



As previously published in Wetland News, December 2012.

IMPLICATIONS TO FLOODPLAIN AND WETLAND MANAGERS OF ARKANSAS GAME AND FISH COMMISSION V. UNITED STATES

Jon Kusler, Esq., Association of State Wetland Managers

This paper was produced with support from the McKnight Foundation.

Introduction

On December 4, 2012 the U.S. Supreme Court issued a unanimous decision with impact on how government agencies at all levels of government will need to address flooding. See *Arkansas Game & Fish Commission v. United States*, U.S., No. 11-597, reversed and remanded 12/4/12. The Court held that government flooding of lands need not be permanent to be a Fifth Amendment “taking” of property without payment of just compensation. Governments have long been held liable for long duration and/or repeated flooding under certain circumstances. So, the decision is to a considerable extent consistent with existing law. But the ruling of the case is not necessarily confined to long duration or repeated flooding.

The Court makes it clear that permanent flooding is not needed for a “taking.” This was in some doubt prior to the decision. The case also broadened the factors government agencies and courts will need to look at in deciding whether flooding results in a taking in a specific instance. See the discussion below.

It is likely that decision will result in a many new flood-related cases despite the efforts of the Court to limit the scope and impact of the decision.

Such an increase in litigation is likely because much of the U.S. is subject to “temporary” flooding to one extent or another. Temporary flooding ranges from the shallow inundation of parking lots and basements by seasonal rains to deep high velocity inundation by rivers, coastal storm surges and tides.

Governments and private landowners often increase the velocity and depth of flood waters on adjacent lands when they install on their own lands drainage ditches and culverts, levees or dams, roads and bridges, houses and other structures. Virtually all grading or fills may temporarily increase flood heights and velocities on other lands, opening the door to many new suits.

The note which follows describes the history of the case, the case holding, and what it may mean to floodplain and wetland managers. The note also briefly discusses existing, prior case law with regard to temporary flooding as a taking and temporary floodplain regulations as a taking.

Facts of the Case

This case involves a claim by the Arkansas Game and Fish Commission that flood releases from an U.S. Army Corps of Engineers dam destroyed trees in a 23,000-acre state wildlife preserve 115 miles downstream from a Corps dam. In July 2009 the Court of Federal Claims had found the United States liable for over \$5.7 million in compensation for its taking of property by flooding. See *Arkansas Game and Fish Commission v. United States*, 87 Fed. Cl. 594 (2009). The Corps of Engineers had repeatedly released water from its dam causing damage to forest and wildlife resources despite complaints from the Arkansas Fish and Game Commission.

The Court's 8-0 decision reverses a ruling in March 2011 by the U.S. Court of Appeals for the Federal Circuit that damages from government-caused flooding needed to be permanent before it could constitute a taking of property requiring compensation under the Fifth Amendment (*Arkansas Game and Fish Commission v. United States*, 637 F.3d 1366 (Fed. Cir. 2011); 62 DER A-29, 3/31/11). The Court of Appeals had held that “government-induced flooding can give rise to a taking claim only if the flooding is “permanent or inevitably recurring.””

The case is of considerable importance to government wetland and floodplain managers who temporarily flood lands by the design, construction and operation of dams and other flood control structures, management of public lands, construction of roads and culverts, construction and operation of stormwater facilities, issuance of permits which may result in temporary flooding, grading and filling, or carrying out other activities which temporarily flood and damage other lands.

What Are the Implications of the Decision to Wetland and Floodplain Managers?

Over the past ninety years, courts have quite often held that temporary flooding is a compensable taking in some specific circumstances. See, for example, *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (S.Ct. 1872). *Arkansas Fish and Game Commission* clarifies that temporary flooding is compensable and sets forth in some detail the factors relevant to a determination of taking (discussed below). However, the impact of the case will depend, in large measure, upon what the lower court will do with this case on remand and what changes government agencies may make in policies in response to the case. There will likely be many new cases claiming a temporary flooding and temporary taking at federal, state, or local levels despite the efforts of the Supreme Court to narrow the scope of the decision.

