

March 2014

Arkansas Game & Fish Commission v. U.S.

Katelyn J. Hepburn

University of Montana School of Law, katelyn.hepburn@umontana.edu

Follow this and additional works at: <https://scholarworks.umt.edu/plrlr>



Part of the [Constitutional Law Commons](#), and the [Environmental Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Hepburn, Katelyn J. (2014) "Arkansas Game & Fish Commission v. U.S.," *Public Land & Resources Law Review*: Vol. 0 , Article 15.

Available at: <https://scholarworks.umt.edu/plrlr/vol0/iss4/15>

This Case Summary is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Public Land & Resources Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

Arkansas Game & Fish Commission v. U.S., 736 F.3d 1364 (Fed. Cir. 2013).

Katelyn J. Hepburn

I. ABSTRACT

The United States Court of Appeals for the Federal Circuit, on remand from the Supreme Court, reconsidered whether temporary increased dam-releases resulting in downstream flooding, constituted a physical taking under the Fifth Amendment of the United States Constitution. Applying the Supreme Court’s more complex balancing test, the Court of Appeals affirmed the Court of Federal Claims’ decision holding that temporary government-induced flooding can qualify as a Fifth Amendment taking. The court upheld an award of damages in excess of \$5.7 million.

II. INTRODUCTION

Arkansas Game & Fish Commission v. United States,¹ concerns the expansion of the Takings Clause to encompass a temporary invasion of private property where a federal agency’s increased dam releases caused severe damage to downstream state-managed timber lands.² On appeal, the Supreme Court held that “government-induced flooding can constitute a taking even if it is temporary in duration.”³ However temporary takings claims are subject to a more complex balancing test than permanent physical takings.⁴ On remand, the Court of Appeals for the Federal Circuit had to determine: 1) whether the duration of the invasion was significant, 2) whether the flooding caused widespread damage to trees, 3) whether the damage was

¹ 736 F.3d 1364 (2013).

² *Id.* at 1368-1369.

³ *Ark. Game & Fish Comm’n v. U.S.*, ___ U.S. ___, 133 S.Ct. 511 (2012).

⁴ *Id.*

foreseeable, and 4) whether the damage was sufficiently severe to constitute a compensable taking.⁵

III. FACTUAL AND PROCEDURAL BACKGROUND

The Arkansas Game & Fish Commission owns and manages the Dave Donaldson Black River Wildlife Management Area (“the Management Area”) in northeastern Arkansas.⁶ The Management Area is a wildlife and hunting preserve, though timber harvests and forest regeneration are also a significant part of the Commission’s management strategy.⁷ In the 1940s, the Army Corps of Engineers (“Corps”) constructed a flood control dam on the Black River, upstream of the Management area.⁸ The Corps instituted a water release policy designed to mimic natural flood patterns and avoid long-term flooding during tree growing season.⁹ However, in 1993 the Corps approved increased water flow standards to provide excess water to downstream farmers.¹⁰ This resulted in prolonged periods where valuable hardwood stands were inundated with water.¹¹ In 1999, the Corps reverted back to more conservative releases to reduce “potential damage to the bottomland hardwoods” within the Management Area.¹² In 2009, the Commission brought this action in the Court of Federal Claims alleging that the water release deviations which caused the flooding constituted a compensable Fifth Amendment taking.¹³

The Court of Federal Claims held that the deviations had resulted in the government taking “a temporary flowage easement over the Management area” which resulted in substantial

⁵ *Ark. Game & Fish Comm’n*, 736 F.3d at 1369.

⁶ *Id.* at 1367.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1367-68.

¹⁰ *Id.* at 1368.

¹¹ *Ark. Game & Fish Comm’n*, 736 F.3d at 1368.

¹² *Id.*

¹³ *Id.*

damage to over 6,000 acres of valuable hardwood timberlands.¹⁴ The court found the damage was reasonably foreseeable and awarded the Commission over \$5.6 million for lost timber, and \$176,428.34 for forest regeneration in severely degraded areas.¹⁵

The Court of Appeals reversed, holding that where flooding is not an “inevitably recurring” event, it does not give rise to a takings remedy.¹⁶ The Supreme Court reversed, holding that “government induced flooding can constitute a taking even if it is temporary in duration.”¹⁷ However, unlike permanent physical takings, the Court held that “temporary invasions are subject to a more complex balancing process.”¹⁸ The case was remanded to be analyzed under this more stringent balancing test.¹⁹

