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PANEL ON GOVERNMENT LIABILITY FOR FLOODING AFTER
ARKANSAS GAME & FISH COMMISSION V. UNITED STATES, 133 S. CT. 511 (2012)

Flood Control Takings Litigation from an Owner's Perspective

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Introduction

Readers should understand that the writer[1] represents the Arkansas Game & Fish Commission in its takings lawsuit against the United States and that the case is currently under submission to the Federal Circuit. This paper is intended to present a landowner's view of takings law in the context of flooding induced by upstream flood control operations following the Supreme Court's decision in *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012) (8-0 decision) (Ginsburg, J.). To give context and background, this paper first provides some of the essential facts and case history as briefed by the Commission. Hopefully this gives those reading the Federal Circuit's anticipated decision and the other opinions in the case a lens to see takings law from a downstream landowner's perspective.

Takings law is important for landowners affected by flood control projects because there is no remedy in tort for their damages. Congress has expressly declared that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . . ." 33 U.S.C. § 702c. Courts have held that this immunity survives the Federal Tort Claims Act and applies nationwide to any project involving flood control whether administered by the Corps of Engineers, the Bureau of Reclamation, or any other federal entity. *E.g.*, *Aetna Ins. Co. v. United States*, 628 F.2d 1201, 1203 (9th Cir. 1980). Congress cannot disclaim its constitutional obligations, so takings claims appear to be the only avenue for relief when government inversely, rather than expressly, condemns property it uses implementing flood control projects.

[1] This was written with extensive contribution by Matthew N. Miller who also represented the Commission at the Supreme Court and in the Federal Circuit. The views expressed in this paper are the authors' own and are offered in their individual capacities. We do not speak for the Commission here.

I. Background of *Arkansas Game & Fish Commission v. United States*

a. The Commission's facts[2]

The Dave Donaldson Black River Wildlife Management Area ("Management Area"), owned and managed by the Arkansas Game and Fish Commission ("Commission"), consists of approximately 23,000 acres of bottomland hardwood forested wetlands along the Black River in northeast Arkansas. Beginning in 1951 and primarily into the 1960s, the Commission bought acreage from several lumber companies to establish the Management Area as a wildlife and hunting preserve. Historically, these lands were part of a larger forest that dominated the region. With widespread cutting and clearing, bottomland hardwood forest disappeared at an alarming rate. The Management Area now represents 38% of all bottomland hardwood forest remaining in the region.

With the Management Area, the Commission seeks to "(1) protect and sustain a functional bottomland hardwood ecosystem, (2) support populations of endemic plant, fish, and wildlife species, and (3) provide public use opportunities, especially waterfowl hunting." It provides critical food and shelter for "neotropical migrant bird species of concern" and for migratory waterfowl that pass through in the late fall and early winter on the Mississippi River flyway. The Commission's objective is to optimize wildlife habitat on a sustainable basis. For example, trees are selectively harvested "to stimulate the growth of new timber, to provide a diverse habitat type and to remove unhealthy or unproductive trees from the forest."

[2] This is a truncated version of the statement of facts in the Commission's opening brief on remand to the Federal Circuit. Citations to the record and opinions are generally omitted here but can be found in that brief.

In 1948, the United States Army Corps of Engineers ("Corps") completed construction of Clearwater Dam upstream from the Management Area in southeast Missouri. In 1953, the Corps approved a water release plan that mimicked natural flood patterns. As a result of the plan, water was regularly released in short-duration, high-discharge pulses in late winter and spring, causing short pulses of overbank flooding along the lower Black River in southern Missouri and northeast Arkansas. Releases were reduced in early summer, and the Management Area typically dried by late May.

From 1953 until 1993, the Corps' operations did not hinder the Commission's ability to maintain the Management Area as critical wildlife habitat, and the bottomland hardwood ecosystem thrived. Starting in 1993, the Corps implemented a string of annual deviations from the water control plan's approved release schedule. Nearly all of the deviations were for considerable time periods and largely extended the deviating throughout eight consecutive years. The primary reason for the deviations—requested by several members of Congress—was to benefit farmers who were planting low-lying acreage below Clearwater Dam. They collectively resulted in slower but more sustained water releases that raised the level of the Black River downstream at the Management Area and prolonged flooding during the timber growing season.

