



SCOTUS Confirms Temporary Flooding Is Compensable Taking

By Elizabeth Story and Christian Torgimson

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In *Arkansas Game and Fish Commission v. United States*, the U.S. Supreme Court recognized that temporary flooding can give rise to a takings claim, finding that “government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable.”

The Arkansas Game and Fish Commission filed a lawsuit against the United States, claiming that the U.S. Army Corps of Engineers, who managed the Clearwater Dam, were damaging timber on the commission’s wildlife management area. The corps adopted a water control manual to determine rates at which the water could be released from the dam. The corps began approving deviations to the manual to provide a longer harvest time to area farmers. However, as a result of the deviations, the commission’s management area was subjected to extended periods of flooding during the management area’s tree-growing season. The commission had repeatedly objected to the deviations and alerted the corps to the detrimental effect the flooding was causing.

The Court of Federal Claims found that the corps’ deviations caused six consecutive years of substantially increased flooding, altering the character of the property and causing “catastrophic mortality.” More than 18 million board feet of timber were destroyed or degraded. The Court of Federal Claims awarded the commission \$5.7 million. However, the Federal Circuit reversed

finding that government-induced flooding can only give rise to a taking claim if the flooding is permanent or inevitably recurring, citing *Sanguinetti v. United States* and *United States v. Cress*.

Justice Ginsburg, delivering the unanimous opinion of the Court, began her analysis with the purpose of the Takings Clause and the history of the Court's treatment of government-induced flooding. Justice Ginsburg noted that seasonal recurring flooding, though temporary, has been recognized as a taking. These temporary takings in duration can be compensable, as established in the World War II era, where several decisions were issued as a "practical response to the uncertainties of the Government's needs in wartime." In these World War II era cases, the takings could be maintained against the government when the government action occurring outside the property gave rise to a "direct and immediate interference with the enjoyment and use of the land." Justice Ginsburg concluded that the World War II era cases were examples of instances when government-induced flooding could constitute a taking of property, and because the taking does not need to be permanent to be compensable, government-induced flooding of limited duration may be compensable.

The government relied primarily on *Sanguinetti v. United States*, a case involving the overflow of a government canal onto the claimant's land. In that case, the Court held there was no taking based on the principles of foreseeability and causation, because the government did not intend to flood the land or have any reason to expect such a result from construction of the canal. In addition, the claimant in that case had failed to show a causal connection between the canal and increased flooding. In its argument, the government focused on the Court's use of the word "permanent" in the *Sanguinetti* opinion that stated "in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land." Justice Ginsburg was not

swayed by the government's argument and declined to focus on the word "permanent," as it only "appears in a nondispositive sentence" within the opinion and was composed to summarize flooding cases that the Court had encountered up to that point. Since Sanguinetti, Justice Ginsburg notes, the Court has had the opportunity to distinguish between permanent and temporary flooding and found that temporary floodings may be compensable.

The government further argued that the Court placed emphasis on the word "permanent" in the *Loretto v. Teleprompter Manhattan CATV Corp.* opinion. However, Justice Ginsburg quickly jumps to the first rule of case law and statutory interpretation that all attorneys should remember: Read on. Justice Ginsburg states that later in the *Loretto* opinion, the Court clarifies that "temporary limitations are subject to a more complex balancing process to determine whether they are a taking" and does not require permanence.

The Court's ruling in *Arkansas Game and Fish Commission v. United States* finds only that government-induced flooding temporary in duration gains no automatic exemption from the Takings Clause inspection. In this particular case, the Court factored the time, the degree to which the invasion was intended or the foreseeable result of authorized government action, the character of the land at issue, and the severity of the interference. The Court of Federal Claims had found that the flooding was foreseeable, as the commission had repeatedly complained to the corps about the destructive impact the flooding was having on the management area. However, the Court of Federal Claims failed to address findings related to the causation, foreseeability, sustainability, and amount of damages, and so those factors were remanded for further proceedings consistent with the Court's opinion.

Justice Ginsburg's opinion creates no exception or rule, other than finding that occurrences of temporary recurring flooding are not exempt from Takings Clause liability, and instead, may be

heard and considered under a more complex balancing process to determine whether there was a taking under the Takings Clause.