

Supreme Court Rules Temporary Flooding May Give Rise To Takings Claim

In an important constitutional decision, the Supreme Court made clear there is no "blanket" rule prohibiting a takings cause of action for government-induced flooding that is only temporary. The Court therefore reversed the Federal Circuit, which had decided such flooding must be "permanent or inevitably recurring" to give rise to a viable takings claim. [*Arkansas Game and Fish Commission v. United States*](#) (No. 11-597, Dec. 4, 2012). From 1993 to 2000, for agricultural purposes, the U.S. Army Corps Engineers periodically authorized flooding that extended into the peak growing season for timber on forest land owned and managed by the Arkansas Game and Fish Commission. This repeated temporary flooding damaged or destroyed more than 18 million board feet of timber and disrupted the Commission's use of its property. The Commission asserted a claim against the federal government under the Takings Clause of the Fifth Amendment to the United States Constitution, which requires "just compensation" when private property is "taken for public use." The Supreme Court reviewed its prior decisions and firmly rejected the notion that temporary government-induced flooding qualifies for an "automatic exemption from Takings Clause inspection." As a general matter, the Court explained, it is well-established that a temporary taking may be compensable. And according to the Court, there is no ground for "setting flooding apart from all other government intrusions on property." The Court did not decide the outcome of the case, but instead remanded the matter to determine whether a taking in fact had occurred. Emphasizing there is no "magic formula" to complete this task, the Court highlighted the relevant factors, including: a) The duration and severity of the government intrusion; b) The degree to which the intrusion is intended or is the foreseeable result of authorized governmental action; c) The character of the land at issue; and d) The landowner's reasonable investment-backed expectations. It remains to be seen whether the Court's decision – which embraces an ad hoc, case-by-case approach – will add confusion or certainty to the extensive and convoluted jurisprudence on the Takings Clause.

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