IV. ANALYSIS

First, the circuit court had to determine if the duration of the flooding was significant enough to constitute an “appropriation of the Commission’s property rights.”²⁰ The government argued that the “temporary and ad hoc” nature of the flooding could not constitute a physical taking.²¹ The court found that each seasonal deviation by itself was not sufficient to constitute a physical taking.²² However, the seven year period in which the flooding occurred constituted a repeated invasion that resulted in an “involuntary servitude.”²³ But the court made clear that not every incidence of prolonged government-induced flooding constitutes a taking.²⁴ In addition to duration, the inquiry includes whether the action caused the damage, whether the injury was a

¹⁴ *Id.* at 1368-69

¹⁵ *Id.* at 1369.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Ark. Game & Fish Comm’n*, ___ U.S. ___, 133 S.Ct. at 521.

¹⁹ *Ark. Game & Fish Comm’n*, 736 F.3d at 1369.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1370.

²³ *Id.*

²⁴ *Id.* at 1371 (citing *Ark. Game & Fish Comm’n*, ___ U.S. ___, 133 S.Ct. at 522-23).

foreseeable outcome, and whether the act was a sufficiently severe invasion which interfered with the landowner's reasonable expected use of the land.²⁵

The court found sufficient evidence in the record to support the finding that the “deviations caused substantial increases in the periods of growing-season flooding . . . and that the flooding caused widespread damage to the trees.”²⁶ This conclusion was based on testimony of the Commission's expert, who stated that the deviation periods created a “highly unique” pattern of flooding which had never happened prior and which resulted in “catastrophic mortality” of trees.²⁷ The Corps also presented compelling evidence that the flooding had “clear potential for damage to bottomland hardwoods.”²⁸ In fact, the Corps admitted that it ended the increased releases because of the negative impacts the prolonged flooding was having on the tree growing season.²⁹

In determining if the damage caused was foreseeable, the court looked to the data collected by the Corps throughout the deviation period.³⁰ In 2001, the Corps investigated the impacts of making the deviant flooding program permanent.³¹ The Corps admitted that flooding for long periods would “damage or destroy trees” in the Management Area.³² The court applied this finding retroactively, stating that if the Corps had done a reasonable inquiry at the outset of the project it would have come to this same conclusion.³³ Therefore, the court found the damage caused by the flooding was foreseeable.³⁴

²⁵ *Id.* at 1369.

²⁶ *Ark. Game & Fish Comm'n*, 736 F.3d at 1372.

²⁷ *Id.* at 1372 (citing *Ark Game & Fish Comm'n v. U.S.*, 87 Fed.Cl. 594, 632 (2006)).

²⁸ *Id.* at 1372.

²⁹ *Id.*

³⁰ *Id.* at 1373.

³¹ *Id.*

³² *Ark. Game & Fish Comm'n*, 736 F.3d. at 1373.

³³ *Id.*

³⁴ *Id.*

Finally, the court looked at the effects the flooding had on the Commission to determine the severity of the intrusion.³⁵ The court stated that the flooding deprived the Commission “of the customary use of the Management Area as a forest and wildlife preserve.”³⁶ The court rejected the government’s contention that the effect of the intrusion was irrelevant to the taking inquiry.³⁷ The court addressed this by distinguishing between the moderate pre-deviation period floods and the post-deviation floods which had significantly more serious consequences.³⁸ Most important was that the severity of the flooding had changed substantially, causing severe damage to the Management Area and making large tracts of land unsuitable for their primary purpose.³⁹ Accordingly, the court found that the temporary flooding constituted a physical taking and upheld damages for the Commission.⁴⁰

V. CONCLUSION

Arkansas Game & Fish Commission marks the first application of a more extensive balancing test to determine if temporary, government induced flooding can constitute a Fifth Amendment taking. This case represents a difficult takings question where the effect of a federal action, implemented to provide an agricultural benefit, falls disproportionately on another landowner. The court makes it clear that those disproportionate affects can, in some circumstances, constitute a costly taking of property, even where the action is temporary.

³⁵ *Id.* at 1375.

³⁶ *Id.* at 1375 (citing *Ark. Game & Fish Comm’n*, ___ U.S. ___, 133 S.Ct. at 522).

³⁷ *Id.*

³⁸ *Id.* at 1374.

³⁹ *Ark. Game & Fish Comm’n*, 736 F.3d at 1374-75.

⁴⁰ *Id.*