Nos. 2009-5121, 2010-5029

In the United States Court of Appeals for the Federal Circuit

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ARKANSAS GAME AND FISH COMMISSION,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

On Appeal from the United States Court of Federal Claims, No. 05-CV-381 (Hon. Charles F. Lettow)

SUPPLEMENTAL RESPONSE BRIEF FOR THE UNITED STATES

IGNACIA S. MORENO
Assistant Attorney General

ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov

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INTRODUCTION

As described in our opening supplemental brief, the Supreme Court set forth four factors for analyzing whether temporarily-recurring government-caused flooding constitutes a taking: (1) the duration of the flooding, (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action," (3) "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use," and (4) the "[s]everity of the interference." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012) (*AGFC*). In its brief, the Arkansas Game and Fish Commission (the Commission) distorts both the factors and the factual record in an effort to hide the holes in its case.

ARGUMENT

I. The deviations were temporary and ad hoc.

The Commission first attempts to minimize the importance of the temporariness of the deviations by claiming that "[d]uration goes to severity." AGFC Supp. Br. 17. In doing so, the Commission combines two factors that the Supreme Court set out separately – the duration of the flooding and the severity of the interference. *Compare AGFC*, 133 S. Ct. at 522 ("When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of

a compensable taking.") *with id.* ("Severity of the interference figures in the calculus as well."). Duration and severity are not the same thing.

The Commission then misconstrues the factual record, suggesting that the deviations were both unbroken in time and uniform in execution. AGFC Supp. Br. 3-4, 17-18. The Commission ignores this Court's accurate description of the record in its prior decision: "all of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year." Supp. A 42 (panel op.); *see also* Supp. A 36-37 (chart of deviations); Supp. A 139-43. The deviations were temporary, varied, and uncertain, as was any resultant flooding. This factor weighs heavily against finding a taking.

II. The Corps did not intentionally flood the WMA, and the flooding was not foreseeable.

The Commission discusses the foreseeability of the flooding without even mentioning that its property is 115 miles downstream from the dam. AGFC Supp. Br. 13-15. It takes six or more days for the water that is released from the dam to reach the WMA. A 2261, 9149. And on its 6-day, 115-mile journey, the water released from the dam is joined by drainage from 1,000 square miles of uncontrolled watershed, more than the approximately 900 square miles of

watershed that drains into the Black River above the dam. A 2260 (Tr. 3041), 2393, 9860, 9868, 9872-74, 11123; Supp. A 136.

These facts are critical to the foreseeability analysis. The United States Army Corps of Engineers (Corps) did not foresee the flooding because it reasonably believed that the effects of releases would dissipate in the 115 miles before the released water reached the WMA. A 12, 29, 2393, 2456-57, 2469.

The Commission claims that a "simple test release" would have revealed flooding impacts. AGFC Supp. Br. 13. That assertion is not supported by the record. The first planned test release failed because of a lack of water. A 14, 8740. The second "test" was not even a test release; it was simply a visit to the WMA to examine what it looked like when the Corning gauge was close to 6 feet because of rain. A 1756, 1768, 2205, 8740. The "test" thus indicated only that at certain river levels some of the WMA might flood; it did not prove a link between releases from the dam and the condition of the WMA, let alone establish that a certain release from the dam would lead to flooding of the WMA. A 1756-57; *see also* A 14, 1722, 1756-57, 8756, 9797, 9830; Supp. A 38. Moreover, the observation of the WMA does not establish that the flooding was foreseeable when the Corps decided to deviate from the Water Control Manual. It suggested only that additional analyses were needed to ascertain the relationship between reservoir

releases and downstream impacts. Because the Corps never deviated from normal operations again, no further testing was pursued.

III. The character of the land – it is part of a floodplain that floods regularly – and the Commission's lack of reasonable investment-backed expectations support a determination of no taking.

A. These factors are relevant to the issue of whether a taking has occurred, not to the issue of the Commission's property interest.

The Commission erroneously claims that "[t]he question of the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use goes to whether the Commission has an interest in being free of the floods here." AGFC Supp. Br. 11 (citation and quotations omitted). The Commission again conflates two separate legal issues: (1) whether the Commission has a protected property interest and (2) the Commission's reasonable investment-backed expectations informed by, among other things, the character of the land.

