



September 2013

Arkansas Game & Fish Commission Returns to the Federal Circuit:

On December 4, 2012, the U.S. Supreme Court unanimously reversed a decision issued by the U.S. Court of Federal Circuit Court of Appeals that had applied a flooding-specific takings test in *Arkansas Game & Fish Commission v. United States*, No. 5-381L, as we previously reported in our [May 2012](#) and [June 2013](#) newsletters.

On September 4, 2013, Marzulla Law hosted a moot court in which Jim Goodhart, the Commission attorney who had successfully argued the case in the U.S. Supreme Court, honed his argument for the Federal Circuit. Participants in the moot court preparation included: Ilya Shapiro of the Cato Institute and Luke Wake of the National Federation of Independent Businesses, both of which joined an amicus brief filed by a group of interested organizations on the Commission's behalf, and Nancie and Roger Marzulla. ([Marzulla Law](#) also filed an amicus brief in the Supreme Court for the owners of agricultural land threatened with repeated but temporary flooding due to Congress's passage of the San Joaquin River Restoration Settlement Act.) Other moot court participants included Julie Greathouse, Kim Logue, and Matthew Miller of Perkins & Trotter PLLC, the law firm representing the Commission, and John Marks, an attorney with the Commission..





The case arises out of actions taken by the U.S. Army Corps of Engineers starting two decades ago, when the Corps authorized what it characterized as temporary, ad hoc deviations from its normal management of the Clearwater flood control dam on the Black River. But those deviations continued through 1999, and repeatedly flooded Arkansas's Dave Donaldson Black River Wildlife Management Area downstream.

Inundated with water from the Black River, the soil became saturated and dominated by wetland plants. Many trees developed root rot and permanently weakened or died. The end result was that the Commission lost 18 million board-feet of hardwood timber and suffered the permanent destruction of the Wildlife Management Area's waterfowl habitat.

In 2005, Arkansas sued the United States in the U.S. Court of Federal Claims for the uncompensated taking caused by the flooding and the timber damage. The trial court held that "the inundations...from 1993 through 1999 were recurrent and constituted an appropriation, albeit a temporary rather than permanent one because the Corps terminated its deviations." The trial court held that the temporary flooding easement caused a permanent taking of the timber and awarded \$5.7 million in damages as just compensation.

But on appeal, the U.S. Court of Appeals for the Federal Circuit focused only on the flowage easement and reversed the trial court's ruling, holding that only permanent or inevitably recurring flooding could constitute a compensable taking.

The Supreme Court unanimously reversed and vacated the Federal Circuit's decision in an 8-0 decision (Justice Kagan not participating), holding: "No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case."

After supplemental briefing, the case was back in the Federal Circuit for oral argument. The Government argues that the Supreme Court essentially created a new four-part takings analysis for flooding cases—which it further contends supports a finding of no takings liability for the flooding that occurred in this case.

Arkansas Game & Fish Commission: Oral Argument on Remand

On September 6, 2013, the Federal Circuit heard oral argument on the remaining issues on remand. Robert J. Lundman, an attorney with the Department of Justice, argued first, presenting the Government's position that the Supreme Court has essentially formulated a new, four-part-takings test for flooding cases. Applying those four factors to this case, Lundman contended that the Federal Circuit should reverse the trial court's liability ruling and remand the case for further proceedings consistent with what the Government described as the Supreme Court's new flooding takings test. The Government's argument, however, did not seem to gain any traction with the three-judge panel, the Honorable Judges Pauline Newman, William C. Bryson, and Timothy B. Dyk. The judges pressed the Government attorney on its legal arguments, and factual contentions. For instance, Judge Dyk asked if the Government has raised the issue of state property law in the trial court, which Lundman conceded that it had not.



Jim Goodhart, in arguing for the Commission, pointed out in his argument that the Supreme Court expressly stated that it was not changing the legal standard for a physical taking. He further argued that the trial court applied the standard physical takings analysis, consistent with the Supreme Court's ruling. The trial judge also made extensive factual findings, which must be sustained by the Federal Circuit on appeal unless they are clearly erroneous. As Goodhart further stated in his argument that, "[the Government] might ask you to relitigate the facts... but they cannot show clear error."

A ruling is expected later this year. To download a recording of the argument, click [here](#) (links to a MP3 audio file).

U.S. Court of Federal Claims Authorizes Deposition of Chairman Bernanke

The Honorable Thomas C. Wheeler, a judge on the U.S. Court of Federal Claims, recently approved an AIG shareholder's request to depose the former Chairman of the Board of Governors of the Federal Reserve System, Ben Bernanke, in *Starr International Company, Inc. v. United States*. In *Starr*, a class of AIG shareholders allege that the Government owes them just compensation for the taking of their shares when the Government used AIG's assets to bailout other financial institutions.