From 1993 to 1998, the Management Area experienced six consecutive years of prolonged growing season flooding that an expert witness testified for the Commission had "never happened prior, and has never happened since." "Those six years consecutively, in every one of those years the river was at or above a five-foot level for at least 63 days. . . . That had never happened prior to 1993." Justice Ginsburg wrote for the Supreme Court observing that, on the facts found by the Court of Federal Claims, "[t]he repeated annual

flooding for six years altered the character of the property to a much greater extent than would have been shown if the harm caused by one year of flooding were simply multiplied by six." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 517 (2012).

The Commission's trees suffered such extensive root damage that they could not survive moderate droughts of 1999 and 2000 as they otherwise would have. The result was "catastrophic mortality." More than 18 million board feet of bottomland hardwood timber were permanently destroyed or degraded.

b. Case history and key rulings

The Commission filed its takings claims against the United States in the Court of Federal Claims in 2005. After a two-week trial, a site visit, pre- and post-trial briefing, and post-trial argument, the Court of Federal Claims (Judge Charles F. Lettow presiding) rendered its judgment with detailed findings of fact and conclusions of law. *Ark. Game & Fish Comm'n*, 87 Fed. Cl. 594 (2009). The Court of Federal Claims awarded just compensation for taking the Commission's timber and habitat for wildlife in the amount of $5.6 million, plus $176,428.34 for a regeneration program, and pre-judgment interest.

The Court of Federal Claims found that the Corps's deviations caused the changed frequency and pattern of flooding experienced on the Management Area and that "the effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills." It found that the flooding had permanently killed or degraded over 18 million board feet of timber" and had "so profoundly disrupted certain regions of the Management Area that the Commission could no longer use those regions for their intended purposes, *i.e.*, providing habitat for wildlife and harvest." *Ark. Game & Fish Comm'n v. United States*, 87 Fed. Cl. at 610, 620 (2009).

The United States appealed and the Federal Circuit reversed in a 2-1 decision. *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cir. 2011). The Commission argued to the Supreme Court that the Federal Circuit's ruling had rested on a single point of law: that because the Corps' actions and the resulting floods were temporary, as a matter of law they could not effect a taking. The Supreme Court granted certiorari and reversed the Federal Circuit with a remand as the Commission requested. Its essential ruling was that the cases relied on by the Federal Circuit did not actually exclude temporary floods from the Takings Clause, and if they had those cases were superseded by later cases in which the Supreme Court expressly recognized takings by temporary invasions. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519-21. It found unpersuasive the United States' arguments for treating floods differently, noting that "[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." *Id.* at 521.

On remand, the United States and the Commission each filed simultaneous supplemental and response briefs, with an oral argument held on September 6, 2013. The case is currently submitted.

II. The takings analysis before and after *Arkansas Game & Fish Commission*

Inverse condemnation claims at the Supreme Court began with a flooding case back in 1872. *See Pumpelly*, 80 U.S. (13 Wall.) 166 (1872). Clearly the role of government has increased since 1872. Since then, the Supreme Court and other courts have faced continually expanding ways in which governments affect property interests and have

wrestled with determining whether or not the government has "taken" those interests for a public use. Governments have continually offered up artificial distinctions that would give them broad, categorical exceptions to the Takings Clause that the Supreme Court has eventually knocked down. *E.g.*, *Pumpelly*, 80 U.S. (13 Wall.) at 177, 181 (rejecting argument that permanent, backwater flooding was a non-compensable "consequential result" of a dam's construction); *United States v. Cress*, 243 U.S. 316, 327-28 (1917) (rejecting argument that anything less than total destruction by permanent flooding was noncompensable); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (rejecting argument that the government could nullify a regulatory taking by abolishing the offending regulation without any liability for just compensation). Mindful that the Takings Clause is a protection, *Arkansas Game & Fish Commission* was just another step in this long line of cases and brought temporary floods back into the fold.

a. Invasive, super-induced floods have always been treated as physical invasions.

Perhaps the biggest development in takings law developed in the 20th century with Justice Holmes' recognition that regulatory interferences on the use of property can effect takings. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). From this came a long line of cases distinguishing regulatory interferences from physical invasions and reasoning why a particular regulation should not be held to take property. *E.,g.*, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 132 (1978). None of those kinds of cases involved flooding, however, which have always been recognized as physical invasions when they are caused by government action. *E.g.*, *United States v. Kansas City Life Ins. Co.*, 339 U.S. 779, 802-03 (1950); *Eaton v. Boston, Concord & Montreal R.R.*, 51 N.H. 504, 512-14 (1872).

