



Black River Wildlife Management Area

The U.S. Supreme Court has granted review in what will be the first environmental case of its next (2012-13) Term: *Arkansas Game & Fish Commission v. United States*, No. 11-597.

The ultimate question is whether the federal government is liable for millions of dollars in damages for flooding a 23,000-acre wildlife management area owned by the State of Arkansas. But the litigation also raises the threshold legal issue of whether such property damage claims should be viewed as unconstitutional takings under the Fifth Amendment to the U.S. Constitution or, alternatively, under traditional tort law principles.

The case arose when the U.S. Army Corps of Engineers released water from the Clearwater Dam on Arkansas' Black River between 1993 and 2000. The downriver, state-owned Black River Wildlife Management Area subsequently suffered extensive property damage—primarily the death of numerous oak trees—that the Arkansas Game and Fish Commission attributed to the Corps' intentional flooding of the property. When informal efforts to resolve the state's property damage claim proved unsuccessful, Arkansas wildlife officials sued the U.S. in federal court. After a lengthy trial in 2009, the U.S. Court of Federal Claims rejected the Corps' argument that it was blameless for the property damage, and ordered the federal government to pay Arkansas nearly \$6 million in damages to compensate for the dead trees and to fund a regeneration program designed "to address areas severely affected by invasive wetlands species." The trial court did so after concluding that the Corps had "taken" a temporary flowage easement over the property for which compensation was due the State of Arkansas under the Fifth Amendment.

The government appealed and, last year, a divided panel of the U.S. Court of Appeals for the Federal Circuit [reversed](#). It did so by concluding that the trial court had erroneously treated the litigation as governed by takings law rather than by tort principles. Specifically, the Federal Circuit majority held that takings liability only attaches when there is a

permanent invasion of land, rather than a *temporary* injury to property. The latter type of harm, the Court of Appeals concluded, was properly addressed through application of common law tort law, rather than takings principles. The dissenting Federal Circuit judge, by contrast, criticized the majority's decision as "depart[ing] from constitutional right and well-established precedent."

Arkansas' successful petition for certiorari was supported by a rather odd coalition that included a handful of other states and the Pacific Legal Foundation. The case will be argued when the Court re-convenes this fall after its traditional summer recess, and likely will be decided sometime in early 2013.

The *Arkansas Game & Fish Commission* case provides the Supreme Court with an opportunity to resolve some longstanding confusion among lower courts as to whether such flooding cases are properly viewed as unconstitutional, physical takings of property or as garden-variety property damage cases best resolved through application of traditional tort law principles. (That confusion extends to a number of state court systems as well-including California's.)

It's always hazardous to predict how the justices will decide particular cases, particularly before briefing on the merits is completed. But given the Supreme Court's inclination in recent decades to steadily expand the scope of government Takings Clause liability, my strong hunch is that the Court will likely wind up ruling in favor of Arkansas and against the federal government, finding that even non-permanent physical invasions of property are compensable under the Fifth Amendment.