IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BIG OAK FARMS, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 11-275L Hon. Nancy B. Firestone
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

BRIEF REGARDING IMPACT OF *ARKANSAS GAME & FISH COMMISSION V. UNITED STATES* ON ORDER DISMISSING PLAINITFFS' TAKINGS CLAIMS

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INTRODUCTION

Pursuant to the Court's Order of January 7, 2013, ECF No. 44, as modified on February 6, 2013, ECF No. 46, the United States respectfully submits the following brief regarding the Court's prior decision and order dismissing Plaintiffs' Fifth Amendment takings claims. As discussed below, the decision reached in the Court's prior decision is correct, and nothing in the Supreme Court's recent decision in Arkansas Game and Fish Commission v. United States, 133 S. Ct. 511 (2012) ("Arkansas Game"), warrants any modification of that prior decision.

I. Summary Of Argument

The decision by the Supreme Court in Arkansas Game does not affect this Court's decision and order dismissing the Plaintiffs' Fifth Amendment takings claims. ECF No. 35; Big Oak Farms, Inc. v. United States, 105 Fed. Cl. 48 (2012). The Plaintiffs seek damages caused by a single extraordinary flood which exceeded the limits of flood protection provided by the United States.[1] Arkansas Game, by contrast, addressed the sole question of whether repeated, Government-induced flooding may effect a taking. That question is not presented by the instant case, which involves damages alleged to have been caused by a one-time flood event.

In order to state a takings claim, the Complaint must allege facts demonstrating that the Plaintiffs owned a protectable property interest in what they allege the United States has taken. Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (citing Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987)). Plaintiffs do not own a protectable property interest in complete flood protection provided by the United States. In order to establish that Government-induced flooding has taken an easement over their property, Plaintiffs must show

[1] The Amended Complaint, which was the subject of the Court's Order dismissing the Fifth Amendment takings claims, and the Second Amended Complaint, which was filed after the takings claims were dismissed, are identical as they relate to the takings claims. The operative Second Amended Complaint will be referred to hereinafter as the "Complaint."

that their property was subject to "additional flooding, above what would occur if the Government had not acted." United States v. Sponenbarger, 308 U.S. 256, 265-66 (1939). The United States can only be found liable for a taking to the extent that actions of the United States exposed the Plaintiffs' land to greater flooding than it would have otherwise experienced absent government action. Id.; Danforth v. United States, 308 U.S. 271, 286-87 (1939). In addition, in order to state a valid takings claim in the context of a flood control project, Plaintiffs must allege that damages to their property resulting from operation of the project are greater than the benefits that the flood protection provided. Sponenbarger, 308 U.S. at 265-67. The Arkansas Game decision did not address, much less modify or overturn, these longstanding principles of takings law.

In addition, Arkansas Game did not change the basic elements of a takings claim based on flooding. The question presented in Arkansas Game was "whether a taking may occur within the meaning of the Takings Clause, when government-induced flood invasions, *although repetitive*, are temporary." 133 S. Ct. at 515 (emphasis added). In order to state a claim for a temporary taking by flooding, Plaintiffs must allege intermittent or repeated flooding.[2] In order to state a claim for a permanent taking by flooding, Plaintiffs must allege that the flooding is permanent, or intermittent and inevitably recurring. United States v. Cress, 243 U.S. 316, 328 (1917). Plaintiffs' claim for relief is based on one flooding event, and therefore cannot constitute a compensable taking. See Nat'l By-Products, Inc. v. United States, 405 F.2d 1256, 1272-75 (Ct. Cl. 1969).

[2] In order to establish a temporary taking, a plaintiff must also satisfy the additional factors set forth in Arkansas Game. See, 133 S.Ct. at 522-23.