Whether a takings claim is analyzed under regulatory or physical takings law depends on whether the government action interferes physically. *See Penn Central*, 438 U.S. at 124 ("So [relevant], too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government."). If the government induces a physical intrusion, rather than a generally-applicable restriction on use, physical takings law applies. This turns on the basic distinction between the two most fundamental property rights: the right to exclude and the right to use and enjoy property. A regulation of use, with no physical intrusion, affects only the right to use and enjoy. A physical invasion, though, also inflicts a "special kind of injury." *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) ("Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion."); *see also United States v. Causby*, 328 U.S. 256, 265 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945).

A landowner facing floods does not have to claim some property interest in the government's dam operations; rather, it claims a property interest in being free of government-induced floods that exceed whatever flowage rights the government has previously acquired. If the government wants to acquire additional use rights for flood control, it can and should condemn them. Indeed, the federal government has long recognized that if it wants the right to induce a particular flow of water on someone else's land in the name of flood control, it must acquire a flowage easement. *E.g.*, *Story v. Marsh*, 732 F.2d 1375, 1378, 1384 (8th Cir. 1984) (describing the Corps of Engineers' purchase of

flowage easements below a levee system so that it could breach a levee and induce temporary flooding if the Mississippi River ever reached a certain level). In its briefing to the Supreme Court in *Arkansas Game & Fish Commission*, it noted that it has acquired "land substantially downstream from a flood control project" before. *See* Respondent's Brief on the Merits at 26.

If the government chooses to proceed without expressly condemning a flowage easement, it can acquire one by inverse condemnation. The Supreme Court has made it very clear that the government does not so acquire a flowage easement until it actually induces flood invasions and the "consequences of inundation have so manifested themselves that a final account may be struck." *United States v. Dickinson*, 331 U.S. 745, 749 (1947). If the government again increases flooding, those floods are invasive. *See Jacobs v. United States*, 290 U.S. 13, 15 (1933); *cf Argent v. United States*, 124 F.3d 1277, 1285 (Fed. Cir. 1997) (holding, as to an avigation easement, that "[t]he United States may effect a second taking by, *inter alia*, increasing the number of flights or introducing noisier aircraft") (internal citations omitted). In *Jacobs*, for example, the United States built a dam that increased already-occurring overflows and the Supreme Court observed that "[a] servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes." 290 U.S. at 16. The government "contemplated the flowage of the lands, that damage would result therefrom, and that compensation would be payable." *Id.*

If the government so invades and causes damage, it takes that damaged property. *See United States v. Dickinson*, 331 U.S. 745, 750 (1947) ("If the government cannot take the acreage it wants without washing away more, that more becomes part of the taking.");

General Motors, 323 U.S. at 383-84 (holding that when the government took a building for part of the tenant's lease, it also took fixtures that were damaged—even those not destroyed—for the government's use); *see also Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987) (holding the government liable for taking timber killed when a temporary stream blockage caused increased seasonal flooding). The central point of the Takings Clause is fairness to the plaintiffs. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (declaring that the Takings Clause's "guarantee that private property shall not be taken for a public use without just compensation is designed 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."); *Dickinson*, 331 U.S. at 748 (declaring that the Takings Clauses "expresses a principle of fairness" and that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.").

b. The Federal Circuit's pre-existing *Ridge Line* analysis for floods.

None of this means that the government is liable for every flood it induces up- or downstream of a flood control dam. Not even those floods that are physical invasions. Summarizing takings law in the context of a flooding, the Federal Circuit's 2003 opinion in *Ridge Line Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), explains the analysis for determining "whether a taking compensable under the Fifth Amendment occurred," which is a "question of law based on factual underpinnings." 346 F.3d at 1352. The Federal Circuit describes the analysis as "a two-part inquiry. First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'" *Id.* at 1355. Second,

a court considers "whether the government's interference with any property rights of [the plaintiff] was substantial and frequent enough to rise to the level of a taking." *Id.* at 1357.

The *Ridge Line* analysis illustrates how physical takings law, even before *Arkansas Game & Fish Commission*, raised the bar well above strict liability. The first prong includes factual elements of causation and (for lack of a better word so far) foreseeability in the takings sense. The second prong is really the ultimate legal question of whether government actions triggered flood invasions as their direct, natural, or probable results, and caused enough damage to rise to the level of a taking.

