

Arkansas Game and Fish Back in Federal Circuit After Supreme Court Ruling

Arkansas Game and Fish Commission v. United States is before the Federal Circuit again after the U.S. Supreme Court reversed the Federal Circuit's prior holding that government-induced flooding must be permanent for a taking to occur. As [we previously noted](#), the Supreme Court, in a unanimous (8-0) decision (Justice Kagan not participating), held that "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."

On March 25, 2013, the parties filed their supplemental briefs on remand. The parties structured their arguments on the U.S. Supreme Court's four-part inquiry used in analyzing the physical taking at issue: (1) the character of the land and the owner's investment-backed expectations, and the (2) foreseeability, (3) severity, and (4) duration of the flooding.

The [property owner's brief](#) understandably relies directly on the favorable Supreme Court decision, noting that "temporary floods do not escape Takings Clause inspection." The brief further argues that the U.S. Court of Federal Claims, which issued a decision in its favor, considered ample evidence in connection with the Supreme Court's four-part inquiry:

Not surprisingly, the [Government's brief](#) tries to characterize the Supreme Court's decision as narrow, one that allows the Federal Circuit to reach the same result it did last time, albeit on a less sweeping basis. The Government's brief argues that that the four-part inquiry used by the Supreme Court leads to a conclusion that no taking has occurred because:

1. The land at issue is part of a floodplain that floods regularly
2. Flooding was not intentional and not foreseeable;
3. Flooding "did not seriously interfere with the Commission's land"; and
4. Deviations from normal regulations related to water releases were temporary.

It will be interesting to see how the Federal Circuit decides this time around, and how much latitude it feels it has, having already been unanimously reversed.

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