation above mean sea level to be expected downstream of St. Stephen at a lake on the Santee River when 24,500 cfs (the maximum design discharge through the St. Stephen tailrace canal) is diverted and discharged into the river below St. Stephen would fluctuate depending on operation of the powerhouse and would be higher than when 500 cfs is discharged below Wilson’s Landing Dam. The final

¹ In its delta, the Santee River flows in two major streams, the so-called North and South Santee River (R4, tab C-2/1).

environmental statement related to the rediversion project, in connection with releases through the St. Stephen facility, noted:

flow in the Santee River below St. Stephen will be increased to about 80 percent of the flow occurring prior to the construction of the Santee-Cooper Project. There will, however, be greater short-term fluctuations in flow than now exist because power releases will be made on a peaking basis.

The “80 percent” figure quoted above was later determined by the Charleston District Engineer, U.S. Army Corps of Engineers (the DE) to be about 70-77%. On the Santee River, at a river gauge near Jamestown, South Carolina, downstream of the lake mentioned above, water discharged through the St. Stephen facilities was expected to cause water levels to rise to 6-12 feet above mean sea level compared with 1-3 feet before the rediversion project began operation. A U.S. Department of the Interior Fish and Wildlife Service report provided:

9. The Santee River downstream from Lake Marion [is bordered by] great expanses of bottom-land hardwoods and swamps. Prior to the Santee-Cooper project, these lowlands were flooded for extended periods each year. Since 1942, the frequency and period of inundation have been greatly reduced.

. . . .

102. The increase of average flows in the Santee River downstream from the [rediversion] canal will greatly benefit fishery resources. An estimated 9,000 acres of swamps and overflow lands will be inundated permanently or for extended periods

At the trial of the landowners’ lawsuit, testimony described a “management plan” that was available to Santee Cooper to lessen the level of flows on the Santee River at Jamestown, South Carolina, downstream of the rediversion canal outflow. Other testimony that summarized historical and predicted flow information on the Santee River below Wilson’s Landing Dam, which would include but not be limited to rediverted water, indicated that the average river elevation at Jamestown before rediversion was 3.82 feet and 7.85 feet after rediversion. (Findings 5-6; compl. ¶¶ 16-17, 19; answer ¶¶ 16, 18; R4, tab C-2/1 at 1-3, 42, 44, 95, 136, tab C-2/9 at 42, tabs C-2/12-14, tab C-2/21 at 36-39, 45-46) The record does not include information concerning pre-Santee Cooper diversion normal high water elevation above mean sea level at any of the locations discussed above. The record also does not provide dates or circumstances and does not quantify the “flows of great magnitude” mentioned above that have spilled down the Santee River during the existence of Santee-Cooper prior to rediversion.

8. In a letter dated 16 February 1966 to the Governor of South Carolina, the DE explained the government's proposed solution to excessive shoaling in Charleston Harbor. Among other things, the DE spoke of meetings with the Authority's personnel:

. . . the subject of damage claims along the Cooper and Santee [Rivers] was raised. At that time it was indicated that [Santee Cooper] may desire the Corps to operate and maintain the St. Stephen power plant in order to protect the [State of South Carolina] from claims for damage should such a redirection become a reality. . . . The Authority wishes complete freedom from liability arising from damage claims and the Federal Government cannot legally assure the Authority this freedom except under the probability that the Federal Government would operate and maintain the plant or contract with [the Authority] for such services. Under such a plan of operation, the Authority would program whatever generation schedule they desired and . . . would in actuality control the flow of water through the generating system. Legally, the Corps would operate and maintain the facility.

The nature of the "damage claims" discussed is not described by the record; however, "Santee River Claims (Paid in 1956 and 1957)," showing names and dollar amounts, among other entries, is listed on a document dated 15 February 1966 entitled "AUTHORITY INVESTMENTS WHICH WOULD BE LOST OR THE VALUE REDUCED SUBSTANTIALLY UNDER THE ST. STEPHEN PLAN OF THE U. S. CORPS OF ENGINEERS." (R4, tab C-2/2 at 4, tab C-2/3)

9. In a written statement dated 24 March 1966, intended for publication during public hearings conducted by the government on the proposed redirection project, appellant urged, in pertinent part, that the project be devised such that appellant "be kept whole so that our vital State functions will not be impaired. [The DE] has repeatedly assured us that any plan that the [government] would propose would fully compensate us for any power loss." Concerning the effect on the Santee River downstream of the redirection project, the Authority stated, as relevant here:

. . . The redirection of fresh water to the Santee River will cause new claims to the effect that the flora and fauna which has [sic] become established in the last 25 years will be changed from a salt water to a fresh water environment. The Authority's expenditures for water rights on . . . the Santee . . . will be greatly decreased in value. . . . The present flood control features protecting the lower Santee area will be less effective,

and irregular surges of water from power generation will occur on . . . the Santee

Appellant characterized language from the DE's letter of 16 February 1966, quoted in the finding above, as a "commitment." The Authority further stated that the redirection project would cause a depreciation in value of "[t]he Authority's investment in . . . perpetual easements on the Santee [River]" (R4, tab C-2/1 at 179-80, 187, 190) Neither the nature nor scope of the "water rights," the "present flood control features," nor the "perpetual easements" is described in the record.

10. S. Doc. No. 88 included "An Analysis of the Powers and Competency of" the Authority. General powers extend, among others, to development of the Cooper and Santee Rivers "as instrumentalities of . . . navigation." Specific powers, as relevant here, were to "acquire and dispose of (by any means) any property" and to "have the power of Eminent Domain." Also appended to S. Doc. No. 88 was a letter to the DE from Santee Cooper's General Manager (GM) dated 5 May 1966, which states in pertinent part:

You and we have had extensive discussions of the proposed St. Stephen plan and its effects on [Santee Cooper]. These discussions have led gradually to certain conclusions, our understanding of which is stated herein. . . .

The controlling principle upon which we have agreed . . . is that the Authority will be kept whole so that it may continue as a public agency to discharge its obligations to the citizens of South Carolina . . . and so that its outstanding bonds and its credit will not be impaired.

If the St. Stephen plan were adopted, [the Authority] understands that arrangements [with the government] as outlined below [will] be incorporated in an agreement for a term of 50 years

. . . .

5. For the term of this agreement, the Authority will make available to the Federal Government without charge such of its lands as would be needed by the Corps for the St. Stephen project.

. . . .

7. At the present time the Authority is fully protected against all claims arising from stream flows on the Santee and

Cooper Rivers. This immunity must either be continued in effect or the Authority must receive compensation if it is to be subjected to risks from which it is presently free. We have agreed with you that the United States should protect the Authority fully from such claims, but you have said you do not have authority to express a commitment that the United States will save the Authority harmless. We therefore recommend that you request such authority. If it is not granted, the Authority reserves the right to compensation for residual rights.

The nature and extent of the “immunity” enjoyed at that time by Santee Cooper was not explained. It is further made unclear by record indications that Santee Cooper paid “Santee River Claims” amounting to more than \$292,000 in 1956-57. (Finding 8; R4, tab C-2/1 at 60-61, 66-67, tab C-2/3) The type and nature of claims paid and the bases for such payments are not further described in the record. The “residual rights” for which appellant reserved the right to compensation are not further described in the record.

11. The DE responded to appellant’s GM in a letter dated 16 May 1966, also made a part of S. Doc. No. 88. The letter, as relevant, stated:

. . . As we have discussed, at the present time I do not have the authority to bind the government or the Corps to any specific course of action. Your letter and the reply thereto, however, will serve to provide an understanding of our mutual positions which will, subject to all necessary approvals, be the starting position for our further discussion should Congress so authorize.

(R4, tab C-2/1 at 68)

12. S. Doc. No. 88 also included a letter dated 26 May 1967 from the Governor of South Carolina citing, among other things, the importance “to the economic development of South Carolina” that would be afforded by alleviating “the shoaling problem in Charleston Harbor.” The Governor’s letter stated that S. Doc. No. 88 reflected “the basic understandings outlined in . . . the report, authorizing legislation for the plan should make certain that the Authority, and its successors in interest, are made whole in view of the diminution in value of the Authority’s Pinopolis facilities through loss of power capabilities.” Further, the Governor’s letter provided that “enabling legislation requested of Congress authorizing the improvements . . . must provide authorization for negotiation between the Secretary . . . and the State of South Carolina . . . to assure solution to the existent problems without loss of resources to the State of South Carolina.” The Governor’s letter further requested that the Cooper River redirection legislation include

the proposed control structure for wildlife refuge purposes but said nothing about post-rediversion increased flows on the Santee River. (R4, tab C-2/1 at ix-x)

13. In August 1968, Congress enacted the River and Harbor Act of 1968, Pub. L. No. 90-483, 82 Stat. 731 (P.L. 90-483) which provided as relevant here:

AN ACT

Authorizing the construction . . . of certain public works on rivers and harbors for navigation, flood control, and for other purposes.

....