Landowners subject to even limited amounts of temporary flooding caused or exacerbated by governments may now claim (whether successful or not) a temporary taking including situations in which flooding would formerly be a common law “tort”¹ but not an unconstitutional taking. This is significant because governments are to a considerable extent protected from tort claims by sovereign immunity but they are not protected from “takings” claims. And, the Supreme Court has made it absolutely clear that temporary flooding may be a taking.

¹A “tort” is a civil wrong compensable through damages. Examples include nuisances, trespasses, and negligence.

Litigation based upon this decision will likely be time consuming, expensive, and technical. And courts are likely to be ill-equipped to deal with complex technical issues raised by the decision. None the less they will need to do so.

The Court's decision will influence how government agencies and courts analyze a takings claim. The Court found "no solid grounding in precedent for setting flooding apart from other government intrusions on property." The Court concluded that "No magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. This Court has drawn some bright lines, but in the main, takings claims turn on situation-specific factual inquiries. See *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 124."

The case will likely result in greater care in the design, construction and operation of dikes, dams, levees and other flood control measures by the Corps of Engineers, Bureau of Recreation, state water resource agencies, and local government water management agencies. Floodplain agencies will need to defend a broader range of flood plain management decisions which temporarily increase flooding on private or other government lands.

Floodplain and wetland regulatory agencies will also need to need to exercise greater care in issuance of permits that result in or increase temporary flooding. The case will likely result addition suits where government agencies issue permits or approve subdivisions which result in temporary flooding. This will strengthen arguments that governmental unit should adopt and enforce "no adverse impact" regulations.

The case may also result in arguments that **temporary floodplain regulations** are a taking despite many cases upholding such regulations. See the discussion below. Arguments will undoubtedly be made that if temporary flooding is a taking then temporary floodplain regulation should also be a taking although floodplain and floodplain regulations are quite different in a number of important respects. For example, flooding involves a physical invasion of lands, regulations do not.

What Factors Will a Court Need to Consider in Deciding Whether Temporary Flooding Is a Taking?

The Court in *Arkansas* remanded the case to the Federal Circuit to carry out more detailed fact finding with regard to a number of issues including "causation, foreseeability, substantiality, and the amount of damages." The Court also described or referenced a broader set of factors which may be relevant to determination of "taking" in a specific instance. These factors include the following. I have stated some of the factors or issues as questions although they are not presented as questions in the decision. Direct quotations of the Court are in quotation marks.

Character of the land. A court will need to consider the "**character of the land**" in deciding whether a temporary taking has occurred. It is not altogether clear what the Court means by this but relevant questions may include: What, if any, flooding is naturally occurring? If flooding is naturally occurring, what are its characteristics (e.g., depth, velocity, frequency, etc.?) What use was being made of the land? What impact did flooding have on the uses?

Degree of intention and foreseeability. To what degree is the flooding the “**intended or foreseeable result** of authorized government action”? Courts have not typically addressed intention in flood/taking cases although they have addressed these issues in flood-related negligence and trespass cases. With the widespread preparation of government flood maps, almost all major flooding is now “foreseeable” to one extent or another. It will be interesting to see what courts do with intent in future temporary flood taking cases.

Continuation and/or repetition of flooding over time. The Court in *Arkansas* observed, quoting from another case, that “**continuance of them (flooding acts) in sufficient number and for a sufficient time** may prove [a taking]. Every successive trespass adds to the force of the evidence.”

Amount of damage. As one might expect, the “**amount of damages**” caused by the flooding is an important factor in determining whether a taking has occurred and, if so, how much has been taken.

Time. The Court mentioned “**time**” as a relevant factor. The duration of flooding is seemingly a straight forward issue. However, it may be anything but straight forward in situations where flooding repeatedly occurs. The date from which repeated flooding is alleged to constitute a temporary taking is relevant to not only a determination whether a taking has occurred but when a statute of limitation or repose begins to run.

Permanence. Was the flooding and damage “**permanent?**” Flooding is, in general, not permanent although some types of flooding such as coastal sea level rise from climate change may be.