There is no dispute that the Commission has a property interest in the WMA. A 24, 1380. But the fact that the Commission owns the WMA is irrelevant to whether the character of the land and the Commission's reasonable investment-backed expectations weigh against finding a taking here. The taking liability question has always been the primary issue in this case, and the character of the land and the Commission's reasonable investment-backed expectations are relevant to that issue. *See, e.g., AGFC*, 133 S. Ct. at 522.

The Commission conflates these two separate questions in order to erroneously claim that the United States has waived any arguments based on reasonable investment-backed expectations. AGFC Supp. Br. 12. But the United States has consistently argued that there was no taking here because of the active floodplain character of the land, explaining that the WMA flooded before the deviations and would have flooded significantly even if the Corps had not deviated. *See, e.g.*, U.S. Op. Br. 29-37; U.S. Reply Br. 7-13. In addition, the parties have never disputed that the 1953 Water Control Manual, which predates most of the Commission's acquisition of the WMA, authorizes the deviations at issue. A 9907-08; Supp. A 5, 33. Thus, the Commission should have reasonably expected the possibility of deviations.

Moreover, the Commission misses the point when it claims that "[o]rdinarily, the owner's investment-backed expectations are not questioned in physical takings." AGFC Supp. Br. 11 (citing *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1362-63 (Fed. Cir. 2000)). The Supreme Court has now clarified that investment-backed expectations should be considered in assessing temporarily-recurring flooding cases; any lower court statements to the contrary are incorrect. In any event, the "physical takings" that the Commission mentions here are not indirect flooding cases, but are direct physical invasions of the sort at issue in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and

the World War II-era cases like *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). As the Supreme Court indicated by adopting a multi-factor analysis here, the direct and continuous physical seizure of private property at issue in those other cases is not analogous. *See Loretto*, 458 U.S. at 428-32 (distinguishing between the direct physical invasions of property addressed in the World War II-era cases and temporary flooding cases); *AGFC*, 133 S. Ct. at 518-19, 522-23.

B. The character of the land and the reasonable investment-backed expectations indicate that there has been no taking.

The Commission barely addresses the character of the WMA and the Commission's reasonable-investment backed expectations. The Commission does not claim that, for example, the WMA did not flood before the dam was put in place or before the deviations occurred. It could not so claim in any event, as its own expert acknowledged that that the River reached a level that flooded the WMA regularly before the deviations took place. *See, e.g.*, A 15-16, 13772, 13775; U.S. Supp. Br. 8-9.

Nor does the Commission claim that it reasonably expected that the Corps would never change its water release plan or pattern when it purchased the WMA. That claim too is impossible to make: the Corps' Water Control Manual provided for deviations of the sort it made here. A 9898, 9907-08. Indeed, Arkansas state law reinforces that the Commission could not have reasonably expected that an

upstream water user like the Corps would never change its operations and the WMA floodplain land would remain dry in a particular way. U.S. Supp. Br. 10-11.

The Commission also wrongly claims that the Corps' deviations were an instance of the government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (quoted in *AGFC*, 133 S. Ct. at 518). First, the Commission did not prove that it was singled out here to bear a burden. The WMA is 115 miles downriver from the dam; any water released by the Corps from the dam must pass the property of hundreds of landowners abutting the River and even more in the floodplain through which the River travels. Flow regulation by the dam necessarily yields varying benefits and burdens on all of these downstream landowners. Second, the Commission is unlike property owners *upstream* of a dam who are impacted by the reservoir behind the dam. They are singled out to bear burdens for the benefit of downstream property owners.

IV. The increased flooding attributed to the deviations did not severely interfere with the Commission's land.

The "[s]everity of the interference figures in the calculus" of whether a taking has occurred. *AGFC*, 133 S. Ct. at 522. The Commission claims that the flooding was severe and unprecedented, but the record does not support that argument.

