

ML Marzulla Law Legal Report

When it's Inverse Condemnation, We Help Property Owners Get Paid



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.

Sincerely,

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Court Invalidates Critical Habitat Designation



In 2003 the U.S. Fish and Wildlife Service ("FWS") designated 143

Testimonial

"Not only were the Marzullas' trial preparation, skill, and experience very compelling, I was also very impressed with their attention to detail in understanding the expert witness report to further enhance the overall impact of the expert witness testimony,"

Chuck Knight
Vice President
J.T. Kruer & Company

acres of privately owned land in San Diego County, California as "occupied" by the San Diego fairy shrimp—also known as sea monkeys—an endangered aquatic crustacean about the size of an ant and with a lifespan of about 30 days. In 1997 the fairy shrimp was listed as an endangered species under the Endangered Species Act, which authorizes FWS to designate private property as "critical habitat" if an endangered species is found to be occupying the land.

According to the Endangered Species Act (ESA), a critical habitat is defined as "the specific areas within the geographical area occupied by the species, at the time it is listed... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."

In 2008 the property's landowners, Otay Mesa Property, LP, sued to challenge the designation of their property as a critical habitat. In 2010 the D.C. District Court ruled in favor of FWS, holding that their designation was lawful.

The landowners appealed to the U.S. Court of Appeals for the D.C. Circuit. In their opening brief, the landowners explained how devastating the designation was on their ability to use their valuable, commercial property:

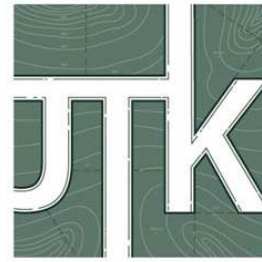
FWS's designation of critical habitat on non-federal property significantly impairs and restricts the Landowners' ability to use and develop highly valuable privately owned land. The designation will likely not alter not only the use of the Landowner's property, but also the use of other property in the area as development shifts, roads and utilities are rerouted, and land uses changed to avoid disruption of the critical habitat. Given the location of this property directly in the path of development resulting from the soon-to-be-opened border crossing, the designation of critical habitat for the San Diego fairy shrimp inevitably affects the quality of the human environment in the Otay Mesa area.

The landowners argued that the FWS erred on several levels in arriving at the determination that the Otay Mesa property should be designated as a critical habitat for the San Diego fairy shrimp and that the species "occupied" the land. The D.C. Circuit agreed. In its opinion the court listed three major factors that pointed to a lack of substantial evidence for the FWS's determination that the property was "occupied" by the fairy shrimp:

1. Surveyors identified the fairy shrimp in only one location on the property, and the only sighting was in 2001 when they found four fairy shrimp in a tire rut on a dirt road.
2. After FWS searched the property six more times in 2001 for the fairy shrimp, none were identified. The Court stated:

Expert Witness

Chuck Knight



J.T. KRUEER & COMPANY
Real Estate Development Services

Chuck Knight was an expert witness in the *International Industrial Park, Inc. v. United States* contract dispute case, where Roger Marzulla and Nancie Marzulla represented the plaintiffs.

The case involved plaintiffs' claim that the government failed to perform its contractual obligation to construct and pave two access roads on plaintiffs' privately owned land in Southern California. The land is very near the international border with Mexico, and which the U.S. Border Patrol had been accessing for years in their efforts to locate and apprehended migrants crossing the border illegally.

Mr. Knight performed a cost analysis of the construction of the two roads and related infrastructure, with the resulting dollar amount being sought in damages by the plaintiffs.

"Not only were the Marzullas' trial

"The failure to observe any San Diego fairy shrimp in later surveys on plaintiffs' property is in tension with the suggestion that the property was occupied by the San Diego fairy shrimp in 2001. It is likewise in tension with the agency's conclusion that the property was occupied in 1997 and the 'species continue[d] to occur' in 2007."

3. The lone sighting of the fairy shrimp in this case was in 2001, but the relevant date for purposes of the designation was 1997. Critical habitat includes "specific areas within the geographical area occupied by the species, *at the time it is listed.*" The FWS provided no evidence of sightings on the land in 1997.