TITLE I-RIVERS AND HARBORS

Sec. 101. That the following works of improvement of rivers and harbors . . . for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary . . . and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated. . . .

....

NAVIGATION

....

Cooper River, Charleston Harbor, South Carolina:
Senate Document Numbered 88, Ninetieth Congress

By adopting the government's report as S. Doc. No. 88, the statute authorized the government and appellant, based on recommendations by the Chief of Engineers, the Board of Engineers for Rivers and Harbors, and other government officials including the DE, to negotiate (a) for a reduction of flows from Pinopolis Dam, (b) to construct, operate, and maintain a canal, the St. Stephen powerhouse, and appurtenances to compensate for limitations on releases from Pinopolis Dam, with apportionment of costs for the power lost at Pinopolis and/or gained at St. Stephen to be determined in consultation with the FPC, (c) for appellant to have priority in use of power produced by the rediversion project, (d) to transfer title to the rediversion project to appellant 50 years from date of commencement of operation of the rediversion project or such earlier date as agreed, (e) to install, if necessary, a fish lift, lock, or similar device at the St. Stephen powerhouse, (f) to replace, if

necessary, an existing State fish hatchery, (g) to construct, if justified and partially funded by the State, a gated structure on the South Santee River, and (h) to resolve any other issues between Santee Cooper and the government as identified in the exchange of letters dated 5 and 16 May 1966. (856 F. Supp. at 1068; 91-2 BCA at 118,994 (finding 13); R4, tab C-2/1) Title II of the Act, “FLOOD CONTROL,” addressed neither the Cooper River nor the Santee River.

14. The government’s General Design Memorandum for the redirection project, prepared for initial review on 18 January 1972, anticipated claims that would require a defense by the government. Among the potential claimants were landowners in the Santee River floodplain. In that regard, the government devised a program for obtaining, among other things, pre-construction river stage data. (R4, tab C-2/10) The data compiled by the government in this connection, if any, are not in the record.

15. During a public meeting on 4 April 1974, the government real estate branch chief for the U.S. Army Engineer District, Savannah, opined that the government would be obliged to obtain land rights on the Santee River comparable to those held by appellant on the Cooper River. Land acquisition mentioned included buying land or buying easements for flooded “fast land” and/or paying for easements on account of fluctuations in flows that “wear away the banks.” The matter was characterized as “one of the knottiest problems of the whole [redirection] project . . . determining what the effects [of the flows] are . . . and what the government’s liability . . . would be [as] a matter of engineering as well as real estate determination from an appraisal standpoint.” (R4, tab C-2/11 at 41-42) The record does not reveal real estate transactions, if any, entered into by appellant and/or the government on account of the redirection project.

16. Pursuant to P.L. 90-483, the government and appellant negotiated and entered into the contract. The contract was signed by the parties on 27 December 1976 and approved by the Chief of Engineers, the authorized representative of the Secretary on 14 January 1977. The contract, as modified, provides in pertinent part:

WHEREAS, the Government has determined that diversion of waters from the Santee River into the Cooper River, for use through Jefferies, has caused excessive shoaling in Charleston Harbor; and

WHEREAS, the Cooper River Redirection Project, (hereinafter . . . the Project), was authorized . . . to permanently reduce shoaling in Charleston Harbor; and

WHEREAS, it is the intention of the Government to construct the Project [and] to operate and maintain it until such time as transfer of title to the Authority is made; and

....

WHEREAS, the parties desire that the Government be compensated for the Project's benefits to the Authority and that the Authority be compensated for the adverse effects of the Project;

Now, THEREFORE, the parties hereto mutually covenant and agree as follows:

SECTION 1. Obligations of the Government. Subject to the availability of funds, the obligations of the Government will include the following:

1.1 Construct authorized improvements substantially in accordance with the provisions of P. L. 90-483

a. Construct a rediversion canal to connect Lake Moultrie and the Santee River. A hydro power plant (St. Stephen) will be provided . . . on the rediversion canal The plant will be sized to discharge water at the rate of 24,500 cfs

....

....

1.2 Operate and maintain the Project until such time as title is transferred to the Authority, except as provided in paragraphs . . . 2.11.

1.3 Transfer title to Project facilities and real estate to the Authority at the end of a 50-year term

....

1.6 Provide and install remote control facilities for the operation of St. Stephen at the Authority's existing control center

....

1.11 Acquire lands or interests therein as required for construction and operation of the Project.

....

Section 2. Obligations of the Authority. The obligations of the Authority will include the following:

....

2.4 Make the maximum use of the additional capacity resulting from the combined two-plant operation which the Authority deems economical and practical in light of water availability, load conditions, costs and other operating considerations. . . .

....

2.7 Provide without cost to the United States such of its rights in lands as are required by the Government for the Project. . . .

....

2.11 Control the operation of St. Stephen by remote control facilities provided by the Government pursuant to paragraph 1.6. This operation shall be within the turbine cavitation limits specified by the manufacturer. The generators shall be operated within their KVA ratings. . . .

....

SECTION 9. Claims.

9.1 During the period the Government holds and retains title to the Project, the Government shall assume the risk of all claims arising from the construction and operation of said Project . . . except those arising from the fault or negligence of the Authority or from failure to release water or operate the Project in accordance with Section 2.

9.2 The Authority agrees that it shall give timely notice to the Government of any claim filed with it or any law suit filed in any Court of Law naming it as defendant to any claim arising out of the operation of the Project . . . and that failure to give such notice . . . shall void the assumption of risk by the Government as set forth in this Section with respect to such litigation.

Section 13 of the contract, entitled “Disputes,” is substantively identical to the standard Armed Services Procurement Regulation (ASPR) clause at ASPR 7-103.12(a), entitled DISPUTES (1958 JAN). “Uncontrollable Forces” are defined at § 18 of the contract: “[n]either party . . . shall be considered to be in default in respect of any obligation hereunder, if prevented from fulfilling such obligation by reason of [such] forces, including

but not limited to . . . flood . . . storm . . . severe drought . . .” (Compl. ¶ 7; answer ¶ 7; R4, tab C-2)

17. In a letter dated 28 September 1987, Santee Cooper’s President and Chief Executive Officer (CEO) took the position that:

[§] 9 of the contract makes clear that the Corps, not Santee Cooper, is responsible for the operating changes to the project [brought on by rediversion], and, therefore, that the Corps “bears the risk of all claims” arising from operation of the [rediversion] project The only exception is for claims arising from Santee Cooper’s negligence or failure to comply with the contract. We believe that, at a minimum, this provision demonstrates that Santee Cooper is immune from damage claims based on its operation of the power plants in the manner contemplated by the contract. Similarly, the contract makes clear that any “taking” that may result from the post-project operations stems from a decision of the Corps to change the flows in the Cooper and Santee Rivers as specified by the contract rather than from a decision of Santee Cooper.

....

The immunity provided by the contract also extends to damages that may result from fluctuating releases into the Santee River at St. Stephen and the Wilson[’s Landing] Dam Spillway. The Corps has suggested that Santee Cooper may not be able to rely on the immunity clause to defend against damage claims arising from decisions by Santee Cooper to release water at St. Stephen or the [Wilson’s Landing Dam] Spillway when high water levels in the Reservoir make this necessary (obviously, when such releases are necessary, the Santee River may already be elevated due to those high water conditions). That position is inconsistent with the flow restrictions of the contract and [§] 9.

In periods of high water, Santee Cooper must maintain the elevation of Lake Moultrie in accordance with the rule curve either by releasing water into the Cooper River (at Jefferies) or into the Santee River (at St. Stephen or the Wilson[’s Landing] Dam Spillway). The flow restrictions of the contract, as amended, however, prohibit Santee Cooper from discharging at Jefferies in excess of 4,500 cfs on a weekly average basis. Accordingly, the flow restrictions of the contract require that

during periods of high water the necessary releases in excess of 4,500 cfs/week be made into the Santee River. Indeed, this diversion of water from the Cooper to the Santee River Basin is the *raison d'être* for the Rediversion Project and the contract, and [§] 9 requires the Corps to assume the risk of damages that may result from this diversion of water.

A proposed modification to the contract was tendered to the government, attached to the CEO's letter, by which the above understanding purportedly would have been effected. (R4, tab C-2/6 at 2-3)

18. By letter dated 28 October 1987, from the DE to the CEO, the DE declined the offer of the proposed contract modification. In pertinent part, the DE's letter further stated:

I consider the current provisions of Section 9., Claims to address adequately the matter of liability. You are correct in your interpretation that the Corps assumes liability for operations which are conducted within the scope of the contract, and Santee Cooper is liable for its negligent operations or for any operations not in accordance with the contract requirements.

