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Elizabeth Judy

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Taking on Water: The Supreme Court Rejects a Temporary Flooding Exception to Fifth Amendment

*Arkansas Game & Fish Commission v. United States*¹

I. INTRODUCTION

In *Arkansas Game & Fish Commission v. United States*, the Supreme Court addressed whether there is a blanket exception to the Fifth Amendment Takings Clause as applied to temporary government-induced flooding.² The case is significant in that the Court held there is no automatic exemption for temporary flooding cases, reversing the controversial decision of the Court of Federal Claims, which held that a bright-line rule should be applied to government-induced flooding cases.³ Emphasizing a need for case-by-case review of factual circumstances when making a decision about whether a temporary flooding can rise to the level of a taking under the Fifth Amendment, the Court has opened the door wider for potential future litigation.⁴ The implications of the decision involve the tension between the practical and the equitable, that is, whether the government should, through such agencies as the Corps of Engineers, be able to regulate water levels without worrying about increased litigation?

This note begins by setting forth the facts and events that led to the Federal Circuit's decision, and the Supreme Court's subsequent review of it. The second section then examines the body of precedent considered by the Court, followed by a third section examining the legal analysis and holding of *Arkansas Game & Fish*. The final section is a critical discussion and commentary on *Arkansas Game & Fish*, which explores the

¹ *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) [hereinafter *Arkansas Game & Fish*].

² *Id.* at 515.

³ *Id.*

⁴ *Id.* at 518.

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practical policy implications and possible consequences that may follow this Takings Clause determination. Ultimately, the conclusion drawn is that *Arkansas Game & Fish* was a sensible (and unsurprising) holding that nevertheless may cause difficulties for the Corps of Engineers and other government actors when dealing with environmental issues in the future.

II. FACTS AND HOLDING

From 1993 to 2000, the U.S. Army Corps of Engineers (“Corps”) facilitated flooding that extended into the peak period for timber growth on forest land owned and managed by the petitioner, Arkansas Game and Fish Commission (“Commission”).⁵ The repeated flooding not only interrupted the ordinary use and enjoyment of the land, but also damaged or destroyed more than 18 million board feet of timber.⁶ The Commission sought relief against the United States pursuant to the Fifth Amendment’s Takings Clause.⁷

Located in Arkansas, the land in question, owned by the Commission, included 23,000 acres, and is called the Dave Donaldson Black River Wildlife Management Area (“Management Area” or “Area”), which extended along both banks of the Black River.⁸ The Management Area, which is operated as a wildlife and hunting preserve, is forested with multiple hardwood timber species essential to the character of the Area as an animal habitat, recreational area, and hunting venue.⁹ The Corps of Engineers constructed the Clearwater Dam (“Dam”) 115 miles upstream in 1948, implementing the Water

⁵ *Id.* at 515.

⁶ *Id.*

⁷ *Id.* See also U.S. CONST. amend. V (“[N]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

⁸ *Arkansas Game & Fish*, 133 S. Ct. at 515.

⁹ *Id.* at 515-16.

Control Manual (“Manual”) soon afterwards to determine the rates at which water would be released from the dam.¹⁰ The Manual release rates vary according to the seasons, but there are permit-planned deviations from the prescribed rates for varying considerations of agricultural, recreational, and other demands.¹¹

Complications began to arise in 1993, when the Corps authorized a planned deviation – releasing water from the Dam at a slower rate than usual – in order to give farmers more harvest time.¹² The cost of this farmer-requested deviation coincidentally interfered with the Management Area’s tree-growing season.¹³ Similar deviations were implemented by the Corps from 1994 through 2000, though the decision to deviate from the Manual was made independently every year and the amount of deviation varied.¹⁴

The Commission initiated the lawsuit at issue in *Arkansas Game & Fish Comm’n v. United States*¹⁵ in 2005, claiming that the deviations from the Manual amounted to a taking of property that entitled the Commission to compensation.¹⁶ The cumulative impact of the deviation caused sustained flooding during tree-growing season from 1993 to 1999, resulting in the destruction of valuable timber and a substantial change in the landscape necessitating costly reclamation measures.¹⁷ Upon considering the Commission’s case, the Court of Federal Claims held in favor of the Commission and awarded it \$5.7 million, accounting for the lost timber and projected cost of the reclamation.¹⁸

¹⁰ *Id.* at 516.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Arkansas Game & Fish Comm’n v. United States*, 74 Fed. Cl. 426 (Fed. Cl. 2006).

