

U.S. Supreme Court Refuses to Adopt Automatic Liability Exemption Under Takings Clause of Fifth Amendment

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A December 2012 decision by the U.S. Supreme Court carries important property rights implications into the New Year. On December 4, 2012, the eight participating justices of the U.S. Supreme Court unanimously concluded, in the case *Arkansas Game And Fish Commission v. United States*, that government-induced flooding, even if temporary in duration, can constitute a "taking" requiring just compensation under the Takings Clause of the U.S. Constitution. The decision is significant in that it refuses to adopt an automatic exemption from liability under the Fifth Amendment for such circumstances.

As background, the Arkansas Game and Fish Commission manages a 23,000 acre forested wildlife recreation and timber harvesting area along the Black River known as the Dave Donaldson Black River Wildlife Management Area. In 1948, the U.S. Army Corps of Engineers constructed a dam upstream from the Area and adopted a plan providing for the release of water from the dam at seasonally varying rates.

Each year between 1993 and 2000, the Corps deviated from the plan at the request of local farmers, which resulted in severe flooding and extensive damage within the Area during the peak timber growing season. The Commission objected to the deviation and advised the Corps of these adverse impacts.

In 2000, the Corps ceased its deviation from the plan. The Commission subsequently sued the United States for a temporary taking, contending that the destroyed timber and substantial change in the Area terrain required costly reclamation. The Federal Claims Court concluded there had been a taking, but the Federal Circuit then reversed that decision, concluding that government-induced flooding had to be "permanent and inevitably recurring" in order to constitute a taking.

The Supreme Court refused to recognize a blanket takings exception for temporary government-induced flooding and reversed the Circuit Court's decision, referring to the general rule that, if government action would constitute a taking if permanently continued, then temporary action of the same character also qualifies as a taking. The Court concluded that government-induced flooding, even when temporary in nature, may in fact constitute a taking, and that determination will turn on a case-by-case analysis of specific factual circumstances, including the severity of the damages incurred. The Court remanded the case for further proceedings consistent with its opinion.

We will continue to monitor future developments related to this matter and will keep you advised accordingly.