

CASE REPORT

TEMPORARY TAKINGS - FLOODING. Government-induced flooding that is temporary in duration is not categorically exempt from Takings Clause liability. *Arkansas Game and Fish Comm'n v. United States*, No. 11-597, United States Supreme Court (Dec. 4, 2012).

I. Facts. The Arkansas Game and Fish Commission (“Commission”) owns and manages a wildlife management area along the Black River in Arkansas, forested with hardwood oak species. In 1948, the U.S. Army Corps of Engineers built a dam upstream of the management area and adopted standards setting seasonally varying rates for the release of water from the dam. Between 1993 and 2000, the Corps released water at a slower rate than usual to allow for a longer growing season for farmers along the River, which increased the accumulation of water behind the dam. In order to reduce the accumulation, the Corps extended the period in which a high amount of water would be released, flooding the management area during its tree-growing season. Data showed that the river levels near the management area reached six feet for 40 percent more days than before the Corps’ changes were implemented. The Commission sued the United States, claiming that the temporary flooding between 1993 and 2000 constituted a taking of property entitling the Commission to compensation for the destruction of timber and the costly reclamation measures needed to restore the terrain. The Court of Appeals held that compensation may only be sought when flooding is a “permanent or inevitably recurring condition, rather than an inherently temporary situation” and dismissed the Commission’s claim.

II. Applicable Law and Analysis. The United States Supreme Court reversed the Court of Appeals and held that recurrent flooding, even if of a finite or temporary duration, is not categorically exempt from Takings Clause liability. The Court reasoned it had previously recognized that takings temporary in duration can be compensable and found no justification for creating a blanket exception for the case of government-induced flooding. Despite objections from the Corps that, without the exception, every passing flood attributable to a government operation could lead to a takings claim, no matter how brief, the Supreme Court refused to approve such an exception. Instead, the Court asserted that “to reject a categorical bar to temporary-flooding takings claims...is scarcely to credit all, or even many” of such claims. The Court established some factors for Courts to consider in weighing whether a temporary flooding amounted to a constitutional taking, including the duration of the intrusion, the degree to which the invasion is intended or is the foreseeable result of authorized government action, the character of the land at issue and the owner’s reasonable investment-backed expectations, and the severity of the interference. The Court noted that while a single flooding event may not be enough, a continuance of them in sufficient number and for a sufficient time may prove to be a taking.¹

¹ The United States also raised the argument that damage to downstream property, whether permanent or temporary, however foreseeable, is not aimed at any particular landowner and therefore does not qualify as a compensable

III. Conclusion. In analyzing government liability for damages attributable to flooding, Washington courts have traditionally distinguished between trespass/nuisance and inverse condemnation causes of action. To establish a taking, Washington courts have repeatedly held that the character of the invasion must be permanent, recurrent, or involving a chronic and unreasonable pattern of behavior by the government. At this time, it is unknown how Washington courts will apply the *Arkansas* decision and the above-described factors to determine if a temporary flooding amounts to a constitutional taking. However, it is possible that cities may begin to see an increase in inverse condemnation claims based upon temporary flooding or invasions of property.

occupation under the Takings Clause. The Supreme Court declined to address this argument, but it may be addressed by the Court of Appeals on remand.