The second prong, substantiality, has turned into a common law question; it is critical to remember, though, that cases awarding just compensation do not set floors for the kind of damage needed to trigger takings liability. *See Argent*, 124 F.3d at 1282. The first prong is the more difficult to clear and a trial court's finding on it is more difficult to challenge on appeal because it is factual. Once that first prong is cleared, the question is nearly answered because the holdings and dicta indicate that the bar of substantiality excludes only fleeting and *de minimis*-type intrusions, which makes sense from the landowner's perspective and considering how noxious physical invasions are to the Takings Clause. *Cf Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). Still, the bar exists and this is where takings law seems to strike some balance between owners' fundamental property rights and the government's need to operate—even if it inflicts a direct invasion—without paying for every minor incursion like a driver parking for lunch or a regulator's routine inspection. *See, e.g.*, *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

Viewing the analysis in this way, with factual elements of causation and foreseeability and a legal question of whether, on the facts of damage proved, the government's intrusion is a taking, explains how *Loretto* is not a separate analysis for permanent occupations. Instead, the *Loretto* rule is simply a rule of law that permanent occupations of any size (which there were small cable boxes that were conclusively direct invasions) are always substantial enough to trigger takings liability. *See Loretto*, 458 U.S. at 438, 441. There are not separate analyses for permanent and temporary invasions. It is simply that some elements are always obvious when the invasion is a permanent occupation.

The Supreme Court's decision in *Arkansas Game & Fish Commission* addressed various points relevant to the takings analysis for the temporary floods at issue here. The Commission and the United States briefed each of those points on remand and the case is currently submitted to the Federal Circuit. This paper explains how the Commission briefed those points and how they each fit the *Ridge Line* analysis. The latter makes sense given that the Supreme Court's decision was unanimous and self-described as "narrow" and "modest," showing that none of the justices intended to change takings law. Their ruling was simply that the Federal Circuit's permanency requirement was mistaken; the Court had never adopted that rule and, even if it had meant to do so with dicta, it had long-ago overruled any permanency requirement. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519-21 (2012). The takings analysis developed in earlier rulings still applies to floods both permanent and temporary.

c. The physical takings analysis, using the Supreme Court's identified considerations in *Arkansas Game & Fish Commission*, as applied to temporary floods from the Commission's perspective.

The physical takings analysis that the Commission briefed incorporates all the considerations that the Supreme Court identified and the *Ridge Line* test:

> The government takes property for public use when it takes actions, the direct, natural, or probable result of which are physical invasions that intrude substantially on a protected property interest.

Breaking this out into the Supreme Court's points is easy.

i. *Investment backed expectations*

The investment backed expectations ("IBE") point goes to the property interest. *See Penn Central*, 438 U.S. at 125. There has never been, obviously, a takings claim if the plaintiff has no protected property interest. At oral argument, the Supreme Court justices asked to identify the "baseline" for floods; meaning "when does a flood become an invasion?" The United States had always conceded the Commission's property interest in its appeal,[3] so the question was evidently concerned with future cases. In applying the IBE point to the Commission's case, the opinion considered that the floods were unlike anything imposed before, whether naturally or artificially, whether pre- or post-dam. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 522. In other words, the floods here surpassed the Commission's investment-backed expectations that it had a right to be free of this six year flooding that had never been imposed before.

[3] *See, e.g.*, The United States' Principal Brief to the Federal Circuit at 25 n.2 (acknowledging the consideration in *Ridge Line*, 346 F.3d at 1357, of "whether the government appropriated from [plaintiff] a legally protectable easement interest" and then conceding that "[t]he United States did not contest the Commission's claimed property interest here").

Understanding that with a physical invasion it is usually obvious that the owner has a right to be free of whatever invasion is at issue is important. Here, with floods, it was a more interesting question because obviously the government does not take property every time the Commission's land floods. The point never came up in the Commission's litigation previously because the United States had never argued that the floods were not physical invasions; from the Commission's standpoint that made sense because the floods were so far beyond anything imposed before and caused so much damage to the native ecosystem that they were obviously invasions. The United States' opening appeal argued instead that the floods were not "foreseeable" and were not bad enough to rise to the level of a taking; it expressly conceded that it was not challenging the Commission's property interests.[4] So while cases like *Ridge Line* had previously informed the United States that state law issues like upstream/upgradient owners' rights to induce some level of downstream/downgradient flooding might be relevant, the United States never appealed any point of property law until the merits briefing at the Supreme Court.

