
ARKANSAS GAME & FISH COMMISSION V. UNITED STATES: A TEMPORARY FIX FOR TEMPORARY TAKINGS

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The United States Supreme Court's decision in *Arkansas Game & Fish Commission v. United States*¹ is a rare unanimous victory for property rights.² The decision is significant because the Court recognized that any government action that interferes with the enjoyment and use of private property can give rise to a takings claim under the Fifth Amendment. There is no exception for government actions that are temporary in duration. The Court's decision closed a long-standing loophole in takings law that had allowed the federal government, as it did in this case, to avoid takings liability for having repeatedly flooded the Arkansas Game & Fish Commission's land. The decision promises to be important for all property owners because the Court relied on principles that reaffirm the protective nature of the Takings Clause.

The *Arkansas Game & Fish Commission* opinion, however, is not without faults. In reaching the conclusion that there is no temporary-flooding exception to the Takings Clause, the Court did not discuss the appropriate test to be applied in temporary physical takings cases. And as a result, the Court created uncertainty in its takings case law which is likely to arise again—if not in this case, then in another.

I. BACKGROUND

The Arkansas Game & Fish Commission owns and operates 23,000 acres of hardwood forest in the Dave Donaldson Black River Wildlife Management Area in northeast Arkansas. This land is used for timber harvesting, hunting, recreation, and wildlife habitat and conservation. Much of the property was seriously damaged when the U.S. Army Corps of Engineers, as part of a dam management plan, inundated the forest with flood waters in each of six consecutive years during the 1990s.

The Commission successfully sued the federal government for inverse condemnation in the Court of Federal Claims. The court found that the flooding “so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions for their intended purposes.”³ Although the Army Corps eventually stopped flooding the forest, the trial court concluded that “the damage done to the Commission's property interest in its timber was permanent . . . and the Commission was preempted from exercising its property rights over its timber during and after” the flooding.⁴ In conclusion, the Court of Federal Claims ruled that “the government's temporary taking of a flowage easement over the Management Area resulted in a permanent taking of timber from that property”⁵ and ordered the Corps to pay approximately \$5.6 million for the value of the timber destroyed by the floods, plus

an additional \$176,428.34 to restore the damaged recreation and conservation lands.⁶

But, in a 2-1 decision, the Federal Circuit Court of Appeals reversed the trial court's judgment, concluding that, as a matter of law, government flooding of private property can never constitute a taking if it is the result of an “ad hoc” or “temporary” government policy because temporary flooding can never give rise to a taking:

[I]n determining whether a governmental decision to release water from a dam can result in a taking, we must distinguish between action which is by its nature temporary and that which is permanent. But in distinguishing between temporary and permanent action, we do not focus on a structure and its consequence. Rather we must focus on whether the government flood control policy was a permanent or temporary policy. Releases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring [and therefore cannot constitute a taking].⁷

Consequently, the majority reasoned, it was unnecessary to consider the extent to which the Army Corps' actions interfered with the Commission's rights in its property.⁸ According to the Federal Circuit, government-induced flooding that is not permanent in duration can never qualify as a taking.⁹

The U.S. Supreme Court granted certiorari on the question of “whether government actions that cause repeated floodings must be permanently or inevitably recurring to constitute a taking of property.”¹⁰

III. THE DECISION

Justice Ginsburg delivered the opinion for a unanimous Court on December 4, 2012. The decision reversed the Federal Circuit Court of Appeals, holding that “government-induced flooding of limited duration may be compensable.”¹¹ The Court rejected the notion that takings claims, like that brought by the Commission, can be subject to per se defenses: “No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.”¹² This is significant because it resolves a long-standing conflict in the Court's takings case law.

There is no question that the government must compensate a landowner when it causes private property to be permanently inundated by flood waters.¹³ But what happens if the government abates the flooding and restores the land to its owner? Is the government still liable for taking the owner's land? Does the government's decision to stop flooding the land change the fact that its physical intrusion deprived the owner of his or her right to use the property?