Inevitable recurrence. Was the flooding “**inevitably recurring?**” Most flooding will reoccur sooner or later whether over a 10 year, 50 year, 100 year, 500 year, or a longer time period. What time frame is to be used in deciding whether flooding may be an “inevitable recurrence” and a taking?

Severity of interference. What the Court means by severity of “**interference**” is not altogether clear. It, arguably, refers to the impact of flooding on the uses of land and water and may include duration, permanence, recurrence and other factors.

Substantiality. How “substantial” was the flooding and the flood damages? Relevant questions may include: How much flooding occurred and how much damage resulted from the flooding? In addition, what is the nature of this damage? Loss of life? Injuries? Monetary losses?

Causation. What was the cause or causes of the flooding and the damage resulting from the flooding? Was the flooding solely due to the actions of the government? Were there multiple causes for the flooding (common)? Were there intervening causes? If there are multiple causes for the flooding and flood damages, how are damages to be apportioned?

Reasonable investment-backed expectations. What were the landowner's "**reasonable, investment-backed expectations?**" To what extent were they impacted by the flooding? How does knowledge of flooding prior to purchase of land affect legally recognized expectations?

State water rights law. The Court noted but did not discuss the possible relevance of Arkansas water law to a taking. State water law issues relevant to a taking may include appropriation rights, public trust, navigable servitude, riparian law, and government prescriptive rights.

Courts will undoubtedly need to address other factors as well in determining whether a taking has occurred in a specific circumstance such as

- Did the flooding occur in emergency conditions? Courts have long held that flooding may not be a taking if carried out in an emergency. Was there an emergency? When does flooding rise to the level of an emergency?
- What impact, if any do the Flood Control Act of 1926 and Federal Tort Claims Act have on a determination of "taking" in situations in which these statutes may apply?
- When does statutes limitation or repose begin to run in a temporary flood/taking case?
- When are threats to public health or safety or the prevention of nuisances a defense to a temporary taking claim?

Impact of the Arkansas Decision on Existing Case Law: When Do Activities Causing Temporary Flood Damage Rise to the Level of an Unconstitutional "Taking?"

As discussed above, many courts have held temporary flooding of various durations to be a taking in specific circumstances. They have typically decided whether particular flooding and flood damages are a "taking" without distinguishing "permanent" versus "temporary" taking in many instances. The *Arkansas* decision is consistent with these cases although it also clarifies that temporary flooding can be a temporary taking and provides a clarified list of factors relevant to determination of temporary taking. See above. The *Arkansas* decision gives indirect support to the argument that temporary flooding may be a taking rather than tort although it does not address this important issue.

Some courts have held that where government actions flood and physically damage private lands, the damage may be compensable as a tort (e.g., nuisance, negligence or trespass), although the flooding and damage may not rise to the level of a "taking". See *Nolan v. City of Eagan*, 673 N.W.2d 487 Minn., 2003) in which the court quoted from *Nelson v. Wilson*, 58 N.W.2d 330 (Minn., 1953): "Whether occasional flooding is of such frequency, regularity, and permanency to constitute a taking and not merely a temporary invasion for which the landowner should be left only to a possible recovery of damages is a question of degree, and each case must stand on its own peculiar facts." See also *South Fl. W. Mgmt. D. v. Basore*, 723 So.2d 287 (Fla., 1998) (Court held that flooding of a lettuce crop was not a temporary taking.); *Dutton v. City of Crest Hill*, 547 F. Supp. 38 (D., Ill. 1982). (Repeated flooding of house by sewage may not rise to the level of a taking by city although this may be a tort.) However, see *Associates, MEA v. Cty*,

Edgewater, 706 So.2d 50 (Fla., 1998). (Temporary flooding of house by improperly functioning stormwater system was a temporary taking.)

