The Fifth Amendment to the U.S. Constitution requires the federal government to pay just compensation when it takes private property. While a taking implies a permanent interruption of property rights by the government, courts have broadened the definition of a taking to include repetitive but temporary intrusions.

Compensable takings are usually accomplished by means of a condemnation action (the government’s power of eminent domain), government regulations (regulatory taking) that affect the value or marketability of a property or as a result of some government action (constructive taking) that has the effect of taking the property. The latter taking cases are sometimes called "inverse condemnation" claims because, unlike the eminent domain cases in which the government is the plaintiff, inverse condemnation cases cast the property owner as plaintiff (hence the action is "inverted") seeking just compensation for land that has been allegedly taken.

Flood taking cases can be regulatory or constructive taking. While there are some permanent flood cases such as when a dam is built and upstream land becomes a reservoir, most floods are temporary; the land floods then the waters recede and the damaged property (real and personal) is restored to the owner. Under these circumstances, the insult to the property is temporary but the courts have held that in some circumstances these temporary intrusions can be takings under the Fifth Amendment.

Against this backdrop, the recent U.S. Supreme Court decision in the Arkansas Game and Fish Commission v. United States, 133 S. Ct.511 is a reaffirmation of accepted Supreme Court precedent regarding flood taking jurisprudence. The court held that 1) temporary but persistent flood claims can be compensable takings under the Fifth amendment and that 2) most taking claims “turn on situation-specific factual inquiries” so there are few bright lines. The court conclusively and emphatically rejected the Circuit Court’s categorical finding that temporary flood claims can never be takings under the Constitution.

In Arkansas Game the government cited Sanguinetti v. United States, 264 U.S. 146 and United States v. Cress, 243 U.S. 316 in support of its position. The Supreme Court distinguished the Sanguinetti permanent reference as dicta, not necessary for the holding and simply a summary of preceding case law. The Court also said that even if the Sanguinetti court meant that flooding must be permanent, such a conclusion “has been superseded by subsequent developments in our jurisprudence.”

Although the Arkansas Game case may be considered an expansion of property rights, it does not lend support to a property damage flood subrogation takings case. Arkansas Game and the other temporary takings cases suggest that a single event, such as a flood, may not be a taking. Such an event causes consequential damage which is a tort and not a taking. The Fifth amendment takings clause does not extend to torts. The federal government is immune from tort claims except as permitted in the Federal Tort Claims Act. The Tucker Act, which gives jurisdiction for constitutional claims to the Federal Court of Claims, specifically excludes torts from the court of claims limited jurisdiction.

Property damage flood subrogation claims share common features. Most important, the flood is usually a one-time catastrophic event and the owner recovers the damaged property after the flood waters recede. Typically the flood subrogation claim is for the cost of repairs or the diminution in value of personal property rather than the conversion of that property; essentially a tort claim.

One-time flood events are temporary and may appear to qualify as takings under the Arkansas Game decision. Temporary floods must also be persistent. Arkansas Game involves persistent flooding over a period of years. The flood taking rule seems to be that one time floods may not qualify as takings, more is required. Takings are more significant permanent governmental intrusions than the one time flood. The court will consider the owner’s interest in the property and government’s interest in flood control and protecting the community. The court cited Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 for the proposition that “while a single act may not
be enough (for a taking), a continuance of them in sufficient number and for sufficient time may prove a taking.” In framing the issue, Justice Ginsburg stated that the question presented is if repetitive but temporary government induced flood invasions are takings. The implication is that non-repetitive flooding events may not qualify as takings but are consequential tort claims.

The Court listed several factors to be considered on remand including; the length of time of the government intrusion, the degree to which the flooding is intentional or foreseeable, the character of the land, the owners reasonable investment backed expectation for the land use, and the severity of the government’s interference. While there is no legal impediment to bringing a flood property subrogation claim as a Fifth amendment taking claim, the prospect for success is guarded at best. The Court’s reasoning in Arkansas Game indicates that a viable flood taking claim must either result in a permanent dispossession of the property owner (not the typical subrogation case as the property is returned to the insured) or arise out of a pattern of repeated flooding that “change the character of the land.” Isolated invasions, including one or two floods, do not constitute a taking but frequent and inevitable recurring flooding may be a taking. Fromme v. U.S. 412 F. 2d 1192. When plaintiff’s taking claim is based upon a single flood that has since receded or two floods separated by 75 years, there is no taking. Also see Baird v. U.S. 5 Cl. Ct. 324 (1984); damage due to unique occurrence that grew out of unusual climatic conditions is not a taking.

While subrogation flood claims may technically qualify as takings under the Fifth amendment, the prospect for success in these cases is limited without a pattern of historical flooding problems. Many states have constitutional proscriptions similar to, yet broader than, the Fifth amendment against taking private property without just compensation. State constitutional proscriptions may offer better opportunities for successful recoveries and should be consulted.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

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