At first blush, the answer to these questions would seem to be easy. After all, the Court has repeatedly held that the government must compensate landowners for its temporary occupation of private property regardless of how short the

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duration of the occupation was.¹⁴ Historically, however, the Court has viewed flooding cases differently from other types of physical invasions. In fact, one early U.S. Supreme Court decision—*Sanguinetti v. United States* (1924)—states that government-induced flooding must “constitute an actual, permanent invasion of land” to effect a taking.¹⁵ And, more recently in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court cited *Sanguinetti* for the proposition that government-induced flooding will always constitute a taking if it constitutes an “actual, permanent invasion of land.”¹⁶

The Court resolved the apparent conflict between “temporary” and “permanent” flooding cases by tracing two threads through its takings case law. First, the Court analyzed its decisions concerning temporary physical interferences with private property to conclude that all physical interferences with private property are subject to the protections of the Takings Clause. And second, the Court reviewed its government-flooding precedents to determine whether there was any significance to the distinction between “temporary” and “permanent” floods. When read together, the Court found “no solid grounding in precedent for setting flooding apart from other government intrusions on property.”¹⁷

A. No Temporary-Interference Exception to the Takings Clause

Although the Supreme Court has, at times, used the terms “permanent” and “temporary” to distinguish those physical intrusions that take an interest in private property from those that do not, the duration of a physical invasion is not determinative of whether or not the government may be held liable for a taking. That principle of takings law was “solidly established” by a series of cases concerning temporary property seizures during the World War II era.¹⁸ In *United States v. Pewee Coal Co.*, for example, the federal government “possessed and operated” the property of a coal mining company for 5½ months in order to prevent a nationwide miners’ strike in the middle of World War II.¹⁹ The Court unanimously agreed that the government’s seizure was a taking, with no regard to the limited duration of the occupation.²⁰ Other wartime seizure cases confirm the principle that short-term occupations can constitute a categorical taking.²¹

Perhaps the best known temporary invasion case is *United States v. Causby*, where the Supreme Court concluded that the noise and glare from military overflights effected a physical taking when they caused a farmer’s chickens to panic and die.²² In that case, the government was issued a one-year lease with an option for annual renewals to use an airport for military purposes.²³ The term of the lease was for a total of five years (1942-1947), or until six months after the end of World War II, whichever was earlier.²⁴ Operation of the airport resulted in the frequent overflight of Causby’s home and chicken farm.²⁵ The noise and glare caused by heavy, four-engine bombers, transports, and squads of fighters so interfered with the use and enjoyment of Causby’s property and the commercial viability of the chicken farm that the Court held that the government had physically taken an easement for which just compensation was due.²⁶ The fact that the government’s fly-over of Causby’s property was of limited duration did not deter the Court from

concluding that a compensable taking had occurred.²⁷

Since its World War II era decisions, the Supreme Court has consistently “rejected the argument that government action must be permanent to qualify as a taking.”²⁸ “Once the government’s actions have worked a taking of property,” the *Arkansas Game & Fish Commission* decision explains, “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”²⁹ Thus, the Court held that takings liability can attach to any temporary government action that gives rise to “a direct and immediate interference with the enjoyment and use of the land.”³⁰

In light of this well-established principle, the *Arkansas Game & Fish Commission* Court considered whether its use of the word “permanent” in *Sanguinetti* established a per se rule that excludes government flooding from the protections of the Takings Clause. The Court concluded that it did not. In *Sanguinetti*, the Court found that no taking had occurred based on questions of foreseeability and causation; the Court did not even consider the duration of the flooding in reaching its conclusion.³¹ The *Arkansas Game & Fish Commission* Court explained that, when read in its proper context, *Sanguinetti*’s use of the word “permanent” was only intended to summarize the facts of prior decisions, which had unsurprisingly involved permanent floods.³² *Sanguinetti*, therefore, cannot be read to create a rule that excludes temporary flood invasions from takings liability.³³ *Arkansas Game & Fish Commission* repeatedly states that takings cases, whether temporary or permanent, should be considered on their merits and are not ordinarily subject to “blanket exclusionary rules” such as the rule adopted by the Federal Circuit Court of Appeals.³⁴

Perhaps more significant than the rule of *Arkansas Game & Fish Commission*, are the principles the Court relied on to reach its decision. First, as stated above, the Court reaffirmed the principle that the duration of a government action that deprives an owner of his or her rights in property is not determinative of whether or not the government may be held liable for a taking. Second, the Court emphasized that there is no “magic formula” by which government can avoid takings liability: “In view of the nearly infinite variety of ways in which government actions can affect property interests, the Court has recognized few invariable rules in this area.”³⁵ And third, the Court indicated that it is unreceptive to “slippery slope” arguments or crabbed readings of its precedents when it comes to takings law.³⁶ “To reject a categorical bar to temporary-flooding takings claims,” the Court explained, “is scarcely to credit all, or even many, such claims.”³⁷ Together, these principles should operate to stave off future government attempts to create rules that exclude government from takings liability and assure that takings claims are considered on their merits.