(R4, tab C-2/7 at 2 (underlining in original))

19. On 22 October 1993, a group of landowners whose property is situated in the Santee River basin below the tailrace canal of the rediversion project, filed a lawsuit against Santee Cooper in a South Carolina State court alleging "flooding damages to their property . . . caused by discharges of water into the Santee River following . . . commencement of operation" of the rediversion project. More specifically, the landowners sued appellant, pursuant to the "South Carolina Tort Claims Act" for "negligence, trespass and inverse condemnation" and for a "taking of their lands for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and in violation of federal statute 42 U.S.C. § 1983." Appellant notified the government of the lawsuit by letter dated 25 October 1993. (856 F. Supp. at 1067, 1069; compl., ¶ 29; answer, ¶ 28; R4, tabs C-2/15, /16 at 1)

20. Santee Cooper successfully removed the case to the United District Court for the District of South Carolina. Appellant then unsuccessfully sought to interplead the United States as a third-party defendant, asserting indemnity, contribution, and negligence. As to the third-party complaint of Santee Cooper, the court granted summary judgment, concluding that appellant's "claims [against the government] which sound in tort are barred by the discretionary function exception to the FTCA [Federal Tort Claims Act]." The court further granted the government's motion to dismiss Santee Cooper's claim for contractual

indemnification pursuant to § 9 of the contract, determining that the claim “is within the exclusive jurisdiction of the [United States] Court of Federal Claims.” (856 F. Supp. at 1067, 1069, 1076; app. supp. R4, tab F)

21. In connection with the above-described lawsuit, the DE, in a sworn statement dated 6 December 1996, certified at ¶¶ 6.c. and 7. of the statement that appellant was compliant with all its obligations under § 2 of the contract and that “Santee Cooper has complied with all other specifications of the Rediversion Contract which relate to the operation of the Santee Cooper hydropower facilities, or notified the United States as appropriate.” The circumstances involved in the appropriate notifications implied by the DE’s certification are not described in the record. The DE certified, at ¶ 8 of the certificate, that appellant had “fully disclosed [to the government] any dangers or potential adverse effects of the operation of these facilities pursuant to the Rediversion Contract.” Concerning rediverted waters, the DE certified as follows:

12. Under the Rediversion Contract, the Santee River will receive excess outflows diverted from the Jefferies facility. The project returns to the Santee River approximately 70% of the flows which had been diverted from the Santee River to the Cooper River by the original Diversion Project.

....

14. The United States believes that the peak or high flows discharged into the Santee River subsequent to the activation of the Cooper River Rediversion Project have not exceeded the historic peak or high flow levels existing prior to the original Diversion Project. In addition, the average annual flow on the Santee River is approximately only 77% of the historic average annual flow prior to the Diversion Project.

(Finding 7; compl. ¶ 23; answer ¶ 22; R4, tab C-2/14)

22. The United States District Court bifurcated the liability and damages proceedings. Following a trial before a jury, the jury found Santee Cooper liable for inverse condemnation and for trespass but not liable for negligence. (Compl. ¶ 35, answer ¶ 33; R4, tabs C-2/16, /18)

23. In 1997 the same landowners filed a separate lawsuit against Santee Cooper in a South Carolina State court. Appellant timely notified the government of the second lawsuit. (Finding 16 (§ 9.2); compl. ¶ 30; answer ¶ 28; R4, tab C-2/16) That lawsuit is not further described in the record compiled to date.

24. Following the jury verdict described above, appellant moved for judgment as a matter of law and for a new trial. The plaintiffs also moved for a new trial. Appellant suggested, *inter alia*, a government contractor defense under *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) and/or *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). Among other arguments, the plaintiffs urged that appellant, as a FERC licensee under a provision of the Federal Power Act (FPA), 16 U.S.C. § 803(c), was liable for damages resulting from operation of the Rediversion Project. That statute provides as follows:

All licenses issued under this subchapter shall be on the following conditions:

Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefore.

The court denied all motions. Concerning the argument related to the FPA, the court opined that “the liability provision of 16 U.S.C. § 803(c) is inapplicable” because

. . . the Rediversion Project (and the contract associated with it) is not a FPA-licensed project, nor is it contained in the FERC license under which [Santee Cooper] currently operates. Indeed, the Rediversion Project was designed and built (and is currently owned) by the [government] as a project to aid in improving the navigation of a waterway. The fact that [Santee Cooper] operates the project pursuant to a contract with the [government] does not “convert” it to a FPA-licensed project nor does it somehow “merge” the project into [Santee Cooper’s] current FERC license.

(*Sauders v. South Carolina Public Service Authority*, C.A. No. 2:93-3077-23 (D.S.C. July 14, 1999) (unpublished Order (R4, tab C-2/19) at 14, 32); compl. ¶ 35; answer ¶ 33)

25. Santee Cooper filed an interlocutory appeal from the denial of its motions. The appeal was initially accepted but later dismissed as improvidently granted. In dismissing the appeal, the United States Court of Appeals for the Fourth Circuit stated, in relevant part:

. . . In this interlocutory appeal, [Santee Cooper] asks us to reverse the district court’s denial of its . . . motion on the authority of Yearsley . . . and/or Boyle. . . In response, the Plaintiffs urge affirmance on the basis that Yearsley and Boyle

are factually distinguishable from the present case.

Alternatively, the Plaintiffs argue that even if . . . not otherwise factually distinguishable . . . certain language of 16 U.S.C. § 803(c) precludes the derivative extension of the sovereign immunity of the United States to [Santee Cooper] under Yearsley and Boyle. . . .

. . . A significant amount of confusion exists regarding what evidence the district court had before it on the issue of whether, at all times relevant to this case, [Santee Cooper] operated the St. Stephen hydroelectric plant pursuant to the 1979 FERC license issued [Santee Cooper] for the “Santee-Cooper Project No. 199,” another FERC license, or no FERC license at all.

Unfortunately, the district court’s order denying [Santee Cooper’s] motion sheds little light on the subject for effective appellate review and, for obvious reasons, this issue may affect the manner in which the question of derivative sovereign immunity is resolved. Accordingly, we strongly encourage the district court to revisit the FERC license in a effort to develop a record amendable [sic - amenable?] to effective appellate review. . . . Furthermore, if the district court ultimately decides, upon further review, that the record contains sufficient evidence for reasonable jurors to find that, at all time relevant to this case, [Santee Cooper] operated the St. Stephen hydroelectric plant pursuant to the 1979 FERC license for the Santee-Cooper Project No. 199 or another FERC license, we encourage the district court to thoroughly address whether the statutory language of 16 U.S.C. § 803(c) relied upon by the Plaintiffs conclusively precludes application of Yearsley and Boyle.

(Sauders v. South Carolina Public Service Authority, No. 99-2686 (4th Cir. May 21, 2001) (unpublished Order); compl. ¶ 35; answer ¶ 33; R4, tab C-2/20 at 2-5)

26. No evidence in the record indicates any action by the United States District Court on the Order dated 21 May 2001 from the United States Court of Appeals for the Fourth Circuit. Neither does the record show any final adjudication before the District Court on damages. The Board has found no published decision in this respect.

27. By letter dated 20 August 2001, appellant submitted to the contracting officer a claim under the contract in the amount of \$576,437.98. Santee Cooper elected application of the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-13 (the CDA), and the claim was certified as required by the CDA. In part, the contractor stated: “The dispute relates to the Government’s obligation under [§] 9 of the Contract to hold Santee Cooper

harmless from claims arising from discharges of water into the Santee River.” Later in the claim, this statement is refined: “Section 9 of the Contract was intended to make the Government responsible for any claims arising from rediverted discharges into the Santee River” (underlining added). Pursuant to § 9.1 of the contract, appellant demanded indemnification, *i.e.*, that the government “defend Santee Cooper and hold it harmless from claims and expenses in the *Sauders* litigation.” In the alternative, breach of contract is claimed: “By refusing [indemnification], the Government has failed to comply with its obligations under the Contract.” The claim amount is for legal fees and other expenses allegedly incurred by appellant through 31 December 2000 for defending itself in the *Sauders* litigation. Appellant purports to reserve the right “to claim additional amounts arising from the *Sauders* litigation (whether incurred as fees and expenses to defend itself, damages and costs, or otherwise) in the future.” (Compl. ¶ 37; answer ¶ 35; R4, tab C-1 at 1, 3, 7, 11)

28. In a letter dated 30 November 2001, a CO final decision (COFD) denied the claim. The CO noted earlier disagreements between the government and Santee Cooper concerning the “indemnity clause” at § 9.1 of the contract and litigation related to the parties’ respective interpretations of that provision and the contract. Finally, the CO opined regarding the legal question of “whether the contract requires the Government to reimburse Santee Cooper for legal costs and expenses incurred by it in its defense of the *Sauders* litigation” and whether § 9.1 of the contract “is a blanket indemnity clause.” The CO concluded, among other things, “that the United States did not enter into a blanket indemnity arrangement for any and all impacts of rediversion.” (Compl. ¶ 38; answer ¶ 36; R4, tab B at 5, 7)

29. By counsel’s letter dated 22 February 2002, Santee Cooper appealed to the Board the CO’s claim denial (R4, tab A).

DECISION

The government asks that the Board (1) dismiss as time barred, pursuant to 41 U.S.C. § 605(a), appellant’s claim to the extent it seeks costs incurred before 20 August 1995, (2) dismiss any request for future costs not addressed in the claim and not set out as a sum certain, (3) dismiss for failure to state a claim or grant summary judgment as to the entire claim based on an insufficient waiver of sovereign immunity, (4) if attorney’s fees are reimburseable under the contract, grant summary judgment to the extent of appellant’s fault based on the trespass verdict or fault or negligence based on § 9.1 of the contract when considered in connection with the Authority’s discretion in operating the St. Stephen power station. Appellant opposes the motions because (1) no statute of limitations applies to claims under the contract, (2) the Board has the authority to adjudge declaratory relief in this case if the monetary claim is insufficient to allow revision of the claim to include future costs and damages, and (3) the sovereign immunity issue was “earlier unsuccessfully litigated . . . is precluded by *res judicata* and collateral estoppel . . . and . . . a responsible

Government official has certified under oath that Santee Cooper was not at fault under the Contract.” (App. opp’n at 3)

In addition to opposing the government’s motions, appellant cross-moves for summary judgment on entitlement. Santee Cooper urges that there is no merit to any of the government’s affirmative defenses asserted in the answer before the Board, that P.L. 90-483 authorized the government to assume the risk of claims arising from operation of the Rediversion Project, and that the government did so in § 9.1 of the contract. Appellant submits that it is entitled to reimbursement of the costs it incurred to defend itself from claims relating to operation of the rediversion project.