The landowners posited that the San Diego fairy shrimp may have been brought onto their property after 1997 by a truck tire. Attempting to counter this position, FWS stated that maps in the record show a stream running from the landowners' property to a pool off their property where fairy shrimp had been observed. However, the Court stated that the potential existence of San Diego fairy shrimp outside the landowners' property "does not itself show that San Diego fairy shrimp occupy the property, and occupation of the property was the rationale supplied by FWS final rule."

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The appellate court ultimately ruled for the landowners, vacating the designation of the landowners' property as "critical habitat," and reversed the district court's grant of summary judgment to the FWS. The D.C. Circuit also held that although courts must give great deference to agency decisions, that "deference is not abdication. This case illustrates... that distinction.... The current record is simply too thin to justify the action the Service took."

"We are pleased that the appellate court agreed that occupied should mean just that, and not whatever the agency argues it should mean," said Nancie Marzulla, attorney for the landowners. "This land should never have been designated as critical habitat in the first place."



Endangered Species Listings on The Rise: How to Protect Your Rights if an Endangered Species is Listed on Your

preparation, skill, and experience very compelling, I was also very impressed with their attention to detail in understanding the expert witness report to further enhance the overall impact of the expert witness testimony," said Knight.

"Overall, it was a great experience working on this case with the Marzullas and the very capable associates and staff of Marzulla Law."

Chuck Knight is the vice president of J.T. Kruer & Company, a regional consulting firm founded in 1994 by Jonathan Kruer. The company has grown to be recognized for its strong and effective client advocacy, superior service and superior results. A California "A" License - Engineering Contractor (License #777345), the firm specializes in program and project management, pre-construction services and construction management. Other specific services provided by the firm include: feasibility studies, due diligence, project budgets, scheduling, constructability analysis, value engineering, earthwork analysis, bidding services, change order negotiations and litigation support.

Mr. Knight graduated with distinction in 1973 with a Bachelor of Science in Mathematics from Harvey Mudd College in Claremont, California. He

Property

On July 12, 2011 FWS entered into a settlement with two environmental groups that, according to FWS, will dramatically reshape the process of listing species under the Endangered Species Act, and affect potentially many thousands of acres of valuable commercial land and water rights. The settlement requires FWS to take action on pending petitions for 757 different species over the next seven years, and provides a schedule each year for FWS to act on identified listing petitions. Despite the settlement, each of the 757 listing decisions can be challenged under the Administrative procedure Act, and all such decisions are ultimately subject to challenge as a taking under the Just Compensation Clause.

Although FWS is free not to list a species in the review process, it is obvious that this Settlement will result in a massive uptick in the listing of species—in the forty years since ESA was passed, only 2,000 species have been listed.

Simultaneously with the listing, the ESA requires that FWS designate critical habitat for each species. As we saw with the fairy shrimp lawsuit, the critical habitat designation can be a major obstacle to commercial or residential development of property. If a proposed development or use of property, water, or minerals would interfere with the habitat of an endangered species, that activity or use may require a permit. Without a permit, under the federal Endangered Species Act, it is unlawful for any person to take any endangered species, which broadly includes harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting.

Any violation of the Act carries with it potential large monetary fines or imprisonment, or both. Under the broad definition of "take" under the Act, even indirect impacts or interferences with habitat could potentially be considered an unlawful "take" of the species.

As a landowner it is important to note that each of the listing decisions can be challenged under the Administrative procedure Act, as a taking under the Just Compensation Clause.

If an endangered species is found or newly listed on your property, here's what to do:

1. First determine the nature and extent of any impact of a listed species on your water or land use, which generally requires the expertise of a biologist. A biologist can either perform a survey of the property or otherwise determine if and how your property interests may be impacted by a listed species.
2. If the species or its habitat might be on your property, you should file comments during the comment period so that you have made a record to support a legal challenge if that becomes necessary.
3. Finally, be aware that development projects can be designed to avoid impacts to a species, or mitigation can be provided to offset unavoidable impacts.

began his career as a laborer with Griffith Company, and swiftly progressed into project supervision and has extensive knowledge of all aspects of public and private general engineering construction. He has been vice president of J.T. Kruer & Company since 1998.



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 are listed in Best Lawyers for environmental law, and Marzulla Law is a member of the International Network of Boutique Law Firms.



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