

Supreme Court rules government may be liable for flooding

By Terry Baynes and Jonathan Stempel, Reuters

WASHINGTON – The Supreme Court ruled on Tuesday that the federal government may be required to pay damages when it releases water from a dam that causes temporary flooding for a property owner downstream.

The case addressed the politically charged issue of when government activity that affects private property constitutes a “taking” that requires payment to a landowner. Under the 5th Amendment to the U.S. Constitution, the government must pay owners of private property that it takes for public purposes.

Writing for a unanimous court, Justice Ruth Bader Ginsburg said temporary flooding of private land by the government is “not categorically exempt” from liability under the 5th Amendment’s Takings Clause.

There is “no solid grounding in precedent for setting flooding apart from all other government intrusions on property,” Ginsburg wrote.

The Arkansas Game & Fish Commission, which operated the 23,000-acre Dave Donaldson Black River Wildlife Management Area, had complained about water releases by the U.S. Army Corps of Engineers from the Clearwater Dam in Missouri, about 115 miles upstream.

It claimed that releases between 1993 and 1998 led to six years of flooding, causing the death or weakening of nearly 18 million board feet of timber and making it harder to operate.

A federal judge awarded \$5.7 million for lost timber and to

regenerate forestry, but the U.S. Federal Circuit Court of Appeals overturned that award in March 2011, saying the flooding was only temporary and required no compensation.

The government had argued that the releases had only incidental consequences, and that it had the right to balance the “benefits and burdens” of such releases, which could also be used to protect crops or avert flooding in specific areas.

The Supreme Court cautioned that its ruling was not meant to “credit all, or even many, such claims.” Rather, lower courts would have to weigh numerous factors in deciding whether to award landowners compensation for temporary flooding, including the degree to which the damage was intended or foreseeable, recurring or severe.

The commission’s appeal was supported by a variety of advocates for fish, forestry and wildlife groups, as well as private property advocates. Justice Elena Kagan recused herself from the case, likely because she worked on the case in her former role as U.S. solicitor general.