¹⁶ *Id.* at 427.

¹⁷ *Arkansas Game & Fish*, 133 S. Ct. at 516-17.

¹⁸ *See Arkansas Game & Fish Comm’n v. United States*, 87 Fed. Cl. 594 (Fed.

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In a split decision, the Federal Circuit reversed.¹⁹ Judging “cases involving flooding and [flowage] easements” to be a special case, the court rejected the general principle that temporary government action may give rise to a “takings” claim if permanent action of the same character would constitute a taking.²⁰ The Federal Circuit held a government-induced flooding can give rise to a “takings” claim only if the flooding is “permanent or inevitably recurring.”²¹ Relying on *Sanguinetti v. United States* and *United States v. Cress*, the Federal Court concluded that the Corps’ flooding of the Management Area did not constitute a “taking.”²²

The Supreme Court granted certiorari to resolve the question of whether government actions causing repeated floodings must be permanent or inevitably recurring to constitute a “taking” of property.²³ The Supreme Court reversed the Federal Court’s conclusion, holding that recurrent flooding, even if of finite duration, are not categorically exempt from Takings Clause liability.²⁴

Cl. 2009).

¹⁹ *Arkansas Game & Fish Comm’n v. United States*, 637 F.3d 1366, 1378-79 (Fed. Cir. 2011) (finding, in a 2-1 decision, reversing 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).

²⁰ *Arkansas Game & Fish*, 133 S. Ct. at 517 (quoting *Arkansas Game & Fish Comm’n*, 637 F.3d at 1374).

²¹ *Arkansas Game & Fish*, 133 S. Ct. at 517 (quoting *Arkansas Game & Fish Comm’n*, 637 F.3d at 1378).

²² *Arkansas Game & Fish*, 133 S. Ct. at 518. See *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924); See also *United States v. Cress*, 243 U.S. 316, 328 (1917).

²³ *Arkansas Game & Fish*, 133 S. Ct. at 518.

²⁴ *Id.* at 515.

III. LEGAL BACKGROUND

A. The Fifth Amendment Takings Clause

The Takings Clause of the Fifth Amendment is rooted as much in fairness as it is in the historical development of the United States – as such, the ebbs and flows of its common law development has presented a complex body of precedent.²⁵ Fashioned with a purpose to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,”²⁶ the Takings Clause has often been discussed in tandem with certain civil claims and eminent domain law.²⁷ The first hurdle of understanding the Takings Clause as it applies to temporary flooding, however, is to understand the government’s duty and when it is triggered.

B. Early Supreme Court Precedent

It is well-established in United States case law that “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”²⁸ Cases like *Loretto* made it clear that some bright lines *have* indeed existed in takings case law for some time.²⁹ For example, permanent physical occupation is always a taking in the context of the Fifth Amendment.³⁰ Through its interpretation of case law, however, the Court soon extended the Takings Clause to include interference with private lands that are temporary in nature.³¹

²⁵ *See id.* at 518.

²⁶ *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

²⁷ *See Arkansas Game & Fish*, 133 S. Ct. at 518-19.

²⁸ *Id.* at 518 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002)).

²⁹ *Arkansas Game & Fish*, 133 S. Ct. at 518.

³⁰ *Id.*

³¹ *See id.* at 518-519.

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The Supreme Court first answered the question of whether the government “takes possession” specifically with regard to government-induced flooding in 1872.³² When the Wisconsin Legislature in *Pumpelly v. Green Bay Co.*³³ authorized the defendant to build a dam which submerged the plaintiff’s land under a newly-formed lake, the defendant argued because the damage was merely “consequential” and the government had not exercised eminent domain over the title to the plaintiff’s land, the flooding was not a taking.³⁴ The Court disagreed, holding “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”³⁵

Not long after, in *United States v. Cress*, the Court established that seasonal flooding, in addition to more permanent inundations of land, could also rise to the level of a taking.³⁶ The government’s construction of a lock and dam, which subjected the plaintiff’s land to “intermittent but inevitably recurring overflows,” gave rise to a takings claim that was no less valid than the claim of an owner whose land was continuously kept under water.³⁷

Though the Court has long recognized the government’s duty to compensate landowners when it floods private property,³⁸ strictures were put on that with the holding in *Sanguinetti v.*

³² See *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1871).

