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Do No Harm—Not Even Temporarily

It used to be standard engineering practice to design site grading to drain all water off site as quickly as possible—no puddles, no ponds, no care about what happened next door. We moved to adding detention basins to slow the water in its race to anywhere other than our site, and then to retention basins as we realized that perhaps neighbors didn't want our excess water in addition to their own.

Somewhere along the line, stormwater management and floodplain management have become two separate practices rather than partners in managing excess water. But in both fields the view was primarily narrow, with blinders that prevented developers and designers and code officials from seeing beyond the boundaries of the single property slated for change. The broadest most could see encompassed multi-lot developments, but rarely did anyone consider cumulative effects on neighboring properties, and certainly not on the watershed as a whole.

The federal Supreme Court recently (December 2012) came to a rare unanimous decision (with one recusal) relating to the effects on a property by actions upstream, in this instance amounting to a taking that was due compensation. The core of *Arkansas Game and Fish Commission v. United States* (133 S. Ct. 511) pits private constitutional Fifth Amendment rights against the powers of the government to flood.

The Army Corps of Engineers built the Clearwater Dam on the Black River in 1948, about 115 miles upstream of what is now the Dave Donaldson Black River Wildlife Management Area, which comprises about 23,000 acres on both sides of the river and is owned and operated by the Arkansas Game and Fish Commission. The Wildlife Management

Area (WMA), for which land acquisition began in 1957, is used for recreation and wildlife habitat, and its website advertises hunting of waterfowl, turkey, and deer as well as trapping, boating, fishing, and camping opportunities. The WMA advertises that it also is "a significant portion of the remaining bottomland hardwood habitat in eastern Arkansas" that serves as critical habitat for migrating birds.

survive droughts (as in 1999 and 2000); many had died or were in the process of dying at the time of the suit. The WMA Commission's expert testified that "half of the damaged trees would die within five years and the living damaged trees were worth half of their original value."

The Corps had anticipated that the downstream effect of the deviations from its Manual would diminish before the

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The health of the various kinds of oak trees making up this hardwood forest is the focus of the complaint. The Corps released water from the Dam according to a Water Control Manual adopted in 1953, but in 1993 began what it termed "temporary deviations" from its usual operations to accommodate requests from agricultural operators to lower the maximum release level.

This slower flow of water allowed farmers more time to harvest their crops, but it also meant that downstream areas (like the WMA) would be inundated for longer periods of time. Faster releases mean shorter inundation periods, which the hardwoods in the WMA could handle, but the slower releases and longer flooding meant that roots were covered in water and deprived of oxygen during the critical months for tree growth. Such a situation extended over six consecutive years meant that the roots of the oaks were weakened and the trees could not

water reached Arkansas. So the WMA Commission's letters complaining about additional flooding had no effect until the Corps' own test releases confirmed the adverse impacts, when it returned to its original 1953 Manual release rates. But the damage to the trees was not reversible.

This damage from the release of water from Clearwater Dam led to the WMA Commission's claim of a "taking" by governmental action. Initially the Commission prevailed against the Corps in Federal Claims Court in 2009, being awarded damages under the Fifth Amendment ("No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.") But a 2011 appeal to the US Court of Appeals for the Federal Circuit reversed that decision to favor the Corps, primarily because the Court found that the flooding was temporary and not inevitably

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recurring, and the impermanence of the inundated condition (or “physical intrusion”) meant that no taking had occurred.

In writing the US Supreme Court’s opinion reversing the appellate decision, Justice Ruth Bader Ginsburg notes that “no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.” But she then observes that the Supreme Court has previously found that temporary government-induced flooding can indeed constitute a taking. She carefully identifies some of the factors to be balanced in deciding the takings question, some being the length of government interference with private property matters, the degree to which the invasion is intended or is foreseeable, and the character of the land and the owner’s reasonable expectations regarding land use. Here, after more than 18 million board feet of timber were destroyed or degraded, unwanted plants invaded and made natural regeneration of the forest unlikely without human intervention and reclamation efforts.

Anticipating outcries that this decision would set the Court on a “slippery slope” regarding disruption of public works dedicated to flood control, Justice Ginsburg states that “[t]he sky did not fall after *Causby* [a case ruling that temporary takings can indeed be compensable], and today’s modest decision augurs no deluge of takings liability.”

This particular case should hold great meaning for anyone dealing with water exiting or entering land, whether as landowners draining their land, landowners receiving unwanted water, floodplain and stormwater managers attempting to control and mitigate flooding, code officials issuing construction permits based on plans that will shunt water offsite without compensating for resultant damages, planners and emergency response personnel needing to know where and how deep water will be in order to site critical infrastructure and plan emergency evacuation routing. It should give more weight to the Association of State Flood Plain Managers’ “No Adverse Impact” (NAI) initiative, which encompasses mapping, planning, and development standards for floodplains (long before RiskMAP came about). For more information about NAI, visit www.floods.org and follow the links to “National Policy and Programs.” 