II. History Of Floodway Including Relevant Factual Findings

Plaintiffs' lands are in an alluvial valley adjacent to and west of the Mississippi River. In its natural condition, all of Plaintiffs' lands are subject to periodic flooding from the Mississippi River. 2d Am. Compl. ¶¶ 31-34; Big Oak Farms, 105 Fed. Cl. at 55; Danforth, 308 U.S. at 286-87; Danforth, 105 F.2d at 319; Matthews v. United States, 87 Ct. Cl. 662, 669-72 (1938) (providing a comprehensive history through 1937 of flooding of the land at issue in this case). In response to unprecedented flooding of the Mississippi River in 1927, Congress authorized the construction of the Birds Point-New Madrid Floodway ("Floodway") as part of the comprehensive Mississippi River and Tributaries Project. Flood Control Act of 1928, 33 U.S.C. §§ 702a-702m, 704; Big Oak Farms,105 Fed. Cl. at 50; 2d Am. Compl. ¶¶ 33, 35; See Sponenbarger, 308 U.S. at 260-62 (providing general history of the Mississippi River and Tributaries Project). The original plan for the Floodway is commonly referred to as the "Jadwin Plan." Big Oak Farms, 105 Fed. Cl. at 50; Matthews, 87 Ct. Cl. at 663-64; 2d Am. Compl. ¶ 37.

Prior to the construction of the Floodway, an existing frontline levee system provided Plaintiffs' land with flood protection from the headwaters of the Mississippi River so long as the river did not rise above fifty-eight feet measured at the Cairo gauge. 2d Am. Compl. ¶ 36; Danforth, 105 F.2d at 319; Big Oak Farms, 105 Fed. Cir. at 50-51.

Under the Jadwin Plan, the height of sections of the then-existing riverside levee was reduced about three feet (from fifty-eight to fifty-five feet as measured on the Cairo gauge) for a distance of eleven miles below Birds Point, Missouri. 2d Am. Compl. ¶¶ 36, 37; Big Oak Farms, 105 Fed. Cl. at 51; Danforth, 105 F.2d at 320; Matthews, 87 Ct. Cl. at 664, 684. The areas where the height of the levee was reduced are called fuse- plugs. Danforth, 60 S.Ct at 233. The modification of the existing levee system under the Jadwin Plan permitted excess flood waters to

flow into the Floodway whenever the river reached a stage of fifty-five feet on the Cairo gauge. Big Oak Farms, 105 Fed. Cl. at 51; Danforth, 105 F.2d at 320; Matthews, 87 Ct. Cl. at 683-84.

The Floodway was operated for the first time in 1937 when the Army Corps of Engineers ("Corps") breached the levees with dynamite. Big Oak Farms, 105 Fed. Cl. at 51. The levees were breached with dynamite because the 1937 flood occurred before the fuse-plugs were constructed. Danforth, 308 U.S. at 279. Not even extraordinary efforts to maintain the original levees could have prevented the 1937 flood waters from overtopping the levees and flooding the land. Danforth, 105 F.2d at 319. The 1937 flood demonstrates that the land within the Floodway has always been subject to flooding during extraordinary flood events, even with the levees that were in place prior to the implementation of the Jadwin Plan.

By the Flood Control Act of 1965, Congress authorized modifications of the Floodway plan. Pursuant to the 1965 Act, the Corps raised the frontline levee to provide protection to a flood stage of sixty feet as measured on the Cairo gauge. Big Oak Farms, 105 Fed. Cl. at 51. Despite the increase in protection, in May 2011 extraordinary flooding conditions overwhelmed the levees.

> On May 2, 2011, when the flood waters reached a stage of fifty-eight feet on the Cairo gauge with a predicted stage in excess of sixty feet, the Corps, in accordance with the current operation plan, artificially breached the front line levee and for the first time since 1937 activated the Floodway.

Id. at 51-52.

Historically, the original pre-Jadwin Plan front line levees provided protection to a flood stage of roughly fifty-eight feet. The Jadwin Plan reduced the level of protection to fifty-five feet. The plan in operation at the time of the May 2011 flood raised the level of protection to a flood stage of sixty feet. The Floodway levees, as improved pursuant to the 1965 Flood Control Act and as operated in May of 2011, provided greater protection than that provided by the

original levee system and the system constructed under the Jadwin Plan. As of May 2011, the United States provided the land within the Floodway with greater flood protection than at any time in the past.