³³ *Id.*

³⁴ *Id.* at 177.

³⁵ *Id.* at 181.

³⁶ *United States v. Cress*, 243 U.S. 316, 328 (1917).

³⁷ *Id.*

³⁸ See, e.g., *Pumpelly*, 80 U.S. at 181 (“[W]here real estate is invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”).

United States.³⁹ This 1924 decision, in which the court clarified that flooding caused by the government must “constitute an actual, permanent invasion of land” to rise to the level of a taking, has led to no small amount of confusion in Takings Clause considerations.⁴⁰ In *Sanguinetti*, the Court held the government should be free from takings liability because there was a lack of intent and foreseeability, and instead held that because the interference with property was consequential, the government had no implied obligation to compensate the owner for indirect and consequential damages.⁴¹

*C. Modernization of Takings Clause interpretation
– WWII and After.*

The Supreme Court’s intensified interpretation of the Takings Clause loosened after World War II.⁴² The Court recognized that interference with property for wartime necessity, though temporary, still entitled the owner to compensation under the Takings Clause.⁴³ In *United States v. Causby*, a landmark decision, the Court acknowledged a taking had occurred wherever there had been “direct and immediate interference with the enjoyment and use of land” – even with a temporary time-frame.⁴⁴ Since the post-WWII era, the Court has recognized that

³⁹ *Sanguinetti v. United States*, 264 U.S. 146 (1924).

⁴⁰ *Id.* at 149.

⁴¹ *See id.* at 150 (“The most that can be said is that there was probably some increased flooding due to the canal and that a greater injury may have resulted than otherwise would have been the case. But this and all other matters aside, the injury was in its nature indirect and consequential, for which no implied obligation on the part of the government can arise.”)(subsequent supporting citations omitted).

⁴² *See Arkansas Game & Fish*, 133 S. Ct. 511, 519 (2012).

⁴³ *Id.*

⁴⁴ *United States v. Causby*, 328 U.S. 256, 266 (1946) (frequent overflights from a nearby airport resulted in a taking, for the flights deprived the property owner of the customary use of his property as a chicken farm); *See also*, *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (flooding of claimant’s land was a taking even though claimant successfully “reclaimed most of his land which the Government originally took by flooding”).

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the consequences of a government action need not be permanent to constitute a taking.⁴⁵ Even where the property owner was able to regain use of some or all of her land, “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”⁴⁶

IV. INSTANT DECISION

In holding that the government’s action of temporarily flooding property can sometimes constitute a taking, the Court focused on precedent establishing both that government-induced flooding can rise to the level of a taking, and a taking can be both temporary *and* compensable.⁴⁷ Although the Court does not address issues of causation, foreseeability, substantiality, and amount of damages, the instant case was reversed and remanded in regards to those issues.⁴⁸ Instead, the Court ruled on the Federal Circuit’s supposed single automatic-exemption decision, holding that temporary government-induced flooding is not automatically exempted from Takings Clause inspection.⁴⁹

First and foremost, the Court refused to create a bright-line rule for takings cases, noting that such claims turn on situation-specific factual inquiries.⁵⁰ Precedent established in *Pumpelly v. Green Bay Co.* and *United States v. Cress* maintain that government-induced flooding and seasonally recurring

⁴⁵ *Arkansas Game & Fish*, 133 S. Ct. at 519.

⁴⁶ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987); *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 337 (2002) (“[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.”).

⁴⁷ *Arkansas Game & Fish*, 133 S. Ct. at 519.

⁴⁸ *Id.* at 523.

⁴⁹ *Id.* at 522.