In response to a Board query, the government further maintains that to the extent § 9.1 of the contract is an indemnification provision, it cannot be imposed in an indefinite and unlimited manner without running afoul of the Anti-Deficiency Act, 31 U.S.C. § 1341 (ADA). Appellant suggests that the ADA is no obstacle to the claim because (1) the contract is a so-called “continuing contract” not subject to the ADA and (2) even if subject to the ADA, the contractual obligation was “authorized by law” pursuant to 31 U.S.C. § 1341(a)(1).

Statute of Limitations

The contract was awarded in 1976 and “approved” in 1977 (finding 16). The statute of limitations in the CDA, 41 U.S.C. § 605(a), does not apply to contracts awarded before 1 October 1995. Accordingly, the CDA statute of limitations does not operate against claims under this contract. *Motorola, Inc. v. West*, 125 F.3d 1470, 1473-1474 (Fed. Cir. 1997), *aff’g Motorola, Inc.*, ASBCA No. 48841, 96-2 BCA ¶ 28,465 at 142,172; FAR 33.206(b). To that extent, the government’s motion to dismiss is denied.

Future Costs and Other Relief

In its claim, appellant purports to reserve the right “to claim additional amounts arising from the *Sauders* litigation (whether incurred as fees and expenses to defend itself, damages and costs, or otherwise) in the future.” The claim presently demands legal fees and other expenses allegedly incurred by appellant through 31 December 2000 for defending itself in the *Sauders* litigation. The claimed amount, as of 31 December 2000, is \$576,437.98. The government expresses concern with appellant’s present claim for additional future amounts for attorneys’ fees and costs, with a claim for damages that have not yet been adjudged, and with language in Santee Cooper’s complaint, whereby appellant seeks “other relief as the Board may determine to be just and proper.” (Finding 27; compl. at 14)

The government urges that the COFD “did not address future costs” but was “limited to only those costs certified by Appellant as ‘accurate and complete.’” The government further contends that a demand “for future costs is not a valid claim because it does not seek

the payment of money in a sum certain.” Accordingly, the government suggests we lack jurisdiction over any amount “for future damages, costs, or otherwise.” (Gov’t mot. at 2-3)

a. New Claim

Initially, we perceive this to be an argument over the scope of the appeal. “The scope of an appeal is circumscribed by the parameters of the claim, the responsive . . . COFD . . . and the appeal therefrom.” *Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,112 at 158,779.

The claim set out a demand for indemnification or, in the alternative, breach of contract. Because the government declined to take up the defense of the lawsuits, the claim amount took the form of attorneys’ fees and costs as well as damages that could be adjudged against Santee Cooper in the subject lawsuits. The monetary sum certified as accurate and complete through a specified date was described as subject to increase for continuing legal fees and costs and the possibility of damages mandated by a court. (Findings 19-20, 22-27) As we understand the claim, from appellant’s perspective, the government was responsible for defending the litigation and, failing that, for the legal costs incurred by Santee Cooper for performing in the government’s stead as well as for damages, if any, that might result.

The COFD, without limitation as to time, reviewed the government’s alleged responsibility for all such costs and potential costs in the context of the claim and the subject lawsuits. Having made that review, the CO denied all responsibility for Santee Cooper’s defense of matters addressed in the lawsuits. The appeal to the Board that followed was in no way limited but sought a full review of the COFD. (Findings 27-29) The CO did not consider mere portions of the claim. Rather, the entire claim was considered and denied. Accordingly, we conclude that appellant has not improperly attempted to expand the scope of the claim and appeal. To that extent, the motion to dismiss is denied.

The government’s argument could also be construed as follows: if appellant submits a claim for additional legal fees and costs for defending the *Sauders* lawsuit after 31 December 2000 and/or is obliged to pay damages adjudged, such claim would be different from the present claim underlying this appeal. A new claim arises when based on different operative facts. However, “a common or related set of operative facts” presents a single claim. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907, 909 (Fed. Cir. 1990); *Consolidated Defense Corp.*, 03-1 BCA at 158,779; *American Consulting Services, Inc.*, ASBCA No. 52923, 00-2 BCA ¶ 31,084 at 153,485.

In the context of the claim assertions, that the government is obliged to indemnify appellant, the continuing defense of the lawsuits after 31 December 2000 and any resulting damages adjudged as a result of that defense arise from the same or related operative facts

as the present claim. Accordingly, to that extent, the government's motion to dismiss is denied.

b. Sum Certain

The government next suggests that the claim for future legal fees and costs and potential liability for damages does not meet the standard for requesting a sum certain. The government does not appear to contend that the claim, as it relates to future costs, adversely affects the Board's jurisdiction over the costs incurred through 31 December 2000. Since the claim for past costs has been properly presented, appellant may revise it or present proof of a greater amount if based on information not reasonably available when the claim was submitted. *Tecom, Inc. v. United States*, 732 F.2d 935, 938 (Fed. Cir. 1984); *Peter Bauwens Bauunternehmung GmbH*, ASBCA No. 44679, 98-1 BCA ¶ 29,551 at 146,496.

The government cites *Dennis Anderson Construction Corp.*, ASBCA Nos. 48780, 49261, 96-1 BCA ¶ 28,076 at 140,186-87 for the proposition that a claim for declaratory relief relative to indemnification, absent a demand for the payment for money, "does not qualify as a claim because it does not seek . . . a sum certain." However, in its claim, Santee Cooper sets forth a monetary claim and asks the Board to interpret § 9.1 of the contract (finding 27). The questions are whether § 9.1 is an indemnification provision and if so, the monetary extent to which, if at all, the Authority is indemnified for legal fees, legal expenses, and any monetary judgments related to the facts and circumstances of the *Sauders* lawsuits. We need not consider declaratory relief to resolve those questions. Accordingly, the government's motion to dismiss is denied.

Cross-Motions for Summary Judgment

A party may obtain summary judgment if no material facts are genuinely disputed and that party is entitled to judgment as a matter of law. To determine whether a material fact is disputed, the evidence of the non-movant is to be believed and we construe all reasonable inferences in favor of the non-moving party. In examining the record to decide a motion for summary judgment, we neither weigh evidence to determine the truth of a matter nor resolve factual differences in deciding whether a material fact dispute genuinely exists. A fact is material if it may affect the outcome of the case. A genuine factual dispute is indicated if the evidence is such that a reasonable fact finder would be obliged to resolve the factual dispute at trial and could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49, 255 (1986); *Abbott Laboratories v. Novopharm Ltd.*, 323 F.3d 1324, 1329 (Fed. Cir. 2003); *Madey v. Duke University*, 307 F.3d 1351, 1358 (Fed. Cir. 2002); *Jay v. Secretary of DHHS*, 998 F.2d 979, 982 (Fed. Cir. 1993); *Range Technology Corp.*, ASBCA Nos. 51943 *et al.*, 04-1 BCA ¶ 32,456 at 160,545; *Blue Cross and Blue Shield Association*, ASBCA No. 53632, 04-1 BCA ¶ 32,413 at 160,447; *Advanced Engineering & Planning Corp.*, ASBCA Nos. 53366, 54044, 03-1 BCA ¶ 32,157 at 158,992, *aff'd*, 292 F. Supp. 2d 846 (E.D. Va. 2003); *GTE*

Government Systems Corp., ASBCA No. 44080, 96-2 BCA ¶ 28,342 at 141,544, *aff'd on recons.*, 96-2 BCA ¶ 28,535.

Where the movant has the ultimate burden of proof at trial, that party must show that no reasonable trier of fact could find other than for the moving party. *Precision Standard, Inc.*, ASBCA No. 54027, 03-2 BCA ¶ 32,265 at 159,600.