III. The *Arkansas Game* Decision Did Not Alter Basic Principles Of Takings Law Applicable To Flood Protection Projects Set Forth In *Sponenbarger* And *Danforth* Which Preclude A Takings Claim Based On The Facts Alleged

The Arkansas Game decision did not alter the basic tenet of takings law applicable to flood control projects. As explained by the Supreme Court in Sponenbarger and Danforth, the United States can only be found liable for a takings claim to the extent that actions of the United States expose the land within the Floodway to more frequent floods than it would have otherwise experienced absent government action. A corollary to this basic rule holds that retention of water from unusual floods for longer periods of time or the increased depth or destructiveness of the water does not cause a taking. A second corollary holds that there can be no takings liability when the flood control program measured in its entirety reduces the general flood hazards and confers a net benefit to a particular tract of land. Sponenbarger, 308 U.S. at 265-67; Danforth, 308 U.S. at 286-87.

In Count I of the Complaint, Plaintiffs seek damages caused by one flooding event when the United States Army Corps of Engineers operated the Floodway in response to extreme flooding conditions in May 2011. In Count II of the Complaint, Plaintiffs allege that the current operation plan itself gives rise to a takings claim because it caused more damaging flooding. Big Oak Farms, 105 Fed. Cl. at 55, 57. Plaintiffs failed to state a takings claim under any theory of liability recognized by the Supreme Court.

A. The United States Is Only Liable For A Taking To The Extent That The Action Of The United States Exposes Land To The Risk Of Greater Flooding

When attempting to safeguard large areas from existing flood hazards, the United States does not owe compensation under the Fifth Amendment to every landowner which it fails to protect in the event of major floods. This is true even if some other property may benefit from the flood control project. Sponenbarger, 308 U.S. at 265-66. The United States can only be found liable to the extent that actions of the United States exposed the land within the Floodway to greater flooding than it would have otherwise experienced absent government action. Id. at 265-66; Danforth, 308 U.S. at 286-87. The Plaintiffs seek to hold the United States liable for damages that resulted from one flood, when this same flood would have occurred had the United States not taken action and raised the levees to provide protection to a flood stage of sixty feet pursuant to the Flood Control Act of 1965. To require the government to pay damages under these circumstances "would far exceed even the 'extremest' conception of a 'taking' by flooding within the meaning of [the Fifth] Amendment. For the Government would thereby be required to compensate a private property owner for flood damages which it in no way caused." Sponenbarger, 308 U.S. at 265 (footnote omitted).

As this Court correctly recognized, "to state a claim based on the current operation plan . . . the plaintiffs had to have alleged that the current operation plan will result in a greater number of floods than would have existed had the plan not been changed." Big Oak Farms, 105 Fed. Cl. at 57 (citing Sponenbarger, 308 U.S. at 265). "The Supreme Court in Sponenbarger made clear that, where the plan is part of a flood protection project, the plaintiff must allege facts to show that the flooding authorized by the plan exceeds the flooding that would have occurred before the plan was changed." Big Oak Farms, 105 Fed. Cl. at 57 (citing Sponenbarger, 308 U.S. at 265-

66).” The Arkansas Game decision does not change this controlling principle of takings law applicable to this case.