B. A Victory at the Cost of Clarity?

Had the opinion ended with the Court’s resolution of the question presented, the *Arkansas Game & Fish Commission* decision would be hailed as an unequivocal victory for property rights. But it did not. Instead, toward the end of the opinion, the Court provides a bird’s-eye overview of the various tests that

may or may not be applicable in a takings case:

When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.

Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. So, too, are the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use. For example, the Management Area lies in a floodplain below a dam, and had experienced flooding in the past. But the trial court found the Area had not been exposed to flooding comparable to the 1990's accumulations in any other time span either prior to or after the construction of the Dam. Severity of the interference figures in the calculus as well.³⁸

This passage is confusing. It lists, without any differentiation, various tests that have been developed over the years to determine different types of takings. For example, the Court recites the "intent or foreseeability" test that is applied as a threshold inquiry to distinguish physical takings from torts like negligence and trespass.³⁹ The Court also references the "character of the invasion" test that was developed to determine whether a government act physically appropriates an interest in private property.⁴⁰ The Court next recites the "reasonable investment backed expectations" test developed specifically for ad hoc regulatory takings in *Penn Central Transp. Co. v. New York City*.⁴¹

Although some may be tempted to argue that the Court created a hybrid regulatory/physical takings test by blending its various takings inquiries, the Court did not intend to do so. Instead, the Court stated that its decision was narrow: "We rule today, simply and only, that government induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."⁴² That the Court did not intend to alter the tests as set out in earlier decisions is made clear earlier in the opinion, where Justice Ginsburg wrote that it is "incumbent on courts to weigh carefully the relevant factors and circumstances in each case, as instructed by our decisions."⁴³ And we know from *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322–23 (2002), that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking' and vice versa." Thus, the tests that control physical invasion takings *still* control physical takings cases, and the tests that control regulatory takings *still* only apply in regulatory takings cases.

More problematic, however, is the fact that the passage creates a potential conflict with the Court's earlier temporary takings precedents. For over a half century, the Court has consistently held that the only relevance that the duration of the government interference has in a takings claim is in measuring how much compensation is due.⁴⁴ In *First English Evangelical Lutheran Church v. County of Los Angeles*, for example, the Court

stated that temporary takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."⁴⁵ In *Pewee Coal Co.*, the "temporary" nature of the government's possession was considered only in the context of the amount of compensation due to the plaintiff.⁴⁶ Indeed, the Court has repeatedly cited cases involving physical invasions of limited duration as "paradigmatic" examples of permanent physical takings for which government is categorically liable.⁴⁷ *Arkansas Game & Fish Commission*, however, states without explanation or elaboration that "time is indeed a factor in determining the existence *vel non* of a compensable taking."⁴⁸ Some may argue that this sentence makes the duration of an intrusion factor in determining liability. But none of the cases cited in support of that sentence compel such a drastic change in takings law.⁴⁹

The meaning and impact of this passage will likely be a centerpiece of the remand proceedings in *Arkansas Game & Fish Commission*, where the Federal Circuit will review the merits of the Commission's takings judgment. It remains to be seen whether the lower court will apply the Court's longstanding tests for determining temporary physical takings, or chart a new course based on this enigmatic passage.

V. CONCLUSION

Without question, *Arkansas Game & Fish Commission* constitutes a major step forward in protecting property rights. The decision eliminates a categorical defense to takings claims, and establishes principles that should fend off future categorical rules limiting government liability under the Takings Clause. The opinion, however, provides a temporary fix for the temporary takings issue because it leaves the question of how a court should review such a claim unresolved.

Endnotes

¹ *Arkansas Game & Fish Commission v. United States*, 568 U.S. ___, 133 S. Ct. 511 (2012), was argued at the Supreme Court on October 3, 2012. The Court issued its decision on Dec. 4, 2012.

² *Arkansas Game & Fish Commission v. United States*, 568 U.S. ___, 133 S. Ct. 511 (2012).

³ *Arkansas Game & Fish Commission v. United States*, 87 Fed. Cl. 594, 620 (2009).

⁴ *Id.*

⁵ *Id.* at 634.

⁶ *Id.* at 647.

⁷ *Arkansas Game & Fish Commission v. United States*, 637 F.3d 1366, 1374, 1377 (Fed. Cir. 2011).

⁸ *Id.*

⁹ *Id.* at 1377–79.

¹⁰ *Arkansas Game & Fish Commission*, 133 S. Ct. at 518.