⁵⁰ *Id.* at 513 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

flooding can both constitute takings.⁵¹ The Court has also held that impermanent takings can also be compensable.⁵²

Relying primarily on *Sanguinetti v. United States*,⁵³ the government in the instant case advocated a blanket temporary-flooding exception.⁵⁴ Emphasizing one sentence of *Sanguinetti* in particular, the government argued “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 the land.”⁵⁵ Instead of taking this as a definitive rule that there can be no temporary taking caused by floods, the Court decided instead to defer to the precedent introduced in the WWII-era cases and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,⁵⁶ which observed that compensation was, contrary to the government’s argument, appropriate for some temporary takings.⁵⁷

The Court also dismissed the Government’s argument that reversing the Federal Circuit’s decision would put public works dedicated to flood control at risk.⁵⁸ Acknowledging that the public interests involved are important, the Court nevertheless held that “they are not categorically different from the interests at stake in myriad other Takings Clause cases in which this Court has rejected similar arguments when deployed to urge blanket exemptions from the Fifth Amendment’s instruction.”⁵⁹ The Government’s attempt at raising an alternative argument with

⁵¹ *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1871); *United States v. Cress*, 243 U.S. 316, 328 (1917).

⁵² *See, e.g., United States v. Causby*, 328 U.S. 256, 266 (1946).

⁵³ *Sanguinetti v. United States*, 264 U.S. 146 (1924).

⁵⁴ *Arkansas Game & Fish*, 133 S. Ct. at 519.

⁵⁵ *Id.* at 520 (citing *Sanguinetti*, 264 U.S. at 149).

⁵⁶ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 107 S. Ct. 2378 (1987).

⁵⁷ *Arkansas Game & Fish*, 133 S. Ct. at 520.

⁵⁸ *Id.* at 514.

⁵⁹ *Id.*

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regard to collateral or incidental damage also failed.⁶⁰ The Court declined to address the issue because it was first raised at oral argument.⁶¹

In this case, the Court emphasized that in such a fact-based determination, there is no “magic formula [that] enables a court to judge, in every case, whether a given government inference with property is a taking.”⁶² Normally, the factual inquiries required in a Takings Clause case require the Court to evaluate duration of the government interference, degree to which the invasion is intended or is the foreseeable result of authorized government action, and severity of interference.⁶³ Because the Federal Circuit handed down its decision entirely based on the temporary nature of the government’s action, however, the Court reviewed the takings issue only in light of the duration of the flooding.⁶⁴ The Court seems not only to note, but to stress that on remand, that the issues of causation, foreseeability, substantiality, and damages remain open for consideration.⁶⁵

V. COMMENT

In reversing the Federal Circuit’s decision in *Arkansas Game & Fish*, the Court rejected, unsurprisingly, any hard and fast rule about what constitutes a taking.⁶⁶ Where the Court of Claims had been willing to draw a bright line, and the Federal Court even more so, the Supreme Court’s consideration of its body of precedent made the outcome of this conflict one that put to rest any question of a bright-line rule.⁶⁷ The decision is

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 518.

⁶³ *Id.* at 514.

⁶⁴ *Id.* at 514-15.

⁶⁵ *Id.*

⁶⁶ *Id.* at 515.

⁶⁷ *See id.* at 518-19.

significant to the “bundle of sticks” that landowners and the government alike cling to with regard to property rights.⁶⁸ In fact, some interpret *Arkansas Game & Fish* as “cast[ing] doubt on the viability of ‘blanket’ defenses in future takings claims.”⁶⁹

*A. The Justices’ Concerns and Yet Another
Balancing Test*

Though the Court’s opinion in *Arkansas Game & Fish* was a unanimous decision, at oral arguments more than one Justice was worried about what deciding the case for the Commission would do to precedent.⁷⁰ Chief Justice Roberts seemed most concerned with the land-water takings distinction, saying, “It’s a different case when they go in with the chainsaw than when they go in with water.”⁷¹ Justice Ginsberg questioned whether the Court would have to overrule or modify *Sanguinetti* and other decisions in order to find for the Commission.⁷² Justice Scalia, on the other hand, seemed less concerned with the necessity of taking either of those actions.⁷³ By his reasoning, the language quoted from *Sanguinetti* was mere dicta, and, insofar as the decision posits that a temporary invasion cannot constitute a

⁶⁸ Brian T. Hodges, *Arkansas Game & Fish Commission v. United States: U.S. Supreme Court Disapproves of Per Se Defenses in Takings Cases*, 65 PLAN. & ENVTL. L. NO. 3, 10 (2013).

⁶⁹ *Id.*

(quoting *Arkansas Game & Fish*, “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.”).

⁷⁰ See generally Transcript of Oral Argument, *Arkansas Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012) (No. 11-597).

