

Today was a busy day for the environment in the U.S. Supreme Court. Not only did the justices hear arguments in a potentially-important Clean Water Act case. (More on that in a future post.) The Court also issued its first decision among the five environmental cases pending before it this Term—three of which involve property rights claims brought under the Takings Clause of the Fifth Amendment.

[The Court's unanimous decision today in *Arkansas Game and Fish Commission v. United States* finds the federal government potentially liable for a taking due to the feds' flooding of the State of Arkansas-owned forest lands.](#)

The *Arkansas Game and Fish Commission* case was [profiled in an earlier Legal Planet post](#), when the justices granted certiorari in the case last summer. Briefly, the State of Arkansas sued the U.S. Army Corps of Engineers, seeking compensation for years of flood damage to Arkansas-owned forest lands caused by water releases from the Corps' upstream dam and reservoir on the Black River. Arkansas claimed that the repeated, interim flooding of its lands was compensable under the Takings Clause. The federal government argued, and the Federal Circuit Court of Appeals held, that takings liability only attaches when such flooding is a “permanent or inevitably recurring condition, rather than an inherently temporary situation.” In the latter instance, ruled the Federal Circuit, the property owner is relegated to pursuing tort remedies against the federal government.

In today's decision, authored by Justice Ginsburg, the Supreme Court reversed. Temporary “regulatory” and “physical invasion” takings of property by government have long been recognized as compensable under the Takings Clause, wrote Ginsburg, and there is “no solid grounding in precedent” upon which to carve out an exception for government-caused temporary flooding. At the same time, the *Arkansas Game and Fish Commission* opinion cautions that such temporary flooding of private property is not subject to the same kind of per se takings liability that the Court has found to be applicable in cases of *permanent* physical invasions of property by government. Rather, temporary flooding should be viewed under the Takings Clause based on “the particular circumstances of each case,” and subject to the type of ad hoc, factual inquiry that the Supreme Court has mandated for most takings cases since its iconic *Penn Central* decision in 1978.

The Court's decision in *Arkansas Game and Fish Commission* was widely anticipated by most legal observers, and works incrementally to make takings law more doctrinally consistent. More consequential, and less predictable, is what the justices will do with the major takings case remaining on its docket, *Koontz v. St. Johns River Water Management District*, No. 11-1447. That case, also [profiled previously on Legal Planet](#) and scheduled to be argued in January 2013, promises to be more contentious, and the scope of the Supreme

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Court's ultimate decision far less clear.