¹¹ *Id.* at 519.

¹² *Id.*

¹³ *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 180–81 (1871) (When the government causes a river to overflow private property in a manner that directly interferes with the landowner's rights to possess, use, exclude others, and/or dispose of his or her property, it appropriates a flowage easement over the land and its actions constitute a taking for which compensation is due.).

14 See *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3–4, 7, 16 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 374, 380–81 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945). The Court has also recognized that a temporary regulation can be so disruptive of a person's rights that it effects a taking. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

15 *Sanguinetti v. United States*, 264 U.S. 146 (1924).

16 458 U.S. 419, 428 (1982).

17 *Arkansas Game & Fish Commission v. United States*, 568 U.S. ___, 133 S. Ct. 511, 521 (2012).

18 *Id.* at 519.

19 *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951).

20 *Id.* (plurality opinion); *id.* at 119 (Reed, J., concurring); *id.* at 121–22 (Burton, J., dissenting).

21 See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3–4, 7, 16 (1949) (government commandeered laundry plant for less than four years, was required to pay rental value for occupied period of time plus depreciation and value of lost trade routes); *United States v. Petty Motor Co.*, 327 U.S. 372, 374, 380–81 (1946) (government compensated leaseholders for the temporary taking of their leaseholds for period of over two-and-a-half years); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945) (government required to pay short-term rental value for taking portion of a building that had been leased by an automobile parts company for a period of one year); *International Paper Co. v. United States*, 282 U.S. 399, 407–08 (1931) (government order authorizing a third party to draw the whole of a river's water flow for a period of ten months effected a physical taking of a paper mill's water rights requiring the payment of just compensation).

22 328 U.S. 256, 266–68 (1946).

23 *Id.* at 258–59.

24 *Id.*

25 *Id.* at 259.

26 *Id.* at 268.

27 *Id.*

28 *Arkansas Game & Fish Commission v. United States*, 568 U.S. ___, 133 S. Ct. 511, 519 (2012).

29 *Id.* (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987)) (internal quotations omitted).

30 *Id.* (quoting *Causby*, 328 U.S. at 266). In a footnote, the Court also explained that the prospect that land can be reclaimed and restored after a physical invasion “does not disqualify the landowner from receipt of just compensation for a taking.” *Id.* at 523 n.2 (citing *United States v. Dickinson*, 331 U.S. 745, 751 (1947)).

31 *Arkansas Game & Fish Commission*, 133 S. Ct. at 519–20.

32 *Id.* at 520 (cautioning against reading nondispositive statements from the Court out of context).

33 *Id.* at 520–21 (for the same reason, *Loretto's* parenthetical quotation of *Sanguinetti* cannot create a categorical exclusion to the Takings Clause).

34 *Id.* at 521.

35 *Id.* at 518.

36 *Id.* at 521 (noting the frequency with which the government raises slippery slope arguments in takings cases).

37 *Id.*

38 *Id.* at 522–23 (citations omitted).

39 *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003).

40 *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922).

41 438 U.S. 104, 123 (1978).

42 *Arkansas Game & Fish Commission v. United States*, 568 U.S. ___, 133 S. Ct. 511, 522 (2012).

43 *Id.* at 521.

44 See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

45 482 U.S. 304, 318 (1987).

46 See, e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951) (plurality opinion).

47 *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (citing *Pewee Coal*, 341 U.S. 114; *General Motors*, 323 U.S. 373); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) (citing *Pewee Coal* and *General Motors*). Indeed, even *Loretto*, the case that established the rule that the government is categorically liable for permanent physical takings involved an interference of limited duration. Even though *Loretto* used the term “permanent” to describe the physical occupation—*i.e.*, installation of a cable box, the statute at issue only required landlords to permit cable companies to install facilities on their properties for a limited and readily determinable period of time. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 439 (1982) (The statute provided for a physical occupation for “[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation.”).

48 *Arkansas Game & Fish Commission v. United States*, 568 U.S. ___, 133 S. Ct. 511, 522 (2012).

49 *Id.* (citing *Loretto*, 458 U.S. at 435 n.12 (stating that temporary takings are typically determined on a case-by-case basis); *Tahoe-Sierra*, 535 U.S. at 342 (rejecting argument that all land use moratoria lasting longer than one year should be evaluated as per se takings); *National Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969) (recognizing that there are “unusual circumstances,” like emergencies, “in which a governmental occupation does not deprive the private owner of any use of his property”)).