Some may be tempted to read the reference to IBEs as somehow applying regulatory takings law to floods, but that would overrule scores of key takings cases and vastly overcomplicate what is really a simple and standard question about the property interest intruded upon. For example, cases like *Cress* found partial takings without any parcel-as-a-whole analysis. *See Cress v. United States*, 243 U.S. 316, 328 (1917) (holding that partial, permanently recurring floods that destroy part—but not all—of a land's value were a taking; that such flooding may not be a permanent occupation both temporally and

[4] *See* United States' Principal Br. to the Federal Circuit at 25 n.2; *see also Ark. Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594, 616 (2009) ("[T]he parties concur, as they must, given the facts, that the superinduced flows of water would constitute a physical, not regulatory, taking . . . .").

spatially is "no difference in kind, but only of degree"). It is a stretch way too far to conclude that the Supreme Court meant to impose regulatory analyses like *Penn Central* to flood invasions by a simple reference to investment-backed expectations in a unanimous and self-described "modest" and "narrow" opinion. *Compare Tahoe-Sierra*, 535 U.S. at 323.

ii. *Foreseeability (and causation)*

Causation is always a factual element. The plaintiff must prove that the government caused the flooding at issue. But the government does not "take" every property on which it causes flooding; takings law has traditionally excluded "incidental" or "collateral" impacts while compensating "direct" invasions. The Federal Circuit uses "foreseeability" to distinguish between them, saying that invasions foreseeable—in the takings sense—are the kind that trigger takings liability (i.e., they are direct invasions) and others are excluded even if they are torts. *See Ridge Line*, 346 F.3d at 1356; *cf Causby*, 328 U.S. at 264-65. Foreseeability is a fact element—demanding great deference to the trial court's finding—present when the floods are the "direct, natural, or probable result" of the government's actions. *See Ridge Line*, 346 F.3d at 1356; *Moden v. United States*, 404 F.3d 1335, 1345 (Fed. Cir. 2005). The Federal Circuit distinguishes between those and floods of which the government's actions are the direct, natural, or probable cause. *See Moden*, 404 F.3d at 1343.

Foreseeability is an objective standard. It does not matter whether the government actually *did* foresee or predict a particular flood. An incomplete study of the situation, even a negligent one, does not by itself prevent takings liability. *See Cotton Land Co. v. United States*, 75 F. Supp. 232, 233-34 (Ct. Cl. 1948) (concluding that a court must look at the "actual and natural consequences of the Government's act," regardless of whether an

"engineering study was not so complete as to include a prediction as to lands beyond the bed of the reservoir") *quoted in Ridge Line*, 346 F.3d at 1357.

iii. *Severity and Duration*

The duration point explains that the cumulative impact of multiple invasions is important to the severity question. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 522-23 (quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence.")). A separate takings claim does not necessarily arise from each individual flood, but instead accrues only when the "consequences of inundation have so manifested themselves that a final account may be struck." *Dickinson*, 331 U.S. at 749. So while government defendants will want to look at each flood event caused by, for example, a series of dam operation decisions, takings law requires courts to view the situation from the landowner's perspective; otherwise the analysis would be an exercise in rationalizing the government's position.. *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) ("The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."); *Nat'l By-Prods., Inc. v. United States*, 405 F.2d 1256, 1275 (Ct. Cl. 1969) ("It is a long settled principal that a taking is not affected by the extent of the benefit to the government, but solely by the amount of injury to the landowner."). In the Commission's case, its perspective was that the Corps used its property to store floodwaters it wanted to keep away from particular upstream farmers. From where it sat, it was totally beside the point that the Corps did not enact a permanent and formal change to its Water Control Plan.

It is true that the Takings Clause generally exempts government actions when the benefits they confer on a plaintiff landowner exceed the burdens. But that does not exempt all flood control actions for at least two reasons. One, because floods are physical invasions, a long- and well-established rule, the exception looks only to the benefits conferred on the landowner. *See City of Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983) ("[I]t is appropriate to emphasize here, where the government denies that any taking at all occurred, that only benefits inuring to the condemnee, rather than the community at large, are relevant . . . ."). Courts cannot look at the total public benefits and ask if they outweigh an individual's burden. Two, flood control dams are not universally beneficial. Often times they create flooding patterns that damage, even without increasing the total volume of water, because they change the natural flooding patterns. We know today that this can be very damaging to wildlife and habitats.

d. Many temporary flood events are excluded by the physical takings analysis.

Taken together, this analysis excludes a huge number of floods in those basins affected by government dams. Natural rain events are excluded. If the rain is bad enough that the land would have flooded anyway, then a landowner has nothing to complain about. The difficult questions arise when the land would not have flooded as badly without the government's dam operations. But even then the burden lies with the landowner to prove what would have happened without the government's actions and how much that difference (if any) intruded on its property interests. That kind of proof is hugely expensive and time-consuming to develop, which will dissuade a large number of landowners from ever bringing claims. That should raise environmental justice concerns about governments shifting flood burdens to people who cannot afford to fight them.