⁷¹ Jonathan Stempel, *Supreme Court weighs federally created floods*, REUTERS (Oct. 3, 2012 2:42 PM), <http://www.reuters.com/article/2012/10/03/us-usa-court-flooding-idUSBRE89217120121003>.

⁷² Brian T. Hodges, *More thoughts on the Arkansas Game & Fish Commission argument*, LIBERTY BLOG (Oct. 5, 2012), <http://blog.pacificlegal.org/2012/more-thoughts-on-the-arkansas-game-fish-commission-argument/>.

⁷³ *Id.*

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taking, it has already been overruled by the Court's large body of cases recognizing that temporary interferences can constitute takings,⁷⁴ particularly those cases determined post-WWII.

Much of the attention leading up to the Court's opinion in *Arkansas Game & Fish* was focused on what test the court would utilize; whether a temporary flood invasion should be treated like all other temporary physical takings or whether the Court should devise a new test applicable only to cases of temporary flooding.⁷⁵ The Court has applied the same "character of the invasion" test from *United States v. Causby* to every physical taking case it has reviewed, regardless of the method or duration of the invasion.⁷⁶ With the test the Court settled on, it seems as though the tests advocated for in the PLF/Cato Institute/ALF amicus briefs was correct.⁷⁷ Looking at the different factors surrounding the flooding in *Arkansas Game & Fish*, the Court prescribes a balancing test considering the length of the government's interference with private property interests, the degree to which the invasion is intended or is the foreseeable result of authorized government action, the character of the land at issue, the owner's reasonable investment-backed expectation regarding the land's use, and the severity of the interference.⁷⁸

Still, not all were satisfied with the Court's decision in regard to what test it advocated.⁷⁹ Brian T. Hodges, one of the authors of the PLF/Cato Institute/ALF amicus briefs comments:

⁷⁴ *Id.*

⁷⁵ Brian T. Hodges, *Is the federal government shifting the focus in Arkansas Game & Fish Commission?*, LIBERTY BLOG (Sept. 21, 2012), <http://blog.pacificlegal.org/2012/is-the-federal-government-shifting-the-focus-in-arkansas-game-fish-commission/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Arkansas Game & Fish*, 133 S. Ct., at 514.

⁷⁹ Hodges, *supra* note 72.

The decision, however, did not indicate what test is applicable to temporary physical invasions. Instead, it listed, without differentiation, fragments from various tests that have been developed over the years to determine different types of takings. For example, the Court recited the “intent or foreseeability” test that is applied as a threshold inquiry to distinguish physical takings from torts like negligence and trespass. The Court also referenced the “character of the invasion” test that was developed to determine whether a government act physically appropriates an interest in private property. The Court next recited the “reasonable investment-backed expectations” test developed specifically for ad hoc regulatory takings in *Penn Central Transp. Co. v. New York City*.⁸⁰

Arguing that the Court’s own declaration that it intended only to rule narrowly,⁸¹ Hodges rejects the notion that the court was advocating any sort of hybrid test.⁸² “[T]he only conclusion that can be drawn from *Arkansas Game & Fish Commission*,” Hodges claims, “is that 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.”⁸³

In utilizing a balancing test, the Court rejected any attempt of lower courts to carve out an exception to this area of takings precedent or make any easy considerations. As with any balancing test, however, it introduces its own body of complications and considerations. By expressly rejecting any distinction between temporary and permanent government intrusions on private property, the decision in *Arkansas Game &*

⁸⁰ *Id.*

⁸¹ *Id.* (“We rule today, simply and only, that government induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.”)

⁸² *Id.*

⁸³ *Id.*

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Fish “closes a dangerous loophole in takings law that could be exploited to allow the government to avoid its obligation to pay just compensation when it takes private property.”⁸⁴ Simply put, “the Takings Clause does not come with a stopwatch . . . imposing arbitrary conditions and limits on the duty to compensate only serves to weaken property rights, and, by extension, all the rights secured by the Constitution.”⁸⁵ Going forward, then, the meaning and impact of this language will likely be a hotly contested aspect of the remand proceedings in *Arkansas Game & Fish Commission*.⁸⁶ It remains to be seen whether the lower court, upon revising this controversy on remand, will fall back on the Court’s more traditional approach, or see this language as warranting an entirely new test altogether.⁸⁷

