The Florida wetlands property at issue in Koontz v. St. Johns River Water Management District.

On Tuesday, the U.S. Supreme Court will hear oral arguments in what is shaping up as the Court's most important property rights case of the current Term: *Koontz v. St. Johns River Water Management District, No. 11-1447*. What can we expect?

Koontz is one of three Takings Clause cases on the Court's docket this Term. It decided a "physical invasion" involving federal flooding and consequential damaging of state-owned lands, *Arkansas Game and Fish Commission v. U.S.*, last month (profiled here.) Another, dealing with jurisdictional questions arising under the Tucker Act (which authorizes takings lawsuits against the federal government), *Horne v. Department of Agriculture*, No. 12-123, will be argued later this year.

But *Koontz*, a regulatory takings case from Florida, is the main event when it comes to the Supreme Court and takings law this year. The issues in *Koontz* were set out in an earlier post, published when the justices granted review in the case last fall. Briefly, however, the case involves the so-called "unconstitutional conditions" corner of takings jurisprudence. In two major decisions issued in 1987 and 1994–*Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, respectively–the Court announced that conditions imposed by government regulators on land use permit approvals pass constitutional muster only if: a) there is an "essential nexus" between the permit condition and the government purpose advanced by the permit itself; and b) the burdens imposed on the landowner by the condition are "roughly proportional" to the estimated impact of the proposed development on the community.

The facts in *Koontz* are relatively straightforward: the landowner of a 14-acre parcel of Florida coastal property containing mostly wetlands proposed to develop four acres of his property while permanently dedicating the remainder to open space. The state water management district reviewing the application believed this dedication to be insufficient

mitigation for the planned development, and asked that the landowner also fund the replacement of culverts in a state-owned nature preserve miles away from the property. When the landowner refused, the district denied the requested permit outright. The landowner then sued the district, claiming that the project denial contravened the Supreme Court's *Nollan/Dolan* unconstitutional conditions test, and therefore constituted a government taking of private property requiring monetary compensation.

The specific issues before the Supreme Court in *Koontz* are 1) whether the denial of a land use permit–rather than government approval of a permit subject to objectionable conditions–can form the basis of a *Nollan/Dolan* takings claim; and 2) if the *Nollan/Dolan* rule applies to monetary exactions as well as those involving dedications of land.

How is *Koontz* likely to be decided? On the one hand, the facts of the case seem to favor the landowner, who is represented by the Pacific Legal Foundation. PLF, which is perhaps the nation's most prominent public interest law firm focusing on property rights issues, has done its usual adroit job of getting before the Supreme Court a land use case with sympathetic plaintiffs and an seemingly unsympathetic government regulator. (PLF similarly represented an Idaho couple in another wetlands development dispute decided by the Supreme Court last year–*Sackett v. USEPA*–and won a unanimous victory over the federal government on their behalf.) The conservative wing of the Court–Chief Justice Roberts and Justices Scalia, Thomas and Alito–are very likely to side with Mr. Koontz, based on past voting records and commentary. That makes Justice Kennedy the potentially-deciding vote, and over his Court career Kennedy has voted with the conservatives in property rights cases more often than not.

At the same time, the defendant water management district has managed to attract some powerful allies. The U.S. Solicitor General has filed a friend-of-the-court brief in support of the district, and will advocate on its behalf in Tuesday's oral arguments. (The government's brief is noteworthy for its spirited recitation of the multifaceted values of our nation's wetlands–a theme notably absent from its briefing in *Sackett* last year.) The National Governors Association and the National Conference of State Legislatures have also weighed in on the district's behalf as amici curiae, as have 20 state Attorneys General in a brief filed by California Attorney General Kamala Harris.

Bottom line: as the adage goes, hard cases make bad law. The hard facts of this case favor developer Koontz more than they do the Florida state regulators whose permit denial he has challenged. I think it's more likely than not that Koontz and his Pacific Legal Foundation lawyers will prevail in this case. The tougher question is how broad or narrow the decision in *Koontz v. St. Johns River Water Management District* will be. We're likely to get a better

sense of that following what promises to be a lively morning of arguments in the Supreme Court on Tuesday. (I'll post a follow-up piece on *Koontz* after the arguments take place.)