In Arkansas Game, the trial court concluded that annual deviations that the Corps authorized from the water control manual for a reservoir project caused “six consecutive years of substantially increased flooding” on plaintiff’s property. The trial court found that the flooding repeated over a period of six years, would not have occurred absent action by the United States. 133 S. Ct. at 517, 522 (The plaintiff’s land “had not been exposed to flooding comparable to [those six years’] accumulations in any other time span either prior to or after the construction of the Dam.”) The trial court held the Corps liable for taking a temporary flowage easement over plaintiff’s property. The Federal Circuit reversed on the ground that government-induced flooding can give rise to a taking claim only if the flooding is ‘permanent or inevitably recurring.’” Arkansas Game & Fish Comm’n v. United States, 637 F.3d 1366, 1378 (Fed. Cir. 2011) (citing Barnes v. United States, 538 F.2d 865 (Ct. Cl. 1976), and Fromme v. United States, 412 F.2d 1192 (Ct. Cl. 1969). The Supreme Court granted certiorari “to resolve the question whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking,” and reversed, concluding that temporarily-recurring floodings are not categorically exempt from takings liability. Arkansas Game, 133 S. Ct. at 515, 518.

Arkansas Game involved claims that the plaintiff’s property was subjected to repeated flooding over a six-year period that would not have occurred absent action by the United States. The gravamen of the Big Oak Complaint is not that Government action caused more frequent flooding than would otherwise have occurred, but rather, that the levee system in place on May 2011 failed to provide protection against a flood that was expected to crest in excess of sixty feet on the Cairo gauge. See Big Oak Farms, 105 Fed. Cl. at 51-52. Plaintiffs’ land has always been

subject to flooding under extraordinary conditions. The United States is not liable for a Fifth Amendment taking of lands not fully and wholly protected when government projects fail to protect land from flood damages which were inevitable without the projects. Sponenbarger, 308 U.S. at 265-66. The Arkansas Game decision does not alter this controlling principle of takings law.

B. Increased Velocity Or Destructiveness Of Flood Does Not Cause A Taking

In Count II, Plaintiffs allege that the change in operations of the Floodway caused a more damaging flood. Big Oak Farms, 105 Fed. Cl. at 57. As recognized by this Court and the Supreme Court, the United States can only be held liable for a taking if the construction and operation of the Birds Point-New Madrid Floodway caused the land to actually experience a greater number of floods than it had prior to the construction of the project. Operation of the Floodway occasioned by extraordinary floods resulting in the retention of floodwaters for longer periods of time or the increased depth or destructiveness of the water does not cause a taking. These are consequential damages for which the government cannot be held responsible. Danforth, 308 U.S. at 286-87; Sponenbarger, 308 U.S. at 265-66; Big Oak Farms, 105 Fed. Cl. at 57-58. This Court's finding that the Plaintiffs failed to state a claim because "[p]laintiffs allege only more severe, not more frequent flooding, based on the current operation plan," Big Oak Farms, 105 Fed. Cl. at 58, is not impacted by Arkansas Game.

C. There Is No Taking When The Flood Control Project Reduces General Flood Risk And Confers A Net Benefit To The Land

Arkansas Game did not alter prior Supreme Court decisions holding that enforcement of a broad flood control project does not cause a taking merely because it will result in an increased volume or velocity of otherwise inevitable destructive floods, "where the program measured in its entirety greatly reduces the general flood hazards and actually is highly beneficial to a

particular tract of land." Sponenbarger, 308 U.S. at 266-67; accord Hartwig v. United States, 485 F.2d 615, 621 (Ct. Cl. 1973).

As deduced from the facts alleged in the Second Amended Complaint, the Floodway has been operated two times - in 1937 and again in May of 2011. 2d Am. Compl. ¶¶ 41, 51. The only conclusion that can be drawn from the Second Amended Complaint is that the Mississippi River and Tributaries Project provided the land within the Floodway with approximately seventy-four years of uninterrupted flood protection.

This Court correctly stated that

> [a]lthough the court finds that plaintiffs failed to state a claim because plaintiffs do not allege more frequent flooding than would have otherwise occurred based on the current operation plan, the court also notes that plaintiffs have also failed to allege any facts to address the "relative benefits" principle outlined in Sponenbarger, 308 U.S. at 265-67[.]

Big Oak Farms, 105 Fed. Cl. at 58 n.6. This independent basis on which to dismiss the takings claims is not impacted by Arkansas Game.