Also excluded are damages caused by the government's use of any flowage easement it has acquired previously either by express or inverse condemnation. Of course, the government does not inversely condemn a flowage easement until it actually invades. *See supra* at 7-8. And even then it does not acquire a total flowage easement; if it changes the flooding regime and floods in a way that neither it nor nature has before, it must pay for an expanded flowage easement. *See supra* at 7-8. This illustrates the proof burdens for takings plaintiffs; it is very hard to be a plaintiff in a flood-based takings case.

Exigency is another rule that might exempt government actions. Regardless of whether that rule is sensible in all situations,[5] it never came up in the Commission's case. That flooding was not caused by natural rain events and it was not aimed at saving someone from a natural disaster. The United States was being pressured by, among others, members of Congress to help out particular farmers who had cleared what the U.S Fish & Wildlife Service considered marginal farm lands that should never have been cleared in the first place. In another situation in which the government is trying to save lives, for example, the exigency defense can be tested.

III. The Federal Government's Upstream / Downstream Distinction First Advanced At The Supreme Court And Argued On Remand

The history of takings litigation against the government has seen a constant in which the government advances a distinction that would give itself a broad, categorical exemption that courts eventually strike down when faced with its basic unfairness. *See*

[5] Justice Holmes long ago observed that "[i]t may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man's misfortunes or necessities will justify his shifting his damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Penn. Coal Co..*, 260 U.S. at 416 (internal citations omitted).

supra at 6. The *Arkansas Game & Fish Commission* case alone has seen the federal government advance two such distinctions: temporary v. permanent (which would totally exclude all temporary floods) and upstream v. downstream (which would totally exclude all downstream floods). The United States did not raise the latter until after the Supreme Court granted cert to review the former. The Supreme Court abrogated the temporary flood exception and then declined to consider the government's proposed downstream exception since the Federal Circuit did not consider it. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 521. The Commission argued on remand that the downstream exception was waived since the United States never raised it until the Supreme Court. But the Commission also argued in the alternative why the courts should reject it.

The United States advanced several arguments for a downstream exception. Basically, the arguments were that its flood control dams do nothing but release water that would have gone downstream anyway, that it cannot direct downstream water onto any particular landowner, and that anyone who lives downstream has no right to expect that it can be free of flooding at the government's discretion to "adjust" the benefits and burdens among downstream owners. The tension between the latter two arguments is self-evident. It would mean that building a dam necessarily gives the government a total flowage easement downstream.

The Commission's rebuttal, in short, is that a downstream exception would destroy basic and established takings law protections in privileging a whole category of government actions from the Takings Clause like the temporary exception did. The takings analysis already includes factual and legal elements (like foreseeability and the property interest) that exclude a whole lot of downstream floods, so exempting all downstream

floods would artificially privilege even those relatively few floods that constitute takings under the traditional analysis. It would also obviate the Court's holdings that a taking does not occur until the "consequences of inundation have so manifested themselves that a final account may be struck." *Dickinson*, 331 U.S. at 749; *see also Cooper*, 827 F.2d at 764. Giving the United States the kind of power requested at oral argument before the Supreme Court—that if 9 of 10 owners asked to change flooding patterns to shift the burdens to the 10th owner, it could do that free of any takings claim—is patently dangerous and unfair.

The United States also pointed to Arkansas's law of surface water usage—reasonable use riparianism—as privileging it to increase floods on downstream property owners. The Commission of course pointed out that this was waived since it was never mentioned until the Supreme Court. The United States' argument was that Arkansas's law of surface water usage (reasonable use) allows the Corps of Engineers to increase floods on downstream owners. Besides the waiver problem, the riparian rights argument has at least two flaws: (1) it is totally unclear that flood-control is a riparian use, and (2) the Arkansas Supreme Court has rejected any such absolute limits on downstream riparians' property rights (*see, e.g.*, *De Vore Farms v. Butler Hunting Club*, 286 S.W.2d 491, 494 (Ark. 1956)).

Conclusion

Much of future takings law in the area of temporary floods might turn on the Federal Circuit's remand decision in *Arkansas Game & Fish Commission*. At the time of writing this CLE paper, that case was submitted after oral argument and we are patiently awaiting the judges' reasoned decision.