The trial court explained that he approved the request to depose the government official because "Mr. Bernanke repeatedly has acknowledged that he was a key decision-maker on behalf of the Government, and his testimony is undoubtedly relevant to the Fifth Amendment taking and illegal exaction claims before this Court." The Government had "oppose [d] this deposition on the ground that Mr. Bernanke is a high-ranking government official whose deposition should not be taken absent a showing of extraordinary circumstances."

But the trial judge explained that this rule is not absolute, and it does not shield an official from a subpoena to appear at a deposition where "the official has personal knowledge of relevant facts necessary to the case and... the information cannot be obtained through other sources."

The trial court further concluded that: "because of Mr. Bernanke's personal involvement in the decision-making process to bail out AIG, it is improbable that Plaintiff would be able to obtain the same testimony or evidence from other persons or sources... Indeed, the Court cannot fathom having to decide this multi-billion dollar claim without the testimony of such a key government decision-maker."

What People Are Saying About Marzulla Law:

"I am extremely grateful for assistance that Nancie, Roger, and all at Marzulla Law provided to help our case before the Supreme Court and then on remand before the Federal Circuit. The moot to prepare for oral argument was rigorous and was the best practical preparation for what actually followed."

James F. Goodhart

Expert Spotlight: James F. Goodhart



James F. Goodhart represented the plaintiffs in *Arkansas Game & Fish Commission v. United States*, and argued the case before the Supreme Court. He has served as General Counsel for the Arkansas Game and Fish Commission (AGFC) since 1997.

As supervisor of the AGFC Legal Division he oversees legal activities involving such matters as representing the Commission in administrative hearings and litigation matters; assisting in adoption and amendment of hunting and fishing regulations; monitoring and drafting legislation; negotiating and drafting contracts; facilitating land purchases, leases, and other real estate transactions; and providing general legal advice regarding criminal and civil law, species and environmental protection, personnel employment and general liability matters.

Originally a native of Little Rock, Mr. Goodhart obtained his undergraduate degree in Environmental and Water Resources Engineering from Vanderbilt University in 1981 and afterwards worked as an environmental and safety engineer with Gulf Oil Exploration and Production Company in New Orleans. He later received his J.D. degree, with honors, from Loyola University (1986) and his Masters of Law degree, with honors, in Environmental and Energy Law from Tulane University (1991).

From 1998 to 2001, Mr. Goodhart served on the Arkansas Pollution Control & Ecology Commission as the representative from the Arkansas Game and Fish Commission. He has taught courses at the University of Arkansas at Little Rock (undergraduate level) in Environmental Regulation and Natural Resources Law, and currently is an adjunct professor at UALR School of Law where he teaches Land Use and Natural Resources Law.

Staff Spotlight: Robert Maxey

Robert Maxey was one of our summer 2013 interns from the Washington Center's Law and Criminal Justice internship program. He is now beginning his third year at the University of Iowa, where he is a member of the Honors Program majoring in Political Science with a Pre-Law concentration, and International Relations; he is also minoring in History.

Since 2010 Robert has been an active member of the Sigma Phi Epsilon Fraternity at the University of Iowa, and was selected to attend the fraternity's Carlson Leadership Academy. An avid sportsman, Robert played varsity football during all four years of high school, and has coached youth sports in football, weightlifting, and speed and agility camps. He also has an impeccable history of volunteering, such as at Salvation Army Kettle Collection, Community Harvest Food Pantry, and Salvation Army Food Pantry, among many others.

"I have gained invaluable knowledge and experience being at Marzulla Law," says Robert, "and I am grateful for the opportunity to be a part of such a talented team of litigators."

Among his many diverse interests are hiking, snowboarding, reading, and attending concerts.



Marzulla Law, LLC is the nation's leading law firm for takings claims against the federal government. ML represents landowners, developers, water districts, Indian tribes, business, and corporate interests in litigation of property rights and contract claims. ML also represents clients in environmental enforcement actions, and litigation involving natural resources and permitting issues, in federal district courts and courts of appeal.

We hope that this Newsletter will serve as a resource for you.



Best regards,

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About Marzulla Law

Marzulla Law, LLC is a Washington D.C.-based law firm. Nancie G. Marzulla and Roger J. Marzulla help property owners get paid just compensation when the Government takes their property through inverse condemnation.

ML lawyers practice in the federal courts, especially the U.S. Court of Federal Claims, the Federal Circuit Court of Appeals, and the U.S. District Court for District of Columbia, as well as other federal district courts, appellate courts, and the U.S. Supreme Court. ML also represents clients in administrative agencies, such as the District of Columbia Office of Administrative Hearings or the Interior Board of Indian Appeals.

Chambers has recognized Marzulla Law as one of the top ten water rights litigation firms in the country. Nancie Marzulla and Roger Marzulla have been selected by their peers to be included on the list of Best Lawyers in America, and their firm has the highest AV-rating from Martindale-Hubble. Nancie and Roger Marzulla have been recognized by Best Lawyers as a Top Tier law firm by *U.S. News & World Report* for environmental law, and Marzulla Law is a proud member of the International Network of Boutique Law Firms.