Courts have held in a number of Section 1983 cases that a flood-related tort does not necessarily rise to the level of an unconstitutional Section 1983 taking. See, for example, *York v. City of Cedartown*, 648 F.2d 231 (5th Cir., 1981); *Dutton v. City of Crest Hill*, 547 F. Supp. 38 (D., Ill. 1982). This defense may apply not only to “taking” claims but to due process and equal protection claims. See, e.g., *Johnson v. Barker*, 799 F.2d 1396 (9th Cir., 1986) (Court rejected defamation, false arrest, malicious prosecution and abuse of process and negligence claims by hikers who violated restricted access zone around Mt. St. Helens as not rising to the level of a Constitutional injury. The court reasoned: “It is well settled that section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.”)

It is often advantageous to a governmental unit to be vulnerable to suit only in tort because sovereign immunity defenses and tort claim act restrictions such as monetary caps to awards then apply.

A taking (temporary or permanent) is quite clear where government causes outright destruction of private land or permanent and continuous damage from erosion, mud slide, or landslide. See, e.g., *United States v. Cress*, 243 U.S. 316 (S.Ct., 1917) (Court held that raising water levels of Cumberland River by dams so that lands not normally flooded were subjected permanently to frequent overflows, impairing them to the extent of one-half their value was a taking).

But, when there is no outright destruction and a natural hazard event merely increases in frequency or severity of damage the issue of “taking” is not so clear. In deciding whether taking has occurred in such contexts, courts have, to a considerable extent, relied on common law nuisance concepts and have considered a number of factors including the frequency of the flooding and damage and the seriousness of the injury to particular activities. See, for example, *Fromme v. United States*, 412 F.2d 1192 (Ct. Cl., 1969) (Court affirmed a referee’s report that flooding of agricultural land used for grazing of cattle once every fifteen years was not sufficient to constitute a taking for public use.); *Sanguinetti v. United States*, 264 U.S. 146 (S.Ct., 1924) (Intermittent flooding of agricultural land by navigational canal not a taking.); *Danforth v. United States*, 308 U.S. 271 (S.Ct., 1939) (Flooding by highest flood of record on the Mississippi and retention of water from such “unusual floods for a somewhat longer period or its increase in depth or destructiveness” does not amount to a taking.)

In light of *Arkansas Fish and Game v. U.S.* landowners damaged by flooding will no longer need to allege a permanent invasion. Nevertheless suits will need to address a broad range of other complicated legal and factual issues. Such complexity is illustrated by a North Carolina case, North Carolina Supreme Court in *Lea Co., v. North Carolina Bd. of Transportation*, 304 S.E.2d 164 (N.C., 1983) in which the court wrestled with issues of flood frequency, the permanency of harm, and impact on the landowner. The court observed that the plaintiff needed to show a “permanent invasion” of rights for a claim to rise to a taking (something a landowner will no longer need to do). The plaintiff in that case argued that flooding with a statistical return frequency of “from once in every twenty-six to once in every one hundred years” was enough to

constitute a taking. The court cited a variety of cases that "intermittent, but inevitably recurring, overflows" may constitute a taking. The court observed that "(o)rdinarily, a mechanical approach should not be taken with regard to frequency of flooding required to constitute a taking...." and further observed that:

The frequency of flooding which will constitute a taking generally will vary with the use to which the property is put. A frequency of flooding sufficient to establish a taking of high density urban residential property, for example, may well fail to be sufficient to establish a taking of low lying grazing lands or other agricultural lands. The issue will hinge to a great extent upon whether the value of the property has been substantially impaired by the additional flooding caused by the State's structures.

The court in this case held that the flooding which caused substantial injury to plaintiff's high density apartments in an urban area was a taking. The measure of damages was the "difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking...less any special or general benefits."

This decision is interesting from another perspective because the court, as a matter of law, limited consideration of damages to the 100-year flood:

Although floods of a magnitude of greater than a 100-year flood are statistically foreseeable, we hold as a matter of law that evidence concerning damage resulting from increased flooding above the level of increased flooding the State's structures would cause during a 100-year flood is inherently too speculative and remote in its nature to be relied upon by our courts.

This is, of course, only one case. How other courts will treat frequency of flooding in determining whether a taking has occurred and the measure of damages remains to be seen. There is also the issue how damages are to be calculated. Is flooding that occurs statistically at least once in each hundred year period sufficiently "permanent flooding" with full compensation due or is such flooding only temporary flooding with limited damages awarded?