A movant may obtain summary judgment, if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support an essential element of the non-moving party's case. If such a motion is properly supported, the non-moving party with the burden of proof at trial is obliged to go beyond the pleadings and to designate specific facts supported by the record submitted to the Board to date showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986); *Golan v. Pingel Enterprise, Inc.*, 310 F.3d 1360, 1367-68 (Fed. Cir. 2002); *J&M Corp. v. Harley-Davidson, Inc.*, 269 F.3d 1360, 1365-66 (Fed. Cir. 2001); *Elam Woods Construction Co.*, ASBCA No. 52448, 02-1 BCA ¶ 31,658 at 156,406, *denying recons. of* 01-1 BCA ¶ 31,305.

That both parties have moved for summary judgment does not oblige the Board to grant judgment as a matter of law for one side or the other if disputes remain as to material facts. *Pickholtz v. Rainbow Technologies, Inc.*, 284 F.3d 1365, 1371 (Fed. Cir. 2002); *C&S Services, Inc.*, ASBCA No. 54032, 03-2 BCA ¶ 32,266 at 159,602.

Summary judgment may also be denied if we determine, in our discretion, that the better course would be to proceed to a full trial. *Liberty Lobby*, 477 U.S. at 255; *Blue Cross*, 04-1 BCA at 160,447.

The claim underlying the appeal is a contractor claim for which appellant has the burden of proof. At issue is whether P.L. 90-483 authorized the government fully to indemnify Santee Cooper and whether the government agreed to do so in the contract. Appellant urges that § 9.1 of the contract indemnifies Santee Cooper because the government agreed to "assume the risk of all claims" arising out of the Authority's operation and maintenance of the rediversion project works. By implication, Santee Cooper's position is that this is the only reasonable interpretation of the contract. Further as to the facts, according to appellant, "the claims of the *Sauders* plaintiffs arose from such operation [of the rediversion project works which] accorded fully with the Government's plans as set forth in its Design Memorandum." (App. opp'n at 19-20) We understand appellant to mean that no material facts concerning the contract's meaning, Santee Cooper's operation of the project works, and the causes of the *Sauders* plaintiffs' claims are genuinely in dispute. Appellant further contends that since there is no merit to any of the government's defenses, Santee Cooper is entitled to summary judgment on entitlement.

The government's legal defenses in connection with statute of limitations and issues related to a sum certain claim underlying the appeal have been discussed above. In addition,

the government moves for summary judgment on the legal defense of sovereign immunity. The government suggests that P.L. 90-483, which authorized the contract, and § 9.1 of the contract can only be interpreted as a limited waiver of sovereign immunity and limited indemnification because the contract only allows for an “apportionment of costs” between the parties, not the “unlimited liability” that might be associated with the claim and appeal. The government further contends that § 9.1 does not exhibit a waiver of sovereign immunity sufficient to “include liability for attorney’s fees and related costs.” (Gov’t mot. at 3, 5)

The government further asserts that its responsibility is subject to a finding that causation for the damages is not on account of Santee Cooper’s fault or negligence (finding 16 (§ 9.1)). Fault has been shown, according to the government, by the jury’s verdict in the *Sauders* case that the Authority is responsible, under South Carolina law, for trespass (finding 22). The government contends that the jury’s determination was necessarily fault-based. Further, according to the government, the United States “District Court dismissed the United States as a third-party defendant in the *Sauders* litigation for lack of subject matter jurisdiction” and thereafter “the jury found that Santee Cooper was not insulated from liability by the ‘government contractor defense.’” The government urges that the District Judge concluded that the Authority had discretion “regarding operation of the St. Stephen facility” (gov’t mot. at 6-7). No particular facts are recited by the government in this connection; however, the government’s citation to the District Judge’s Order on post-hearing motions (R4, tab C-2/19 at 23) connects the argument to matters related to responsibility for release of rediverted water, which is the alleged cause of downstream flooding along the Santee River. We construe these arguments to mean that no material facts concerning the contract’s meaning and the fault or negligence of Santee Cooper under South Carolina law are genuinely in dispute and that the government’s interpretation of the contract is the only reasonable one. On those arguments, the government has the burden of proof for its affirmative defenses.

The government’s reply brief also refers to contract § 18, which addresses *force majeure*, as an expression of “the party’s [sic] intention to limit their mutual obligations” (gov’t reply brief at 4). Here the government, in arguing for no liability, also seeks to counter the appellant’s suggestion that the government is liable for the risk of all claims by invoking limitations on the waiver of sovereign immunity. In that regard, apportionment of costs and/or causation is raised.

Sovereign Immunity

a. Indemnification

Citing a previous court decision, *South Carolina Public Service Authority v. U. S. Department of the Army*, Civil No. 2:89-0302-8 (D.S.C. July 11, 1990) (unpublished Order at 8 adopting United States Magistrate’s Report and Recommendation at 7-8 (R4, tab C-2/4 at 7-8)), the government admits that it is authorized by P.L. 90-483 to enter into the contract and that § 9.1 of the contract is a form of an “indemnity clause” (gov’t mot. at 4).

To the extent that appellant seeks summary judgment for the proposition that the government is allowed by the redirection authorization statute to indemnify appellant and has thereby assumed, under the contract, the risk of certain claims arising out of the redirection project, there is no factual or legal dispute. Santee Cooper is entitled to summary judgment to that extent.

However, the government contends that the indemnity afforded by P.L. 90-483 and § 9.1 of the contract, as a waiver of sovereign immunity, is limited and must be narrowly construed. The government is correct that a waiver of sovereign immunity of the United States cannot be implied but must be unequivocally expressed. *Franconia Associates v. United States*, 536 U.S. 129, 141 (2002). Waivers will be strictly construed in favor of the government. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Hartog Foods International, Inc. v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002). But, to the extent that the government waives its immunity by doing business and entering into a contract, it does so as a party never cloaked with immunity. Indeed, when the government agrees to a contract, its rights and duties under that contract are governed by principles of general contract law. *Franconia Associates* at 141; *E.I. Du Pont de Nemours and Co. v. United States*, 365 F.3d 1367, 1372 n.10 (Fed. Cir. 2004).

The claim under the appeal involves the correct interpretation of the contract, in particular § 9.1 and the scope of the obligations expressed there (finding 27). The waiver of sovereign immunity presented by applicability of the CDA precludes summary judgment for the government in a broad manner that would entirely defeat a contract claim of the type presented here.

United States Supreme Court decisions cited by the government, *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992), and *Eastern Transportation Co. v. United States*, 272 U.S. 675 (1927), did not involve contracts to which the government was a party. Further, the concept expressed in *Eastern Transportation Co.* is consistent with *Franconia Associates*. The *Eastern Transportation* Court determined that the Suits in Admiralty Act of 1920 constituted consent by the government to be sued in an admiralty proceeding in the same manner as a private vessel owner would be liable provided the vessel through which liability arose was operated by the government as a merchant vessel. 272 U.S. at 689-91. Likewise, the CDA allows claims and legal actions against the government in the event of contract disputes. When the government goes into business by way of a contract, it assumes potential business liabilities, subject to limitations expressed in the statutory bases for the business activity and/or liability and subject to the allocations of risk expressed in contract language as agreed by the parties. See, e.g., *Les Etablissements Eiffel-Asie*, ASBCA No. 22596, 80-2 BCA ¶ 14,500 at 71,488, *recons. denied*, 80-2 BCA ¶ 14,779 (in a pre-CDA contract, government provided contractual indemnification under a war risks provision for the value of contractor equipment lost in the 1975 fall of the Republic of Vietnam); cf. *Hercules, Inc. v. United States*, 516 U.S. 417, 424, 426-27 (1996) (the Court found no express or implied indemnification agreement in a contract to

produce Agent Orange by which the government would be liable for reimbursement of costs of defending and settling claims arising out of performance of that contract).

The decision of the Comptroller General cited by the government, *U.S. Park Police Indemnification Agreement*, Comp. Gen. No. B-242146, 1991 U.S. Comp. Gen. LEXIS 1070, 1991 WL 200162 (Aug. 16, 1991), involved a memorandum of understanding between the U.S. Park Police and local law enforcement agencies in Maryland and Virginia pursuant to 16 U.S.C. § 1a-6(c)(1) (authorizing the Secretary of the Interior to designate, among others, State law enforcement personnel as “special policemen in areas of the National Park System”). That case did not involve a contract under which disputes could be subject to resolution pursuant to the CDA.

The extent of the waiver of sovereign immunity under the CDA is coextensive with the indemnification afforded by the contract. To that extent, the government’s motion for summary judgment is denied and appellant’s motion for summary judgment on entitlement is granted.

b. Scope of Contractual Indemnification

(1) Scope of the Claim

We understand the claim for indemnification to include claims arising from the effects of water discharged (rediverted) into the Santee River from the St. Stephen tailrace canal. The parties in the past have disputed whether water entering the Santee River upstream of the canal is to be considered a product of the rediversion project. (Findings 3, 16 (§ 18), 17-18, 27) We are not convinced, on the record compiled to date, that water from any source entering the Santee River, other than the St. Stephen tailrace canal, is the result of the rediversion project.

