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Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012)

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COURT REPORTS

FEDERAL COURTS

UNITED STATES SUPREME COURT

Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (holding (i) government-induced temporary flooding can give rise to a compensable taking claim under the Fifth Amendment; and (ii) on remand, the lower court should consider the duration of compensable taking, character of the land, owner's expectations about the land's use, and foreseeability of invasion when determining whether a compensable taking occurred).

The Arkansas Game and Fish Commission ("Commission") owns the Dave Donaldson Black River Wildlife Management Area ("Area"), a 23,000-acre tract of land along the Black River in Arkansas. In 1948, the US Army Corps of Engineers ("Corps") built the Clearwater Dam upstream from the Area and adopted the Water Control Manual ("Manual") to set seasonal water release rates. The Manual allowed deviations from normal release rates for agricultural, recreational, and other purposes. In 1993, pursuant to farmers' requests, the Corps approved deviations, allowing a slower than usual water release rate from the dam. The Corps continued implementing temporary deviations to water releases from 1994 through 2000, and proposed to revise the Manual in order to make the temporary deviations permanent.

While the deviations benefitted farmers, the Commission opposed the Manual revisions because they interfered with natural habitats and timber growing seasons by causing abnormally long downstream flooding. After testing the detrimental effects of the deviations on the timber and natural habitat of the Area, the Corps abandoned the planned revisions and ceased the temporary deviations.

In 2005, the Commission filed a lawsuit against the United States, seeking compensation under the Fifth Amendment Takings Clause. The Commission claimed government-induced temporary flooding resulted in the destruction of timber and caused a substantial change in terrain. These damages allegedly required costly reclamation measures.

The United States Court of Federal Claims ("claims court") ruled in favor of the Commission. The claims court concluded the cumulative effect of the water release rate was exceptionally damaging to the once-flourishing forests of the Area and awarded the Commission \$5.7 million in compensation. The United States appealed.

The United States Court of Appeals for the Federal Circuit ("appeals court") reversed the claims court, despite its acknowledgment that a temporary governmental action may give rise to a takings claim if permanent action of the same character would qualify as a taking. The appeals court, however, held flooding cases constituted an exception to this general rule and related claims were thus compensable only if flooding was permanent or inevitably occurring.

The Commission appealed and the United States Supreme Court granted certiorari on the issue of whether government-induced temporary flooding could ever give rise to a compensable takings claim.

Arguing that temporary flooding was an exception to the general rule, the United States' position was that, in order to create liability under the takings clause, government-induced flooding needed to be permanent. The Court disagreed. It rejected the United States' interpretation of earlier precedent, explaining the temporary flooding exception was erroneously parsed out from stand-alone sentences in prior precedent. Furthermore, the Court added that subsequent developments in jurisprudence superseded the cases the United States used to support its position.

The United States also argued that reversing the appeals court would disrupt public works in flood-control areas by making even the smallest flood qualify as a compensable taking. The Court rejected this position as a slippery slope argument, noting that this case was no different from other takings clause cases that unsuccessfully urged blanket exceptions from the Fifth Amendment without proper justification.

Finally, the United States asked the Court to address two additional issues: (i) the collateral nature of the flood damage; and (ii) the bearing of Arkansas water-right law on this case. The Court refused to express any opinion with regard to these issues because the parties did not brief the issues or argue them in the lower courts.

Accordingly, the Court reversed the appeals court's decision and held that government-induced temporary flooding can give rise to a compensable taking claim under the Fifth Amendment. The Court noted the majority of such claims depend on situation-specific, factual inquiries. Consequently, the Court remanded the case, directing the claims court to consider the duration of compensable taking, owner's reasonable investment-backed expectations regarding the land's use, and the degree of foreseeability related to the invasion.

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Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710 (2013) (holding the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway is not considered a discharge of a pollutant under the Clean Water Act).

The Los Angeles County Flood Control District ("District") operates a drainage system that collects, transports, and discharges storm water. Federal regulations define "storm water" as storm water runoff, snowmelt runoff, and surface runoff and drainage. Due to the highly polluted nature of the storm water at issue in this case, the Clean Water Act ("CWA") required the drainage systems' operators to obtain a National Pollutant Discharge Elimination System ("NPDES") permit before discharging the storm water into navigable waters. The District obtained a NPDES permit in 1990 and subsequently renewed its permit several times.

The Natural Resources Defense Council and Santa Monica Baykeeper ("Respondents"), both of which are environmental organizations, filed a citizen suit in United States District Court for the Central District of California ("district court"), alleging the District violated water quality measurement require-