

Seeking Just Compensation for Damages from Federal Flooding

Damon W. Root | July 18, 2012

At the Cato Institute’s blog, Ilya Shapiro and Trevor Burrus run down what’s at stake in *Arkansas Game & Fish Commission v. United States*, which the Supreme Court will hear this fall. As they explain, the case centers on property damage caused by a federal flood control project. Under the Fifth Amendment to the U.S. Constitution, when the government takes private property for a public use, the payment of just compensation is required. So the question here is whether this federal flooding resulted in a Fifth Amendment taking. According to the U.S. Court of Appeals for the 5th Circuit, no taking occurred because the flooding was only temporary in nature. Shapiro and Burrus offer a different view:

We argue that the length of time of the government’s physical invasion of property should not be used to determine *whether* a taking occurred, but rather only for calculating *how much damage* the taking caused. We further argue that the Federal Circuit’s focus on the “intent” of the government action—whether the flooding resulted from a “permanent or temporary policy”—is likewise irrelevant to whether a taking occurred. Instead, the inquiry should be whether the government caused permanent damage and, if so, how much. The lower court erroneously created a rule—that so long as it might be “temporary,” no government flooding can be remedied under the Fifth Amendment—that runs afoul of a constitutional provision meant to compensate property owners for government intrusions on their land.

Read the rest [here](#).