(2) Project Resources

Santee Cooper argues for summary judgment adjudging full liability in the government for all claims without contribution by appellant, except for matters specifically addressed by the contract at § 9.1. The government contends that the parties intended to apportion costs for the project. The history of the rediversion project, the contents of S. Doc. No. 88, and the contract language taken as a whole reveal that the Authority’s major concern was diminution of its electrical generation capacity with secondary attention paid to other matters. The driving force for the government was a reduction in maintenance dredging costs for the Federal portion of Charleston Harbor and calculation of a favorable cost-benefit ratio that would support authorization of the project and passage of necessary appropriations bills by the Congress. The State of South Carolina, from the standpoint of economic development and the viability of Charleston Harbor, joined the government in supporting a solution to the shoaling problem. Prior to executing the contract, the parties discussed but did not agree on potential liability for damage claims on the Santee River;

however, it is clear that real estate interests downstream of the tailrace canal would be impacted by rediverted water. Thereafter, in the contract, the government agreed to obtain whatever “lands and interest therein” would be “required for construction and operation of the [redirection] Project” and Santee Cooper agreed to “[p]rovide without cost to the United States such of its rights in lands as are required by the Government for the Project.” The government further agreed to take on the risk of claims arising from discharge of water from the tailrace canal rediverted by the construction and operation of the redirection project, subject to the exceptions at § 9.1 of the contract. (Findings 6-15, 16 (§§ 1.11, 2.7, 9.1), 17-18) To that extent, appellant is entitled to summary judgment on entitlement.

The government seems to suggest that it may not be adjudged indirectly responsible for “takings” claims by way of indemnification, such as those presented by the *Sauders* plaintiffs, when it has successfully defended such inverse condemnation claims in the proper forum. We believe the government is confusing the claims here. There is a distinction to be made between the claims of the *Sauders* plaintiffs for inverse condemnation and the contract claim of the Authority. We express no opinion on the merits of the government’s defenses to a direct claim of inverse condemnation or whether the government should have taken up the defense of the *Sauders* lawsuit directly. We only construe the allocation of risk expressed in the contract between the government and Santee Cooper. Section 9.1 of the contract states that the government “shall assume the risk of all claims arising from the construction and operation of said Project,” subject to certain exceptions. Section 9.2 requires that the Authority, if it expects the government to assume the responsibility for a claim or lawsuit, must give notice of any such claim. We see no reason for § 9.2 other than incident to the promise of indemnification for claims of the type presented by the *Sauders* plaintiffs.

(3) Anti-Deficiency Act (ADA)

After the parties submitted their respective motions and supporting briefs, the Board directed the parties to address more specifically the effect of the ADA, 31 U.S.C. § 1341(a)(1)² on this matter. The CO relied, in part, on the ADA in his decision denying the claim. In pertinent part, the ADA provides:

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government . . . may not-

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]

² Formerly Revised Statutes § 3679, 64 Stat. 765, 31 U.S.C. § 665, now restated and codified at 31 U.S.C. § 1341.

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law

The CO, in his final decision, noted that the “indemnity clause” in the contract, “if read in an unlimited fashion” could be “a potential [ADA] violation” (R4, tab B at 5). The government adopts a consistent position in its supplemental brief in response to the Board’s query. Santee Cooper’s brief addressing the ADA suggests that the contract is not subject to the ADA because it is a “continuing contract” as defined by 33 U.S.C. § 621 and as construed in *Army Corps of Engineers’ Continuing Contracts*, Comp. Gen. No. B-187278, 56 Comp. Gen. 437 (1977). Appellant also contends that, regardless, § 9 of the contract was “authorized by law.” (App. supp. br. at 1)

An interpretation that gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a portion of it inoperative, void, meaningless, or superfluous. *New Valley Corp. v. United States*, 119 F.3d 1576, 1580 (Fed. Cir. 1997); *E.L. Hamm & Associates, Inc.*, ASBCA Nos. 51085 *et al.*, 03-2 BCA ¶ 32,259 at 159,570.

The contract does not necessarily present, as its only reasonable interpretation, a scenario that would violate the ADA. With due consideration for the statute under which the contract was authorized and within the financial parameters expressed in the supporting documents on which the statute was based, the contract reasonably can be interpreted to require an apportionment of costs and the provision of other resources by each party in support of the rediversion project. *See Du Pont*, 365 F.3d at 1374-77 (Contract Settlement Act of 1944 (CSA) “authorized by law” exemption of a contract indemnity provision from the reach of the ADA within limitations, if any, of the CSA and the contract).

Such an interpretation is consistent with previous U.S. Army Corps of Engineers Board of Contract Appeals (ENG BCA) decisions that construed the contract, albeit in disputes that were limited to questions related to electrical generation capacity, not § 9.1 of the contract or broader issues of liability for alleged adverse effects of the rediversion project. *See* 91-2 BCA at 118,994 (finding 13), 118,998-119,003 (findings 35-37), 119,011 (contract interpretation that placed Authority in approximate same position regarding electrical generation as before rediversion avoided making provisions “mere surplusage”), 89-3 BCA at 110,299-300 (findings 11-13, 15), 110,303 (in deciding government motion to dismiss for lack of jurisdiction, ENG BCA determined that the contract provided for “payment adjustments” by way of a system of “credits and . . . payments”).

Our construction of the contract is also consistent with Santee Cooper’s pre-dispute position. In connection with being kept whole, that is, in the same position as before the rediversion project became operative, appellant said that it was immune from claims related to flows on the Santee River but had also paid claims and made apparent real estate investments, perhaps to obtain or enhance the asserted “immunity.” (Findings 8-10) For

summary judgment purposes, viewing the circumstances in a manner favorable to the government because appellant has the burden of proving its claims, the best that can be said at this point is that each party may be responsible for the defense of suits in which it is the named defendant, interposing whatever defenses are separately available to it. It is further possible that Santee Cooper may be liable under South Carolina law and the government would not be obliged to intervene or defend directly. However, under the contract as a whole, the government is required to provide for the costs of constructing and operating the rediversion project, within available appropriated funds. Under the contract as a whole, but specifically § 9.1, if rediversion project construction and operation, in this case, discharge at the tailrace canal of reddiverted water, was the cause of the liability and the Authority was without fault or negligence and in compliance with the contract's requirements, then the government is at risk. (Findings 16 (§§ 1, 9), 17-18)

The contract does not impose unlimited liability on the government for all the financial consequences arising out of the rediversion project. Under the contract, as stated above, the government will perform certain construction and operation activities subject to the availability of funds. The contract, on its face, also specifies that appellant will minimize its losses of electrical generation capacity caused by the project by maximizing the additional capacity provided by the project, within certain parameters, and will expend funds and make other contributions to the rediversion project. In the event of Acts of God, each party will be responsible for its own costs. (Finding 16 (preamble to contract and §§ 1-1.2, 1.11, 2-2.2, 2.4, 2.7, 2.9-2.11, 18))

The authorization bill and the feasibility reports incorporated into the bill by the Congress cite estimated sums, in 1968 dollars, for construction and operation of the rediversion project, for "net power betterment," and for maintenance dredging costs that would be required but for rediversion (among the so-called "Annual benefits"). Another structure on the Santee River was to be considered. The bill's supporting studies show that the government was to negotiate an apportionment and/or division of costs with the Authority in view of the estimated costs with consideration for electric generating capacity and any mitigation of damages that might be associated with possible surges on the Santee River. (Findings 7, 13) The Board lacks a full record of the extent of South Carolina sovereign power applicable to the rediversion project, the extent of such authority accorded to Santee Cooper in this instance, and the provision by each party of money and other resources that seem to be implicated by the rediversion project authorization bill, the contract, and the parties' positions on their respective responsibilities prior to the initiation of the dispute underlying the Board appeal (findings 2, 6-18). However, all such matters, to the extent relevant to the claim here, relate to quantum, only, or to defenses that may be applicable only to the damages component of the claim, if any damages are adjudged by the court.

None of the above discussion, relating to shared costs of construction and operation of the project, of which the acquisition and/or contribution of real estate interests was a part, should be confused with the payment of claims arising under or relating to the contract

such as the Authority's present claim for attorneys' fees and costs. The ADA does not impinge on such contingent liabilities under the contract any more than the ADA would preclude consideration, for example, of CDA claims for constructive changes under the standard Changes provision. To the extent that the government is liable for CDA claims, the judgment fund is generally available. 31 U.S.C. § 1304, 41 U.S.C. § 612.

(4) Attorneys' Fees and Expenses

Concerning the attorneys' fees and costs claimed, the government suggests that attorney's fees generally are not a recoverable cost of litigation absent explicit congressional authorization, citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 264 (1975). The government says that recovery of attorneys' fees and expenses may arise only under the Equal Access to Justice Act, 5 U.S.C. § 504, or the contract. The government then seems to urge, in the context of the rule that waivers of sovereign immunity are to be strictly and narrowly construed, that attorneys' fees are not recoverable unless the contract explicitly indicates a waiver to that effect.