IV. The *Arkansas Game* Decision Does Not Apply To Claims Based On A Single Flood Event

In United States v. Cress, the Supreme Court held that there was no difference in kind between liability for permanent flooding and intermittent but inevitably recurring flooding. 243 U.S. 316, 328 (1917). Arkansas Game explained that flooding need not be permanent or inevitably recurring in order to find liability for taking. The Court held that repeated flooding can be temporary in nature and still affect a taking, rejecting a categorical bar to temporary-flooding takings claims. 133 S. Ct. at 521. However, Arkansas Game did not change the requirement for a temporary taking that the plaintiff must show *repeated* floodings that cause recurring and cumulative interference with property for a finite period of time. Arkansas Game, 133 S. Ct. at 515. Arkansas Game did not change the requirement that flooding must be

permanent or inevitably recurring to cause a permanent taking. See also Cary v. United States, 552 F.3d 1373, 1380-81 (Fed. Cir. 2009) ("floods that visit once and then recede" do not effect a permanent taking."). Nor did Arkansas Game give rise to new takings liability under a takings theory for consequential damages sounding in tort.

Plaintiffs in this case baldly allege the damages "resulting from Defendant's operation of the Floodway constituted a physical and permanent taking … ," 2d Am. Compl. ¶ 3, and that "in addition to Defendant's permanent taking … Defendant's permanent plan … [of operation] … constitute[s] the taking of flowage easements … ." Id. ¶ 4. However, as this Court correctly found, "the court cannot infer from the facts alleged in the [Second] Amended Complaint that there will be inevitably recurring and intermittent flooding." Big Oak Farms, 105 Fed. Cl. at 56.

A. Plaintiffs Failed To State A Claim For A Temporary Taking Based On Allegations Of A Single Flood

The Arkansas Game decision was based on the trial court's finding of repeated floods, as the Court stated numerous times in the decision: "The question presented is whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are temporary." 133 S. Ct. at 515; "Ordinarily, this Court's decisions confirm, if government action would qualify as a taking if permanently continued, temporary actions of the same character may also qualify as a taking." Id.; "We disagree and conclude that recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability." Id.; "We granted certiorari to resolve the question whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking." Id. at 518.

> [O]nce it is recognized that at least some repeated nonpermanent flooding can amount to a taking of property, the question presented to us has been essentially answered. Flooding cases, like other takings cases, should be assessed with

> reference to the "particular circumstances of each case," and not by resorting to blanket exclusionary rules.

Id. at 521 (citations omitted).

The Supreme Court cited footnote 12 on page 435 of the Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), to demonstrate that the Court never intended to adopt a rule which required flooding to constitute a permanent physical occupation of the land to cause a taking. Arkansas Game, 133 S. Ct. at 521. In Loretto the court stated:

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. As PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d. 741 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979), and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking.

Loretto, 458 U.S. at 435 n.12 (emphasis in original).

In Loretto, the Court recognized that not every physical invasion is a taking. The Court pointed to intermittent flooding cases, not cases involving a single flood, as examples of when a balancing test is applied to determine whether there has been a taking. It is evident that the Arkansas Game decision is limited to situations where the United States allegedly caused repeated floods. The Court cautioned that its "modest decision augurs no deluge of takings liability." 133 S. Ct. at 521. There should be no deluge of takings liability because Arkansas Game did not alter established precedent holding that takings liability depends upon a finding of intermittent flooding and the decision continues to recognize the distinction between tort and takings liability.