*B. The Flip Side: the Burden of Losing for the
Corps of Engineers*

Though it is an apt observation that the government should not be able to impose burdens on property without having to answer for its actions, the flip side of the argument stresses the importance of the Corps of Engineers and other entities to respond to flooding and other environmental difficulties. In its brief to the Supreme Court, the Government stressed the importance of the Corps of Engineers, emphasizing the historical role that the government actor has played.⁸⁸ Indeed, the Corps of

⁸⁴ Jonathan Stempel, *U.S. Supreme Court weighs federally created floods*, REUTERS (Oct. 3, 2012, 11:55 PM), <http://in.reuters.com/article/2012/10/03/usa-court-flooding-idINL1E8L351U20121003>.

⁸⁵ Brian T. Hodges, *Important property rights victory in Arkansas Game & Fish Commission v. United States*, LIBERTY BLOG (Dec. 4, 2012), http://blog.pacificlegal.org/2012/agfc_property_rights_victory/.

⁸⁶ Hodges, *supra* note 72.

⁸⁷ *Id.*

⁸⁸ Brief for Respondent at 2, *Arkansas Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012) (No. 11-597) 2012 WL 3680423, at *2 (“For

Engineers has taken on the responsibility of managing and improving navigable waters, and today it is responsible for thousands of miles of commercial navigation channels and hundreds of locks and dams.⁸⁹ In the context of water-resource management, the Corps of Engineers' responsibilities include flood control.⁹⁰

"Federal involvement in flood control dates to at least 1849," the Government's brief informs the Court, "but it was after a series of deadly and devastating floods in the early 20th century that Congress enacted legislation 'directly and openly aimed at flood control.'"⁹¹ Reacting to the catastrophic lower Mississippi River flooding of 1927, Congress passed the Flood Control Act of 1928⁹², authorizing the "largest public works project undertaken up to that time in the United States."⁹³ Not long after this legislation was enacted, Congress established the first nationwide flood-control program.⁹⁴

Looking at the work that the Corps of Engineers has done up to the present-day, it is clear that the Corps of Engineers suffers from no lack of responsibilities to attend to. The Corps currently has built or controls 11,750 miles of levees, and it maintains and operates more than 690 dams that store more than 100 trillion gallons of water.⁹⁵ These water control assets control

nearly two centuries, the United States Army Corps of Engineers has played an essential role in developing, managing, and protecting the Nation's water resources.").

⁸⁹ See The U.S. Army Corps of Engineers: A Brief History, US ARMY CORPS OF ENGINEERS,

[http://www.usace.army.mil/About/History/BriefHistoryoftheCorps.aspx.](http://www.usace.army.mil/About/History/BriefHistoryoftheCorps.aspx)

⁹⁰ Brief for Respondent at 2, *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) (No. 11-597) 2012 WL 3680423, at *2.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*, citing *United States v. James*, 478 U.S. 597, 606-07 (1986).

⁹⁴ Brief for Respondent at 2, *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) (No. 11-597) 2012 WL 3680423, at *2.

⁹⁵ *Id.*

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everything from flooding (with benefits to life, property, and the environment) to navigation, water supply, hydropower, and recreation.⁹⁶ Even examining solely the monetary benefits of the Corps' flood-control projects, the impact is staggering, from 2000 to 2009 those projects are estimated to have saved an average of \$22.3 billion in damages per year.⁹⁷ Beyond the monetary impact, the actions of the Corps of Engineers affect the day to day lives of approximately 4.5 million people who live or work behind the Mississippi River and Tributaries project.⁹⁸ This project alone protects 22.4 million acres, has provided a 34:1 return on investment, and just in 2011 prevented flooding of more than 10 million acres and damages of more than \$110 billion.⁹⁹

In oral arguments, Deputy Solicitor General Edwin Kneidler argued that the Army Corps of Engineers “requires a broad ambit of discretion” when making flood management decisions, including leeway to release destructive floodwaters downstream without incurring liability.¹⁰⁰ Arguing for the United States, Kneidler called the case “a classic example” of the government’s struggle to balance the “benefits and burdens” of water control—in essence, that there was usually a winner and

⁹⁶ *Id.* at 3 (Further, the “Corps facilities store 3 trillion gallons of municipal and industrial water supplies, provide 24% of the Nation’s hydropower capacity, and receive 370 million visitors per year.” *Id.*).