The contract is not so explicit at § 9.1. However, § 9.2 provides that Santee Cooper will give notice to the government in the event of claims or lawsuits arising from redirection operations. As we said above, there would be no necessity for § 9.2 except to invoke indemnification by the government.

If appellant's claim includes attorneys' fees for or the costs of litigating against the government as a third party in the *Sauders* case or against the government as respondent in this appeal, facts not yet addressed, the above-stated rules and other limitations in favor of the government may apply. ASPR 15-205.31(d). However, we construe the main thrust of appellant's claim to be one for the costs of appellant's performance of the contract in defending the lawsuit after tender of the defense to the government (finding 27). Santee Cooper alleges that it was obliged to undertake the government's responsibilities on the government's account because the government refused to defend the *Sauders* litigation and thereby refused to perform under § 9.1 of the contract. The Authority interprets the contract to mean that the government is responsible for providing a legal defense of all claims arising from the operation of the redirection works. Because the government refused to undertake that responsibility, the Authority was obliged to do so and now seeks reimbursement.

Assuming the correctness of appellant's position for the purposes of the government's summary judgment motion, the claimed costs under the contract for attorneys' fees and expenses would constitute an equitable adjustment or breach of contract damages due appellant for services rendered on account of the government's refusal to perform. The government can and in some instances must reimburse a contractor for attorney fees and costs even absent an indication that such reimbursement has been specifically authorized in a contract. *CRF, a Joint Venture of CEMCO, Inc., and R.F. Communications, Inc.*, ASBCA No. 18748, 76-2 BCA ¶ 12,129 at 58,290, *rev'd in part on*

other grounds, 224 Ct. Cl. 312, 624 F.2d 1054 (1980). See *Terteling v. United States*, 167 Ct. Cl. 331, 334 F.2d 250 (1964) (government, acknowledging liability for any judgment against contractor, breached contract by failing to defend contractor against suits by third parties). Further, at the time of award of the contract, legal costs were allowable within certain parameters and pursuant to certain standard contract provisions. See ASPR 15-205.31; *Western States Management Services, Inc.*, ASBCA No. 37471, 89-2 BCA ¶ 21,600 at 108,754 (pursuant to DoD FAR Supp. 52.243-7001, PRICING OF ADJUSTMENTS (APR 1984) and subject to certain limitations, legal services are allowable under FAR 31.205-33, the later regulation comparable to ASPR 15-205.31). See also *Abraham v. Rockwell International Corp.*, 326 F.3d 1242, 1244, 1252-54 (Fed. Cir. 2003) (legal fees and other costs incurred in defense against environmental criminal charges were recoverable under environmental costs clause in a cost-type contract).

We cannot conclude that Santee Cooper is precluded from the recovery of attorney's fees and associated expenses as a cost of performance of the contract to the extent that the government is responsible by way of indemnity and if such costs otherwise meet applicable cost standards under the contract. See *Blue Cross Association and Blue Shield Association*, ASBCA No. 25778, 89-2 BCA ¶ 21,840 at 109,889-92 (legal fees allowable under special provision defining "allowable administrative expenses").

Appellant has not addressed how the government should have participated in the *Sauders* litigation following dismissal of Santee Cooper's third party complaint against the government or in the later lawsuit filed in a South Carolina court. Neither party has addressed cost standards applicable to the contract. These are matters to be addressed on quantum.

c. Sovereign Immunity Summary

The government is not entitled to judgment as a matter of law on the proposition that sovereign immunity trumps the obligations that the government was allowed to undertake by way of the authorization bill and the allocation of risk expressed in the contract. The government was authorized by the redirection authorization statute to assume the risk of certain claims under the contract. Therefore, Santee Cooper is entitled to summary judgment on entitlement as described above. The government must indemnify the Authority to the extent that the claims being defended arise from the construction and operation of the redirection project. In the context of the claims presented by the *Sauders* plaintiffs, such liability in the government is limited to the effects of water redirected into the Santee River from the St. Stephen tailrace canal. If other flows along the Santee River from other sources had any effect on the *Sauders* plaintiffs and/or the claim being defended by appellant, it must be segregated from the government's liability.

d. Federal Power Act

Issues related to the sovereign immunity of the United States and Santee Cooper's asserted derivative extension of the immunity to itself pursuant to 16 U.S.C. § 803(c) are pending before the United States District Court that heard the *Sauders* case (findings 2, 24-26). We have no record of the disposition of that question. The court's decision could bear on further proceedings before the Board as they relate to any government liability for damages that might be mandated by a court. However, even if Santee Cooper is not liable to the *Sauders* plaintiffs on account of the asserted Federal Power Act defense, that would not excuse the government from its contractual indemnification obligations relative to the defense of the *Sauders* lawsuit.

Failure to State a Claim

The government's statement in its motion that Santee Cooper's "claim fails to state a claim for which relief can be granted" (mot. at 1) must also be denied. "Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that appellant cannot prove any set of facts in support of [the] claim that would entitle [it] to relief." *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920, *recons. denied*, 03-1 BCA ¶ 32,130, *aff'd*, 82 Fed.Appx. 226 (Fed. Cir. 2003) (*per curiam*, Fed. Cir. R. 36), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As indicated above, that standard is not met.

Fault or Negligence of the Authority

The government next contends that even if attorneys' fees and costs are reimburseable under the contract, those costs were incurred as a consequence of Santee Cooper's fault or negligence. The contract excuses the government from responsibility for, *inter alia*, claims "arising from the fault or negligence of the Authority" (finding 16 (§ 9.1)).

a. Trespass Under South Carolina Law

The government asserts that trespass is fault-based as a matter of law, citing *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (S.C. Ct. App. 1991). However, we read that case as stating, in a discussion of the trespass cause of action under South Carolina law in the context of the element of intent and strict liability, that the "wrong" in trespass to land under South Carolina law can be as simple as intentional entry onto land in peaceable possession of another.

At common law, all land held in peaceable possession is deemed to be enclosed. Subject to limited exceptions not relevant to this case [involving a water pipe leak on Snow's property from a city water utility line], the person in peaceable possession has the right to exclude all others from the

enclosure. The unwarrantable entry on land in the peaceable possession of another is trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. The entry itself is the wrong. Thus, for example, if one without license from the person in possession of the land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass The mere entry entitles the party in possession at least to nominal damages. To constitute an actionable trespass, however, there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion. Trespass does not lie for nonfeasance or failure to perform a duty.

409 S.E.2d. at 802 (internal citations omitted).

South Carolina Supreme Court cases cited in the *Snow* decision, state that a trespass “plaintiff need not prove the defendant was willful or negligent to recover damages.” 305 S.C. at 553, 409 S.E.2d. at 802 n.6, commenting on language in *Baldwin v. Postal Telegraph Cable Co.*, 78 S.C. 419, 59 S.E. 67 (S.C. 1907) and *Wood v. Pacolet Manufacturing Co.*, 80 S.C. 47, 61 S.E. 95 (S.C. 1908) where the issue was whether the damage arising from the alleged trespass was inflicted willfully.

Based on the above and the limited showing by the parties, we are not convinced that the contract exception in § 9.1 for “fault or negligence of the Authority” necessarily leads to judgment as a matter of law in favor of the government or summary judgment on entitlement in favor of the Authority. First, we note that appellant was found not liable for negligence by the *Sauders* jury (finding 22). Second, we are not confident that “fault” under the trespass cause of action is the same as “fault” within the meaning of § 9.1 of the contract. We recognize that, in its most generic formulation, torts invoke the concept of a civil wrong or fault by breach of a duty to another. However, the *Sauders* case involved trespass under South Carolina law and in the context of the assertions of the *Sauders* plaintiffs (finding 19). The Board has not yet been provided with the pleadings in the *Sauders* case to see how the trespass cause of action was framed. Neither party has addressed the essential elements of trespass under South Carolina law as pleaded and proved by the *Sauders* plaintiffs. The court’s instructions to the jury have not been submitted to aid our understanding of how terms were defined for the jury or what the jury was asked to decide as to the alleged trespass. Moreover, what the government suggests without saying so is that the South Carolina jury verdict has collateral estoppel effect as to Santee Cooper’s contract claim and the government’s defense. Such a determination would require us to follow South Carolina law on collateral estoppel; however, no showing has been made in that regard. See *Caldera v. Northrop Worldwide Aircraft Services, Inc.*, 192 F.3d 962, 971-72 (Fed. Cir. 1999) (Board and court considered the elements of the cause

of action, jury instructions, jury's verdict, and State law formulation as to the merits of the cause of action and concerning collateral estoppel).

The government is not entitled to summary judgment. Beyond its conclusory legal argument, the *Sauders* trespass cause of action has not been shown by the government to be fault-based as a matter of fact or law. Under *Celotex*, the government has the burden to designate specific facts supported in the record showing a genuine issue for trial. It has not done so.

b. Causation

To the extent that the claim of the *Sauders* plaintiffs arises from the effects of water rediverted into the Santee River at the St. Stephen tailrace canal, there are no genuinely disputed material facts. Under *Celotex*, if a factual basis existed to support the government's affirmative defenses related to the Authority's fault or negligence in this connection, the government would have been obliged to make a factual showing in support of its motions. No such showing has been made.