Floodplain Moratoria on Rebuilding After a Disaster and Other Temporary Regulation of Floodplains

Many communities have adopted temporary floodplain regulations after a flood disaster. These regulations typically prohibit reconstruction of flood damaged properties within a specified period of time such as one or two years. Courts have broadly endorsed such regulations as discussed below and this support should not be disturbed by *Arkansas Game and Fish Commission v. United States*.

Temporary regulatory taking cases have focused upon the duration and restrictiveness of the regulations. The length of time a landowner must wait from the time he or she applies for a permit, zoning, amendment, etc. to the time the permit is ultimately denied or accepted is relevant to taking including temporary taking. It is not, however, an inflexible "stand alone" test for taking. Courts have sustained moratoria on development or redevelopment in hazard areas in

a variety of contexts and for varying durations. See, for example, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (S.Ct., 2002) in which Supreme Court upheld Tahoe Regional Planning Agency temporary ordinances which had applied for 32 months to “high hazard” (steep slope) zones near Lake Tahoe against a claim that the ordinances were a taking of private property. The Court concluded that “the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim....” But the Court refused to recognize any hard and fast rule for determining the duration which would be valid and which would not.

Courts want to know not only the duration of a delay but the reason for the delay (e.g., whether caused by the landowner) and the uses allowable during the delay. For example, an Ohio court in *C & D Partnership v. City of Gahanna*, 474 N.E.2d 303 (Ohio, 1984) held that a delay in approving a subdivision plat due to severe flooding was not the basis for a valid Constitutional challenge to regulations.

Normal delays in processing permits do not constitute a temporary taking. Chief Justice Rehnquist in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (S.Ct., 1987) observed, in discussing “temporary taking” that “quite different questions... arise in the case of normal delays in obtaining building permits, changing in zoning ordinances, variances, and the like....” See also *Valley View Industrial Park v. City of Redmond*, 733 P.2d 182 (Wash., 1987) (Delay which occurred in processing of building permit applications did not justify damages for interim taking where delay did not extend beyond reasonable period for issuance of permits. Processing of permits for a project of this nature required a minimum of 4-6 months.)

Courts have also upheld building moratoria for particular, fixed periods of time. See, for example, *Carl Bolander & Sons v. City of Minneapolis*, 378 N.W.2d 826 (Minn., 1985) (Minnesota court upheld 60 day moratorium on building permits while the city clarified plans on use of area as a public park.); *Bradfordville Phipps Limited Partnership v. Leon County*, 804 So. 2d 464 (Fla., 2001) (Florida court of appeal held that temporary moratorium on development in an area until a stormwater plan could be implemented was not a taking.); *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850 (N.D., 2005), cert. denied, 547 U.S. 1130 (S.Ct. 2006). (Court held that 21 month moratorium on building permits for flood areas were not a temporary taking.) The South Carolina Supreme Court in *Sea Cabins v. City of Myrtle Beach*, 548 S.E.2d 595 (S.C., 2001) held that city denial of a permit to rebuild a pier for four years after Hurricane Hugo was not a temporary taking in light of the economic uses for the entire property.

Conclusion

The impact of the *Arkansas* case upon floodplain and wetland managers will depend, in large measure, upon what the lower court will do with the case on remand and what changes government agencies make in policies in response to the case. However, as a result of the decision there will likely be many new cases claiming a temporary taking at federal, state, or local levels. And, these cases are likely to be expensive and dominated by expert testimony, technical studies, and hydrologic and hydraulic models.

Government floodplain and wetland managers will need to be more careful in undertaking activities which even temporarily increase flooding on private lands including operation of flood control measures and issuance of permits. They will need, in administering their programs, to look at the factors considered by courts in determining whether a taking occurs.

The case should not undermine temporary floodplain moratoria of sort adopted by communities after disasters although there will likely be arguments that if temporary flooding is a taking, temporary regulation should also be a taking. Flooding, whether temporary or permanent, involves a physical intrusion onto private lands; temporary regulations do not.