⁹⁷ *Id.* (“On average since 1928, the Corps’ projects have cost only \$1 for every \$7.17 in damage they have prevented. See NAT’L RESEARCH COUNCIL, NATIONAL WATER RESOURCES CHALLENGES FACING THE U.S. ARMY CORPS OF ENGINEERS 32-33 (2011).”).

⁹⁸ Brief for Respondent at 3, *Arkansas Game & Fish Commission v. United States*, No. 11-597 (U.S. Aug. 27, 2012).

⁹⁹ *Id.*

¹⁰⁰ Damon Root, *Supreme Court Questions Federal Government’s Narrow Reading of Takings Clause*, REASON.COM (Oct. 4, 2012, 11:55 AM), <http://reason.com/blog/2012/10/04/supreme-court-questions-federal-governme>.

loser in the context of water release cases.¹⁰¹ He also said the releases had only “incidental consequences.”¹⁰² It is true that if the Corps of Engineers is so encumbered with liability concerns, it could find its functions more difficult to perform effectively, but this does not and should not exempt such entities from compensating those individuals who bear the burden of accomplishing the important societal functions of government actors.

Looking at this dilemma practically, the myriad of procedural and environmental requirements already in place tend to cause the Corps of Engineers, and other governmental actors, to make long-term decisions about how water will be managed. Particularly in view of this Court’s decision, any ensuing flooding that could be interpreted as “permanent” could warrant compensation, paid for out of the Corps’ pocket.¹⁰³ The NEPA, for example, requires the Corps of Engineers to prepare an environmental impact statement for every major action that will significantly affect the quality of the environment.¹⁰⁴ Likewise, the Endangered Species Act of 1973 (“ESA”)¹⁰⁵ may require a biological assessment by the Corps of Engineers and a secondary opinion by the Fish and Wildlife Service.¹⁰⁶ With these protocols in place, the Corps of Engineers is required to articulate with some particularity how it proposes to operate a project so that the Corps of Engineers and other agencies can evaluate the effects of

¹⁰¹ Jonathan Stempel, *U.S. Supreme Court weighs federally created floods*, CNBC.COM (Oct. 3, 2012, 2:25 PM), <http://www.cnbc.com/id/100131806>.

¹⁰² Damon Root, *supra* note 102.

¹⁰³ *See generally* Arkansas Game & Fish Comm’n v. United States, 133 S. Ct. 511 (2012).

¹⁰⁴ *See* 42 U.S.C. § 4332(2)(C).

¹⁰⁵ 16 U.S.C. § 1531 *et seq.*

¹⁰⁶ *See* 16 U.S.C. §§ 1536(a)-(d). *See generally* In re Operation of the Mo. River Sys. Litig., 421 F.3d 618 (8th Cir. 2005) (discussing ESA and NEPA requirements related to Corps operation of flood-control and irrigation project on the Missouri River), *cert. denied*, 547 U.S. 1097 (2006).

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a proposed course of action.¹⁰⁷ This process of seemingly endless checks and regulations in turn lends a relative permanence to most significant decisions affecting the Corps' responsibilities.¹⁰⁸

With the Court's decision in the instant case, the Corps' job is bound to be plagued with even more uncertainty in weighing their future decisions. Though the Court deemed this practical policy difficulty as less important than the Takings Clause's role in protecting property rights from government interference, going forward there will inevitably be more litigation questioning the how and when of flooding liability.

C. Championing Property Rights – the Fifth Amendment at Work.

The plight of the Corps of Engineers aside, the Fifth Amendment's Takings Clause was designed to protect against such government actions that try to force "some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."¹⁰⁹ The government's concern, then, may be more rooted not in a desire to dodge all liability for temporary takings, but in a desire to have a more clear-cut idea of when they will and will not have to foot the bill for any and all foreseeable consequences of their actions. Their slippery slope argument plays to the fear that if the Court will not draw a bright line in this case, it will lead to even more claims against its crucial actors, and the expenses and difficulties will entrench the Corps of Engineers and other entities from being able to function correctly.¹¹⁰ If the Court recognizes a temporary taking as compensable in this case, will even the briefest of interruptions

¹⁰⁷ Brief for Respondent at 22, *Arkansas Game & Fish Commission v. United States*, No. 11-597 (U.S. Aug. 27, 2012).