Given the record compiled to date, the parties have not shown whether the harm to the *Sauders* plaintiffs was caused, in part, by floods or high water flows in excess of the storage capacities of Lakes Marion and Moultrie, localized weather events in the Santee River watershed, as opposed to flows through the St. Stephen canal when electrical generation was being maximized, or a combination of those and possibly other factors.³

The record also does not allow the Board to determine that no genuinely disputed material facts exist with regard to a comparison of flows along the Santee River prior to diversion when compared with those after rediversion. The Board is not sufficiently informed about the parameters of the lake level management, the economic rule curves developed by appellant and/or the government and used by Santee Cooper, the regulation of flows through the Jefferies and St. Stephens powerhouses, and any interplay among those considerations. (Findings 1, 3-4, 7, 14, 17, 21) However, the questions presented are not whether the government is liable for indemnification. Rather, the potential issues indicated here relate to causation for the flooding of the *Sauders* plaintiffs' property in connection with proportionate responsibility for the quantum involved, if apportionment is indicated and feasible.⁴

³ The trial court described the *Sauders* complaint as alleging "excessive flows . . . causing flood events in 1987, 1990, 1991, 1992, and 1993," not continuous inundation of the property at issue there. *Sauders v. South Carolina Public Service Authority*, Civil Action No. 2:93-3077-18 (D.S.C. Jun. 29, 1994) (unpublished Order (R4, tab C-2/17) at 6).

⁴ The jury verdict, limited as it was to liability, provides no guidance on allocation, if any, of responsibility or causation. Here again we note the lack of any information in the record before the Board of any evidence presented at the *Sauders* trial or how the

The Authority contends that the DE “certified under oath that Santee Cooper was not at fault under the Contract” (app. opp’n at 3). However, the certification is limited in its scope to activities under the contract. It does not purport to cover matters outside the scope of the redirection project or appellant’s actions within its own discretion, particularly as that discretion relates to operation of the lakes and other facilities which pre-date redirection. The certificate also does not rule out the effects or contributing effects of uncontrollable forces (contract § 18) on the flooding complained of by the *Sauders* plaintiffs. Further, the certificate implies but does not specify instances when the Authority may not have complied with the contract but instead “notified the United States as appropriate.” And, while the certificate states in a conclusory manner that appellant was compliant with, among others, § 2.4 of the contract, we are left with no definition of the term “other operating considerations” as used in that paragraph. There arises an inference that the Authority could operate the redirection project within some measure of its discretion and remain compliant with the contract. (Findings 16 (§ 2.4), 21) The *Sauders* trial court, in deciding, among other post-trial motions, the Authority’s renewed motion for judgment as a matter of law based on the so-called government contractor defense, drew a similar inference. *Sauders*, C.A. No. 2:93-3077-23 (July 14, 1999) (unpublished Order at 15 n.6) (R4, tab C-2/19). Again, we see these as matters to be resolved in connection with quantum or to the damages component of the claim, if any damages are adjudged by the court.

Navigational Servitude

Among the “limited exceptions” under South Carolina trespass law to the right of a person in possession of land to exclude others, mentioned but not applicable in *Snow*, 409 S.E.2d. at 802, may be the following:

Where the property in question is a navigable waterway, the rights of the riparian or littoral owner are not absolute; the use of his property is subject to lawful regulation by public authority. In the case of navigable waters of the United States, the littoral owner’s rights are subject to the paramount public right to free navigation.

South Carolina Electric and Gas Co. v. Hix, 306 S.C. 173, 410 S.E.2d 582, 584 (S.C. Ct. App. 1991) (internal citations omitted).

The government, pursuant to the Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, has a dominant servitude over navigable waters. That

jury was instructed under applicable law on issues such as comparative or contributory negligence, *force majeure*, and/or the interplay of disparate potential causes of the flooding.

navigational servitude extends to the entire stream and the streambed below ordinary high-water mark. The sovereign States and other riparian owners are subject to the dominant power of the government in respect of navigation. The proper exercise of that power neither is an invasion of private property nor a taking within the meaning of the Fifth Amendment. Rather, it is a lawful exercise of a power to which riparian owners are always subject. A waiver of sovereign authority in this regard will not be implied but must instead be stated in plain terms. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 703-04, 706-07 (quotes and internal citations omitted) (takings claim). So-called “fast land,” that is, land above the ordinary high-water mark, is subject to taking but not without just compensation. *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 805 (1950). Both parties were aware of this legal construct prior to redirection. (Findings 2, 7, 9, 14-15, 16 (§§ 1.11, 2.7))

The government urges the Board to construe strictly § 9.1 of the contract “since it essentially involves a waiver of the navigational servitude . . .” (gov’t br. addressing the ADA at 4). We do not understand the government’s argument to mean that navigational servitude has been waived. Rather, the government is urging that adoption of appellant’s interpretation of § 9.1 would require a determination of waiver. On the other hand, the government makes no assessment of its responsibility, if any, for assisting in the defense of the *Sauders* litigation to the extent of the navigational servitude defense. Neither does the government address the distinction that may be made for government responsibility to obtain real estate interests over fast lands as opposed to lands subject to the navigational servitude. No evidence of any government-financed real estate transactions in connection with redirection are in the record.

Appellant argues that the servitude has not been waived. Instead, contends the Authority,

it [is] incumbent upon the Government to assert the protections of the doctrine to the fullest extent possible to shield not only itself, but also its contractor, Santee Cooper. By not supporting Santee Cooper’s assertion of the government contractor defense (indeed, by not asserting it on Santee Cooper’s behalf), the Government itself undermined the protections of the navigable servitude doctrine and created what it now complains are “open-ended” obligations under Section 9.1.

(App. supp. br. at 7) The Authority does not develop this argument to indicate whether the navigational servitude defense would be complete, how it relates (if it does) to the government contractor defense, and by what means the government could have asserted the defense.

The primary purpose of the redirection project is to protect navigation in Charleston Harbor. That purpose, as implemented, involved redirection of water to the Santee River. (Findings 1-2, 4-6, 13) We are unable to conclude that navigational servitude was waived by the United States in connection with the flooding claims of the *Sauders* plaintiffs' or the related contract claim for indemnification.⁵

The jury verdict for the *Sauders* plaintiffs could involve a taking under South Carolina law or under the United States Constitution and does involve trespass (which under South Carolina law would seem to invoke an "invasion of private property") (findings 19, 22). However, we are not informed of the extent of the taking or invasion as it relates to the high-water mark versus fast lands. Below the ordinary high-water mark, we fail to see on this record how the government could be liable directly for a taking or indirectly for trespass under South Carolina law; however, such a determination is beyond our authority as we have no subject matter jurisdiction over takings claims. Whether the government's dominant servitude is a resource to somehow be pooled with Santee Cooper's rights along the Santee River in order to accomplish the redirection project is yet to be shown.

Further, based on the above-cited South Carolina decision, navigational authority of the State of South Carolina may also be a defense to trespass within certain limits. Neither party explains whether this is a correct reading of South Carolina law and whether it is coextensive with the government's dominant servitude. We also are not told whether any navigational defenses were presented to the jury by Santee Cooper or instructed on by the court.

Concerning factual matters, the ordinary high-water mark has not been shown to be undisputed. Application to the facts of the *Sauders* litigation in the context of the cause and extent of the flooding also has not been shown to be without dispute. Further development of the record is necessary.

None of the above discussion changes the government's liability for indemnification under § 9.1 of the contract, at least to the extent of attorneys' fees and costs. Such defenses may be applicable to the damages component of the claim, if any damages are adjudged by the court.

⁵ In an earlier decision involving these parties, the same contract, but a different claim, the ENG BCA stated, as relevant here, that "[t]he authorizing statute required the Government not to look to its rights under the theory of 'navigable servitude' but to keep the Authority 'whole' when constructing this project." 91-2 BCA at 119,016. In that decision, the ENG BCA was addressing electrical generation capacity and whether compound interest was due on the claim at issue there. That decision did not involve issues specifically related to river waters and adjacent land that may have been impacted by redirection.

CONCLUSION

For the reasons explained above, the government's motions to dismiss and motion for summary judgment are denied. Appellant's motion for summary judgment on entitlement is granted, as explained above. The appeal is sustained as to entitlement.

The government is authorized by the redirection authorization statute to assume the risk of certain claims under the contract. That authorization was carried forward in § 9.1 of the contract. Accordingly, the government must indemnify Santee Cooper, including the costs of defending such claims and/or lawsuits, subject to the exceptions in the contract and other matters described above.

Having sustained the appeal on entitlement, we return the matter to the parties for consideration of the quantum due and other matters described above.

Dated: 8 June 2004

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53701, Appeal of South Carolina Public Service Authority, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals