# 2009-5121, 2010-5029

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ARKANSAS GAME & FISH COMMISSION,
*Plaintiff – Cross-Appellant,*

v.

UNITED STATES,
*Defendant – Appellant.*

Appeal from the United States Court of Federal Claims
in 05-CV-318, Judge Charles F. Lettow.

# RESPONSE BRIEF ON REMAND OF PLAINTIFF – CROSS APPELLANT ARKANSAS GAME & FISH COMMISSION

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## INTRODUCTION

The facts of this case require just compensation. The United States works hard to minimize those facts and move the goal posts with new legal arguments. But the record supports the Court of Federal Claims' findings. And the United States cannot abrogate its Takings Clause obligations with arguments that conflict with takings law and were waived long ago.

## I. The Corps of Engineers Must Provide Just Compensation When It Shifts Substantial Flood Burdens To The Commission.

The facts in this case show that the United States shifted substantial flood burdens from one group to another, violating the *Armstrong* principle. *See* Supp. A9 (slip op. at 6) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

### A. The Corps imposed substantial burdens on the Commission.

The United States downplays the flooding increase by talking only of additional days of flooding without mentioning percentage increases. Even including the 1999 moderately-dry year, its own numbers show a *24.5% increase* in the days the Black River exceeded 5 feet in June, July, and August. *See* USA's Supp. Br. at 8. The United States' fourth bullet point shows a *40.3% increase* in days above 6 feet for April through mid-October. *See* USA's Supp. Br. at 9.

Considering that the increased flooding was not just at 6 feet, but was concentrated at 8 to 10.5 feet when the entire Management Area is flooded except for the highest ridge and natural levee elevations (*see* Commission's Supp. Br. at

6-7), the volume of extra water held and then discharged down the Black River during the critical growing season for *six consecutive years* was extraordinary. The government's intrusion here was unquestionably substantial enough to require just compensation. *See* Commission's Corrected Response Br. at 24-27; Commission's Supp. Br. at 16-17 (severity); Supp. A8, 17 (slip op. at 5, 14).

**B. The United States cannot rationalize away these flood burdens.**

Like the government's rationalization in *Pumpelly* that the owner did not lose its property when the government flooded it, suffering only a non-compensable "remote and consequential injury"—which the Supreme Court in this case described as a "crabbed reading" of the Takings Clause—the United States here suggests various theories why the Commission did not lose anything from the floods. *Cf. Pumpelly v. United States*, 80 U.S. (13 Wall.) 166, 174, 177, 181 (1872) *described in* Supp. A10 (slip op. at 7). Each theory incorrectly focuses on the government instead of the owner, reducing the analysis to an exercise in rationalizing the government's position. *See Pumpelly*, 80 U.S. at 177-78; *see also United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

One such theory is that the Commission could have just cut down the trees and sold them before the flooding killed them. *See* USA's Supp. Br. at 15. The Court of Federal Claims rightly rejected this notion as unworkable. *See* A27-28 (87 Fed. Cl. 594, 619-20 (2009)). Considering that the Commission harvests

timber as a management tool to facilitate a diverse and sustainable habitat (*see* Commission's Supp. Br. at 2), clear-cutting the forest—which the Commission would have had to do as there was no way to know which individual trees were going to die—would have absolutely destroyed the character of the land and the Commission's use and enjoyment of it. *See* Supp. A5, 8 (slip op. at 2, 5).

Another theory is that there is no evidence of "interference," but only of "injury." This distinction is legally flawed because it disregards that all direct, physical invasions necessarily displace the owner's fundamental rights to exclude and to use and enjoy its property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982); *Causby v. United States*, 328 U.S. 256, 262 (1946); *General Motors*, 323 U.S. at 380. Floods are physical invasions. *United States v. Cress*, 243 U.S. 316, 321, 328 (1917). Thus, "it is the character of the invasion, not the amount of damage resulting from it, so long as the ***damage*** is substantial, that determines the question whether it is a taking." *Cress*, 243 U.S. at 328 (emphasis added); *see also United States v. Welch*, 217 U.S. 333, 339 (1910) (observing that if flooding cuts off a right of way, its "destruction for public purposes may as well be a taking as would be an appropriation for the same end").

The United States' interference theory is also factually incorrect: evidence well supports the finding that "the government's superinduced flows so profoundly disrupted certain regions of the Management Area that the Commission could no

longer use those regions for their intended purposes, *i.e.*, providing habitat for wildlife and timber for harvest." A28 (87 Fed. Cl. at 620); Commission's Corrected Principal Br. at 24-27.

### C. The United States waived its new and legally incorrect arguments challenging the invasive and physical character of the floods it imposed on the Commission.

All arguments in the United States' brief about investment-backed expectations contend that the floods were not physical invasions, either because the Corps had already taken a total flowage easement in the Management Area or because the flooding from its operations is a regulatory adjustment. But these arguments were available when the Commission filed suit, and the United States explicitly waived them. *See, e.g.*, USA's Principal Br. at 25 n.2 (acknowledging the consideration in *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1357 (Fed. Cir. 2003) of "'whether the government appropriated from [plaintiff] a legally protectable easement interest'" and then conceding that "[t]he United States did not contest the Commission's claimed property interest here"); A24 (87 Fed. Cl. at 616) ("[T]he parties concur, as they must, given the facts, that the superinduced flows of water would constitute a physical, not a regulatory, taking . . . .").

The United States' new arguments also contradict established law. First, the United States argues that it could flood like it did because the Management Area is in a floodplain and the Commission has long maintained green-tree reservoirs

(GTRs). But the United States cannot *increase* flooding that substantially intrudes without paying just compensation. *See Argent v. United States*, 124 F.3d 1277, 1285 (Fed. Cir. 1997) (holding, as to an avigation easement, that "[t]he United States may effect a second taking by, *inter alia*, increasing the number of flights or introducing noisier aircraft") (internal citations omitted); *Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) (holding the United States liable for taking timber by increased flooding); *see also* Supp. A17 (slip op. at 14); *Danforth v. United States*, 308 U.S. 271, 286 (1939) (acknowledging, although there was no specific evidence that the flooding caused actual injury (*see* 105 F.2d 318, 320 (8th Cir. 1939)), "[t]he Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction").

Second, the United States argues that it imposed an unlimited flood control servitude on the Management Area, either when it completed construction and began operating Clearwater Dam in 1948 or when it approved the 1953 water control plan. *See* USA's Supp. Br. at 10-11. Because the United States had never imposed floods like those here, this argument distorts the nature of investment-backed expectations. Those simply address whether the owner received value for the government's intrusions by negotiating a discount at the time of purchase. *See*,

*e.g.*, *Palm Beach Isles Associates v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000). When the government chooses to increase burdens by a series of physical events, as it did here, then the landowner can wait until the "consequences of inundation have so manifested themselves that a final account may be struck." *United States v. Dickinson*, 331 U.S. 745, 749 (1947); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 627-28 (2001) (acquiring title after the effective date of regulations did not bar takings claim); *Cooper*, 827 F.2d at 764.

Third, the United States argues another categorical exception, this time—as it first advanced at the Supreme Court—that downstream flooding becomes exempt when it passes some undefined distance from the dam. Its apparent theory is that the flood control project does not occupy downstream property and only adjusts benefits and burdens in releasing water that would already go down the river. *See* USA's Supp. Br. at 12. But myriad cases hold that no permanent and exclusive occupation is required. *E.g.*, *Ridge Line*, 346 F.3d at 1352; *Causby v. United States*, 328 U.S. 256, 262, 266 (1946). And the United States conceded to the Supreme Court that it has acquired "land substantially downstream from a flood control project" in other situations. *See* Respondent's Brief at 26.

Like the United States' temporary flood exception, it falls far short of fulfilling the purpose of the Takings Clause to exempt downstream floods when the Corps can, as it did here, foreseeably shift flood burdens from one group to

another. *Cf. Armstrong*, 364 U.S. at 49; A29-31 (87 Fed. Cl. at 621-23) (finding the Corps' deviations resulted directly, naturally, and probably in downstream flooding during the growing season that would not have occurred otherwise). Applying the physical takings analysis to downstream floods like this Court did in *Ridge Line* is fair and faithful to precedent. *See Ridge Line*, 346 F.3d at 1355-56; *see also Cary v. United States*, 552 F.3d 1373, 1378-79 (Fed. Cir. 2009).

Fourth, the United States argues that the character of flooding from its flood control operations is a regulatory interference instead of a physical invasion. *See* Supp. Br. of USA at 13. But the United States cannot downplay its floods by arguing that shifting them to the Commission as part of a flood control program confers great public benefits. *See* Supp. A15 (slip op. at 12) ("While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases."). Whether physical takings law applies depends on whether the government action interferes physically. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). As the government conceded, superinduced floods are recognized physical invasions. A24 (87 Fed. Cl. at 616).

The takings analysis for physical invasions "scarcely" imposes strict liability. *Cf.* Supp. A15 (slip op. at 12). On these facts and the arguments properly raised, affirmance does not hold the United States liable for every flood. Because

the Corps' actions to reduce floods on one group resulted directly, naturally, and probably in increased floods on the Commission beyond those imposed before and that substantially intruded, the Commission is entitled to just compensation.

## II. The Deviations Caused Consecutive Years Of Growing Season Floods That Resulted in Widespread Destruction.

### A. The Commission's experts considered other possible causes and rejected them, concluding that only the Corps' deviations could and did cause the destruction suffered here.

To challenge the Court of Federal Claims' specific findings of fact that the United States' deviations—and not some other cause—resulted directly, naturally, and probably in unprecedented growing season floods that killed and degraded over 18 million board feet of the Management Area's bottomland hardwoods, the United States ignores copious evidence and focuses on the correlation between its deviations and the growing-season floods. It does so to accuse the Commission of resting on the "correlation proves causation" fallacy. But the Commission is unlike the fabled rooster who believed his crowing made the sun rise. Even the United States admits a causal relationship. *E.g.*, A2342 (Tr. 3367:10-17 (King)); A9828 (PX632). There is more evidence of causation than just a correlation.

The Commission's experts considered other potential causes of the flooding, including rain and run-off, and rejected them, concluding that only the deviations could have caused this shift in flooding patterns. For example, Drs. Heitmeyer and Overton both considered rainfall data from Poplar Bluff and Corning and rejected

rainfall as the cause of the flooding. A2176, 2213 (Tr. 2674:15-2675:9 (Overton); 2823:22-2824:16 (Heitmeyer)). Dr. Heitmeyer testified from extensive knowledge of the area between Poplar Bluff and Corning that there were no changes that would have increased run-off. A2213 (Tr. 2824:16-24 (Heitmeyer)).

Notably, the United States offers no evidence of rainfall or run-off. This is likely because its own expert—the same who utilized the SUPER-model—made a significant math error with it. *See* A2281 (Tr. 3122:3-3124:2 (Nutter)); A11130, 52 (DX310). Given that the United States never modeled its deviations until just before trial, failed to produce the actual data used in running its model until after pre-trial discovery concluded, never produced the assumptions built into the model, and then offered an expert at trial who miscalculated rainfall data, the Court of Federal Claims did not clearly err in accepting the Commission's experts' testimony. *E.g.*, A2190 (Tr. 2729:24-2730:9 (Overton)); A31 (87 Fed. Cl. at 623).

The Commission's experts further testified that the floods, not a preexisting condition, caused the damage. Dr. Baker examined and rejected the possibility that the damage was simply the result of a stressed or aging forest. He eliminated insects, disease, and general oak decline or wilt and testified that the trees were much younger than their anticipated lifespan of 150 years. A2133-34 (Tr. 2434:8-2435:18; 2438:22-2440:20 (Baker)). Dr. Heitmeyer considered and rejected beaver dams or the GTRs as the culprit. A2215-16 (Tr. 2830:17-2833:22

(Heitmeyer). Beaver dams have no effect when river levels are high because the water will just overtop them, and there was no evidence that there were enough beavers to cause this extensive damage. A2216 (Tr. 2833:5-21 (Heitmeyer)); A38, 42 (87 Fed. Cl. at 630, 634 & n.23). The GTRs had been in place since the 1950s-60s and were flooded only during the dormant season, plus timber mortality was not restricted to and was often greater outside of the GTRs. A2214 (Tr. 2831:1-8 (Heitmeyer), A13766, 13769 (PX500). The Court of Federal Claims properly found that the difference between the normal background mortality rate and the mortality rate observed during the 2000 and 2001 timber cruises was caused by flooding from the Corps' deviations. A41-42 (87 Fed. Cl. at 633-34).

### B. The United States does not challenge the Court of Federal Claims' decision admitting the expert testimony on causation.

Instead of challenging the experts' opinions on causation under the rules of evidence, the United States argues that its actions just could not do this much damage. *E.g.*, USA Supp. Br. at 15. At its core this begs that the Court of Federal Claims should have weighed competing expert testimony differently. This cannot overcome the deference to which the Court of Federal Claims' findings are entitled. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-76 (1985). The evidence amply supports those findings.

## CONCLUSION

The Court should affirm on direct appeal and reverse on cross-appeal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing Response Brief on Remand of Plaintiff-Appellee/Cross-Appellant Arkansas Game & Fish Commission

1. complies with the type-volume limitation of 10 pages pursuant to this Court's Order dated January 29, 2013. This brief contains 2,469 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). Microsoft Word 2003 was used to calculate the word count; and
2. complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type style.

Dated: May 3, 2013

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2013, the foregoing Response Brief on Remand of Plaintiff-Appellee/Cross-Appellant Arkansas Game & Fish Commission was filed electronically and served via ECF on the following:

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