First, the Commission is wrong that the flooding here is severe and unprecedented. The WMA regularly flooded before the deviations took place as well, regardless how one measures flooding. At trial, the Commission attempted to show that the government caused an incremental increase in the average number of days of higher river stages during the growing season. The Commission's own experts testified that before the deviations the Black River experienced (depending on what months and years of comparison are chosen) an average of 10-15 days of higher stages each month before the deviations, and the River experienced an average of 14-17 days per month of higher river stages between 1993 and 1999. A 15-16, 13772, 13775; U.S. Supp. Br. 8-9. That small incremental increase in average monthly river stages is not severe.

Second, the Commission errs in claiming that it compared the flooding during the deviations to flooding that occurred before the dam was built. The Commission claims that the flooding from 1993 to 1998 "never happened prior, and has never happened since." AGFC Supp. Br. 5. But the Commission did not put on evidence documenting the extent of flooding on the WMA before the dam was constructed in 1948. The Commission's overreach is important because it demonstrates a critical hole in the Commission's case – it did not demonstrate that the Corps' actions led to more flooding than if there was no dam.

Third, the Commission selectively picks from the available data to create a false impression of severity. Throughout this case, the Commission has relied on average monthly river stages at the Corning gauge in support of the claim that the deviations caused increased flooding on the WMA. This analysis is flawed, as we have previously described. U.S. Supp. Br. 16-18; U.S. Op. Br. 31-37; U.S. Reply Br. 14-17. But even assuming the Corning gauge levels are instructive, the Commission's theory is still incoherent. For example, in its supplemental brief, the Commission suggests that the critical level for flooding on the WMA at the Corning gauge is 4.5 feet, 5 feet, or 6 feet, or maybe 8 to 10.5 feet. AGFC Supp. Br. 7. The Commission's inability to identify the critical river stage reveals the fundamental incoherence in the Commission's theory of liability. Further, even if the Commission had identified a critical river stage, because the Commission lost or destroyed its 2001-era cruise maps (U.S. Op. Br. 42-53), it is not possible to tie any particular flooding event on the WMA to the location of trees for which the Commission demands compensation.

Moreover, the Commission remains confused about the key drainage question that must be answered in order to evaluate flooding patterns (see U.S. Supp. Br. 17-18): at what river level does the WMA drain of floodwaters? It claims that the government was wrong to use 3 feet in the government's model (AGFC Supp. Br. 14), but that is the level that the Commission's expert said

should be used. A 9752, 13753-74. In its supplemental brief, the Commission confuses the drainage issue further by claiming that the WMA both floods and drains at the same level – when the River is at 4.5 to 5 feet at the Corning gauge (AGFC Supp. Br. 14) – a plainly flawed assumption upon which the Court of Federal Claims relied. A 35.

When the Commission's contradictory arguments are stripped away, it is clear that any incremental increase in flooding was not severe, whether measured by the Commission's experts or by the government's more rigorous modeling. U.S. Supp. Br. 13-17; U.S. Op. Br. 29-37; U.S. Reply Br. 7-13.

CONCLUSION

When the factors identified by the Supreme Court are weighed, it is clear that the United States did not take a flowage easement over the WMA. The deviations were temporary and varied; increased flooding was not foreseeable; the WMA flooded regularly before the deviations and the Commission should have reasonably expected the Corps to adjust its water releases; and at most the deviations led to an incremental non-severe increase in flooding of the WMA, if that. For the foregoing reasons and those set out in our earlier briefs, this Court should reverse the Court of Federal Claims' decision and judgment that the United States has taken a flowage easement on the Commission's land without just compensation.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

/s/ Robert J. Lundman
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Supplemental Response Brief complies with the 10-page limit set by this Court's order dated January 29, 2013.

I further certify that this brief 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) because this brief has been prepared with a proportionally spaced typeface (14-point Times New Roman) using Microsoft Office Word 2007.

/s/ Robert J. Lundman
Robert J. Lundman
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on May 3, 2013, that I served a copy of the foregoing Supplemental Response Brief through the Court's CM/ECF system on counsel of record.

/s/ Robert J. Lundman
Robert J. Lundman
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Phone: (202) 514-2496
Fax: (202) 353-1873
robert.lundman@usdoj.gov