

**FOR IMMEDIATE RELEASE****July 11, 2012**

COURT URGED TO REQUIRE COMPENSATION FOR TEMPORARY TAKINGS

(Arkansas Game & Fish Comm'n v. United States)

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to hold that the Fifth Amendment's Takings Clause requires payment of compensation whenever the government physically occupies private property – regardless whether the occupation is permanent or (as in this case) was undertaken pursuant to a temporary government policy.

In a brief filed in *Arkansas Game & Fish Commission v. United States*, WLF urged the Court to overturn an appeals court decision that compensation is never required when the physical occupation consists of flood waters and the flooding was the result of a temporary government policy. WLF argued that the Court has never distinguished between permanent and temporary government policies in determining whether the Fifth Amendment requires the government to pay compensation for physical intrusions. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

“The Court has on occasion denied compensation under the Takings Clause when the loss of property value results from the application of temporary land use regulations, even when the regulations deprive the landowner of all value for that temporary period,” said WLF Chief Counsel Richard Samp after filing WLF’s brief. “But when the government goes beyond mere regulation and physically occupies the property, compensation is always required, regardless of the duration of the occupation. The appeals court’s determination that compensation is *never* required for temporary flooding is unprecedented and finds no support in the case law,” Samp said.

The case involves the federal government’s releases of water from a dam it owns on the Black River in Missouri. Between 1993 and 2000, the Government deviated from its normal release policy (a policy that had been in place since 1953); the foreseeable result of this new policy was to cause unprecedented summer flooding of downstream wilderness property owned by the Arkansas Game & Fish Commission. The Government’s adhered to the “deviations” from its normal release policy despite Arkansas’s repeated protests that the summer flooding was destroying valuable timber. Only after the United States recognized the full extent of the damage (losses of timber worth millions of dollars) did it cease its deviations.

The trial court (the Court of Federal Claims) held that Arkansas was entitled to Takings Clause compensation and awarded several million dollars in damages. Its

decision included detailed factual findings that the new water-release policy was the cause of the summer flooding and that the timber losses were an entirely foreseeable consequence of that policy. The U.S. Court of Appeals for the Federal Circuit reversed, holding that a Government-induced flood is never compensable unless it constitutes a “permanent” invasion of the plaintiff’s land or results in “intermittent but inevitably recurring overflows.” The appeals court held that Arkansas failed to meet the “inevitably recurring” standard because the deviations that led to the flooding were never adopted as a permanent policy. The Supreme Court later agreed to hear the case.

In its brief, WLF argued that government-induced flooding undoubtedly qualify as a government invasion of one’s property. Such invasions have traditionally been deemed to require compensation under the Takings Clause, even when the invasion is temporary, WLF noted. It argued that flooding cases are not exempt from those normal rules. WLF asserted that the appeals court misinterpreted the phrase “inevitably recurring overflows,” a phrase that the Court has regularly employed in its Takings Clause cases involving floods; the phrase requires no more than that the challenged government policy will inevitably lead to flooding, not (as the appeals court asserted) that the government has decided to keep its flood-inducing policy in place for the indefinite future.

Noting that the Government challenges the Claims Court’s causation and foreseeability determinations, WLF argued that the Supreme Court should remand the case to the Federal Circuit to consider the Government’s assertion that those determinations were “clearly erroneous.” WLF urged the Court to reject the Government’s plea that the Supreme Court should consider the Government’s challenge; it argued that the Supreme Court usually deems it inappropriate to consider an issue until after the lower court has had an opportunity to consider it in the first instance.

The Washington Legal Foundation is a nonprofit public interest law and policy center based in Washington, D.C. with members and supporters in all 50 States, including many in Arkansas. WLF has appeared in courts across the country to support private property rights.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF’s brief is posted on its web site, www.wlf.org.