While the Fifth Amendment provides that private property shall not be taken without just compensation, the distinction between damage sounding in tort and actions amounting to a taking must be observed when applying the Fifth Amendment. Bedford v. United States, 192

U.S. 217, 224 (1904) (Erosion and flooding of 2,300 acres allegedly caused by construction up stream along the banks of the river to resist erosion held not to be a taking.) The distinction between tort and takings liability has been recognized by the Supreme Court in other contexts. In aircraft overflight cases, the Court has also required repeated invasions in order to state a temporary takings claim. "[F]lights over private land are not a taking, unless they are low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." United States v. Causby, 328 U.S. 256, 266 (1946) (case remanded to determine if the United States acquired a permanent or temporary easement) (cited by Arkansas Game, 133 S. Ct. at 519). In order to effect a taking, flooding must amount to an appropriation of the land and not merely cause an injury to the property. Sanguinetti v. United States, 264 U.S. 146, 149 (1924).

As a practical matter, if a single, impermanent and non-recurring trespass by flooding could be litigated as a taking, the distinction between taking and tort would become largely meaningless and would allow artful pleading to overcome Congress' express prohibition of tort claims arising from the United States' flood control efforts. *See* Flood Control Act of 1928, 33 U.S.C. § 702c ("[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . ."; United States v. James, 478 U.S. 597, 608 (1986) ("[t]he sweeping language of § 702c was no drafting inadvertence. Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control.") (citations omitted). In Central Green Co. v. United States, 531 U.S. 425 (2001), the Supreme Court clarified its interpretation of the § 702c phrase "floods or flood waters," but reaffirmed its relevant holding that no tort liability lies against the United States for "waters that are released for flood control purposes when reservoired waters are at flood stage." Id. at 431.

The Arkansas Game decision does not obliterate the distinction between tort and takings liability. Recognizing the distinction between a tort and a takings claim, the Federal Circuit has emphasized that, when inundation is not permanent, a plaintiff's cause of action depends on the frequency of flooding. "Not every 'invasion' of private property [constitutes a taking]." "[I]solated invasions, such as one or two floodings . . . , do not make a taking . . . , but repeated invasions of the same type have often been held to result in an involuntary servitude." Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355-57 (Fed. Cir. 2003) (quoting Eyherabide v. United States, 345 F.2d 565, 569 (Ct. Cl. 1965)). The Arkansas Game decision refines existing law to recognize that repeated flooding can give rise to a temporary taking. However, Ridge Line is still applicable to the extent that plaintiffs are required to allege facts which demonstrate that any alleged interference with a protected property right, either permanent or temporary, was substantial and frequent enough to rise to the level of a taking. 346 F.3d at 1357. The property right allegedly taken in Arkansas Game was a temporary flowage easement. In order to state a claim for the taking of a flowage easement, a plaintiff must allege multiple floods. United States v. Dickinson, 331 U.S. 745, 751 (1947) (intermittent flooding can constitute a taking of an easement) (cited by Arkansas Game, 133 S. Ct. at 519); see Fromme v. United States, 412 F.2d 1192, 1196 (Ct. Cl. 1969) (per curiam) ("[O]ne flooding or two floodings of land attributable to the construction of nearby works by the Government cannot be regarded as a taking of a permanent interest in the affected land.") (internal citations omitted); Hartwig, 485 F.2d at 620 ("The principle may be reduced to the simple expression: 'One flooding does not constitute a taking . . . .'") (quoting B Amusement Co. v. United States, 180 F. Supp. 386, 389 (Ct. Cl. 1960)).

Plaintiffs failed to allege intermitted or repeated flooding. Big Oak Farms, 105 Fed. Cl. at 56. ("In order to state a takings claim under the conceded facts of this case, plaintiffs were required to allege facts to show that flooding is likely to frequently repeat. This they did not do.") Therefore, Plaintiffs failed to state a claim for a temporary taking as recognized by Arkansas Game.