¹⁰⁸ *Id.*

¹⁰⁹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹¹⁰ *Arkansas Game & Fish*, 133 S. Ct at 521.

from government action eventually be cause for expensive litigation? It is for this reason that the court says “[w]hile we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after *Causby*, and today’s modest decision augurs no deluge of takings liability.”¹¹¹

It is the nature of the beast for government actors such as the Corps of Engineers that when trying to control flooding, some land and benefits may have to be sacrificed in order to get the job done. With the facts in *Arkansas Game & Fish*, the Corps flooded the state’s duck hunting and lumber lands in favor of the upstream farmers, who were able as a result of the Corps’ actions to increase their productivity.¹¹² Naturally, concerns of the environmental impact of decisions to flood valuable wildlife lands are dramatic here, due to the damage done by the habitual flooding that change the fundamental uses of the wildlife area. What if the farmlands had been downstream? The action taken by the government may well have been different. The crux of the issue is that of making difficult decisions. Flooding *will* happen – the Corps and other entities exist to try and adapt to the changing landscape in a way that will lead to the greatest public benefit. Justice Sotomayor explained:

The problem with this case is that flooding is going to occur naturally anyway. The government generally builds dams to control that flooding to the benefit of all of the interests along its affected route. And at some point, either the government is going to make a decision that’s going to help someone and potentially hurt someone. And the question is, are all of those situations going to be subject to litigation?¹¹³

¹¹¹ *Id.*

¹¹² *Id.* at 513.

¹¹³ Brian T. Hodges, More Thoughts on the Arkansas Game and Fish Commission argument, LIBERTY BLOG (Oct. 5, 2012),

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Though none of the briefs addressed this important issue, it shows the difficulty that a logically-based and seemingly fair balancing test like the one implemented by the Court in *Arkansas Game & Fish* does not solve most of the problems surrounding such situations. The facts at hand reflect the difficulties specific to this case, but the Commission is surely just one of many land holders that, should one view this decision through a pessimistic lens, merely want a piece of the proverbial pie. Undoubtedly, the Court's rejection of a blanket exception to the Takings Clause in *Arkansas Game & Fish* represents a step forward in protecting property rights.¹¹⁴ The decision eliminated a categorical defense to takings claims, and established principles that should fend off future categorical rules limiting government liability under the Takings Clause.¹¹⁵ The concern going forward, then, is that the Court here has provided only a temporary fix for the temporary takings issue, leaving the question of how a court should review such a claim unanswered.¹¹⁶

VI. CONCLUSION

The Court's decision in *Arkansas Game & Fish* was one that rejected a bright-line rule in favor of a more balanced approach, reflecting the Court's understanding that not all cases of temporary flooding are created equal. The logical conclusion of the Court, however, is bound to have ramifications that seep into other areas of Takings Clause liability. Whether one is of the opinion that the court has "whittle[d] away" the protections against government overreach provided for by the

<http://blog.pacificlegal.org/2012/more-thoughts-on-the-arkansas-game-fish-commission-argument/>.

¹¹⁴ See generally Brian T. Hodges, *Arkansas Game & Fish Commission v. United States: U.S. Supreme Court Disapproves of Per Se Defenses in Takings Cases*, 65 PLANNING & ENVTL. NO. 3 (2013).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Fifth Amendment,¹¹⁷ or that the Court is a great champion of the Takings Clause, to dismiss the implications of the Court's decision in *Arkansas Game & Fish* as simple would be in error.

By looking at the intent, foreseeability, and character of the intrusion, the Court clearly desires lower courts to be more able to evaluate the outcome of each case that comes before them on a fact-by-fact basis. Will this ill-defined standard for determining if a taking has occurred prove sufficient in the face of endless variations on the facts of *Arkansas Game & Fish*? With the government interests and property interests in tension, and uncertainty surrounding the standard that should be utilized going forward, the Court has run quite a risk that this simple and straightforward opinion will create a litigious swampland all its own.

ELIZABETH JUDY

¹¹⁷ Damon W. Root, *Protecting Property Rights from the Army Corps of Engineers*, REASON.COM (Sept. 9, 2012), <http://reason.com/archives/2012/09/19/protecting-property-rights-from-the-army>.

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