

[Supreme Court Holds Temporary Flooding Can Be A Taking](#)

After passing on a number of Fifth Amendment issues in recent history, the U.S. Supreme Court is scheduled to hear three cases this term in which the takings clause plays a prominent role. And today, the Court addressed the first of these three cases, holding that a temporary-flooding can result in a taking requiring just compensation under the Fifth Amendment.

In *Arkansas Game and Fish Commission v. United States*, the Arkansas Game and Fish Commission argued that a temporary but reoccurring flooding of its property resulted in a taking requiring just compensation. The property, which was operated as a wildlife and hunting preserve, as well as a timber resource, was located in a floodplain approximately 115 miles downstream of the Clearwater Dam. Shortly after the construction of the Dam in 1948, the Army Corps of Engineers adopted a schedule of release rates. From 1993 to 2000, however, in response to annual requests from farmers, the Army Corps temporarily deviated from the schedule. As a result of these temporary deviations, the property experienced on average an additional 26 days of flooding per year. The Commission asserted that the temporary floodings eventually resulted in the destruction of more than 18 million board feet of timber, and led to the invasion of undesirable plants requiring the Commission to undertake significant reclamation efforts.

In 2005, the Commission initiated an action in the Court of Federal Claims alleging that the temporary deviations by the Army Corps resulted in a taking under the Fifth Amendment for which it was entitled to just compensation. The Court of Federal Claims found that a taking had occurred, and awarded the Commission \$5.7 million. The Federal Circuit, however, reversed. The Federal Circuit held that government-induced flooding can only result in a taking if the flooding is "permanent or inevitably recurring." And in this case, the flooding was temporary, and it was not inevitably recurring, as demonstrated by the fact that the Army Corps had not deviated from the schedule after 2000.

In an 8-0 decision authored by Justice Ginsburg (Justice Kagan took no part in the decision), the U.S. Supreme Court rejected the Federal Circuit's holding. In order to set the table for its decision, the Court provided a short synopsis of the relevant jurisprudence. For example, the Court highlighted the 1872 decision in *Pumpelly v. Green Bay Co.*, in which the Court first ruled that government-induced flooding can constitute a taking. The Court also discussed its 1917 decision in *United States v. Cress*, in which the Court recognized that seasonally recurring flooding could constitute a taking, and a number of decisions from the World War II era which galvanized that takings temporary in duration can be compensable. Finally, the Court dealt with its 1924 decision *Sanguinetti v. United States*, which was the primary authority that the United States relied on to argue that a temporary flooding could not result in a compensable taking.

In *Sanguinetti*, a year after the construction of a canal, a flood of "unprecedented severity" caused the canal to overflow, flooding the claimant's land. The Supreme Court held that despite the flooding, there had been no taking of claimant's property. In its decision, the Court stated that "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 land." In the Court's present opinion, however, Justice Ginsburg dismissed this language as merely dicta, stating that the issue of permanence was not relevant to the holding in *Sanguinetti*, and that the statement was merely an attempt to summarize the flooding cases that the Court had encountered as of that date. And, just to drive the final nail into the Government's argument, Justice Ginsburg stated that "[i]f the Court indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence."

Accordingly, after also rejecting the Government's slippery slope argument, the Court held that government-induced flooding of limited duration may be compensable. While this holding effectively reversed the decision by the Federal Circuit, the Court did not affirm the \$5.4 million judgment, as it found that there were factual issues and legal theories that could potentially prove dispositive which the Federal Circuit did not address and the Court would not hear in the first instance. The Supreme Court did not simply leave the matter there, though, as it also provided some guidance for the Federal Circuit on remand. Specifically, the Court explained that relevant factors in determining whether a temporary flooding rises to the level of a compensable taking include: (i) the degree to which the invasion is intended or is a foreseeable result of authorized government action, (ii) the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use, and (iii) the severity of the interference.