B. Plaintiffs Failed To State A Claim For A Permanent Taking Based On Allegations Of A Single Flood

Arkansas Game recognized that repeated intermittent flooding can cause the taking of a temporary easement. However, the Arkansas Game case did not involve a permanent takings theory, and the Supreme Court did not announce any new standard relating to permanent physical takings. On the contrary, the Supreme Court reviewed with approval prior cases involving permanent physical takings, and discussed the standards applicable in those cases only to distinguish them from the standard that the Court explained was applicable to alleged temporary physical takings. See Arkansas Game, 133 S.Ct. at 518-21. The Court explained that while "[most] takings claims turn on situation-specific factual inquiries," the area of permanent physical takings is one in which it has "drawn some bright lines." Id. at 518. In order to state a claim for a permanent taking, Plaintiffs must allege that the intermittent flooding will be inevitably recurring. United States v. Cress, 243 U.S. at 328.

The Supreme Court reaffirmed that a valid permanent physical takings claim must allege that the Government has caused a plaintiff's land to become permanently flooded, or at least exposed to "inevitably recurring overflows." See Arkansas Game, 133 S.Ct. at 518-21. (The Court characterized its prior precedents as permanent physical takings by flooding which require continuous flooding or "'intermittent but inevitably recurring overflows.'" (quoting United States v. Cress, 243 U.S. at 328)).

This standard has been applied for almost a hundred years and has yielded dozens of opinions in the former Court of Claims and the Federal Circuit that control the Court's analysis here. For example, in Bryant v. United States, 216 Ct. Cl. 409, 411 (1978),[3] the Court of Claims rejected a takings claim premised upon flooding caused by the Corps' operation of Prado Dam, a flood control project used to manage the waters of the Santa Ana River in California. During an extraordinary rain event in 1969, 28 years after it was constructed in 1941, the Corps operated Prado Dam to release floodwaters onto the plaintiffs' land. Id. at 409-10. Plaintiffs alleged that this event, taken together with the prospect of future flooding from Prado Dam, constituted a permanent physical taking of their property. Id. The Court of Claims rejected Plaintiffs' claim. The Court explained that "plaintiff must show recurrent, inevitable inundation due to the action of the Government which amounts to a permanent appropriation for use by the Government." Id. at 9 (citations omitted). Based upon Plaintiffs' pleadings, and an affidavit submitted by a Government hydrological engineer estimating that "the flood conditions which had occasioned the discharge" were likely to occur no more frequently than every 30 years, the Court of Claims held that plaintiffs failed to articulate a valid takings claim: "Such a large time gap between floods does not satisfy the proof required to show that Government action has in effect taken an easement over plaintiffs' property." Id. at 410.

Likewise in Fromme v. United States, 412 F.2d 1192 (1969), the Court of Claims rejected a takings claim premised upon government caused flooding that occurred at distant time intervals. As here, the Fromme plaintiff owned flood plain acreage in close proximity to a federal engineering project, which, according to plaintiff, caused periodic increased flooding of

[3] Bryant v. United States, an order deciding a motion for summary judgment, appears in the *Federal Reporter* in a table of "Decisions by Order Without Published Opinions," *see* 578 F.2d 1389 (Ct. Cl. 1978). However, the order is published in the *United States Court of Claims Reports*, the official reporter of the United States Court of Claims, see Commodities Recovery Corp. v. United States, 34 Fed. Cl. 282, 292 n.9 (1995), and is therefore a published decision.

his properties. Fromme, 412 F.2d at 1195. The Court of Claims found evidence that the challenged federal project "impede[d] the runoff of floodwaters from the plaintiff's land" when "floodwaters reach[ed] an elevation higher than 29 feet above mean sea level" -- an extraordinary circumstance that could "reasonably be expected to recur at intervals of about once in every 15 years, on the average." Id. at 1195, 1197. Based on this record, the Court of Claims held that the "case lacks the future prospect of intermittent and frequent floodings" required to establish a taking. Id. at 1197. Thus, the controlling law of this Circuit, which remains vital after the Arkansas Game decision, holds that even Government-caused flooding at intervals as close as 15 years apart does not meet the standards of frequency and inevitable recurrence required to establish a permanent physical takings claim.

CONCLUSION

For the reasons stated herein, the United States respectfully requests that the Court confirm its prior decision and Order dismissing Plaintiffs' takings claims.

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