The Supreme Court's Dec. 4, 2012, decision broadly construed the scope of the Fifth Amendment taking clause in relation to *Arkansas Game & Fish Commission v. United States*. It pays to go to great lengths in the beginning of any taking clause case to identify, analyze, and prepare for the probable defenses that will be soon be thrown your way.

BY DARRELL K. CHERRY

Ten Tips from the Tucker Act Trenches

The government had succeeded in 2011 to convince the Court of Appeals for the Federal Circuit that temporary flooding could not be a compensable taking in *Arkansas Game & Fish Commission v. United States*, 637 F.3d 1366, 1378 (Fed. Cir. 2011).[1] The Court of Federal Claims had ruled that there had been a taking of a flooding easement on the plaintiff's land, repetitively over six consecutive years, that had caused death of and damage to 50-60 percent of large tracts of timber, for which some 5.77 million dollars of compensation for reclamation costs was awarded. 87 Fed. Cl. 594 (Fed. Cl. 2009).

The trial court found that the prerequisites for an inverse taking were proved, such as foreseeability, causation, substantiality and damages.[2] The Federal Circuit reversed the $5.77 million damages award, finding that, as a matter of law, no compensable Fifth Amendment taking due to flooding could be recognized unless the flooding is "permanent or inevitably recurring."[3]

In *Arkansas Game & Fish*, the Corps of Engineers had purposefully deviated from its operation manual's water release schedule for seven straight years, to which Arkansas objected each year, and advised that damages were being incurred. These deviations, which took place during the tree growth season, were a significant departure from those of the prior five decades, produced increased temporary flooding each year, and had a significant cumulative negative impact on the root systems of much of the timber within the 23,000 acres comprising an Arkansas Game & Fish Commission wildlife management area.

What is important about the Court's reversal is that it reconfirmed that the Takings Clause is not to be arbitrarily limited. "The Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" [*Citing Armstrong v. United States*, 364 U.S. 304, 318-19 (1987).] The Court recognized that "when the government physically takes possession of a interest in property for some public purpose, it has a categorical duty to compensate the former owner."[4]

> "We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which the government actions can affect property interests, the Court has recognized few invariable rules in this area. Most taking claims turn on situation-specific factual inquiries."
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> Because government flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. 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."[5]

The *Arkansas Game & Fish* Court did expressly note that by rejecting an all-or-nothing rule, it was *not* opening the floodgates to liability for every water release from a reservoir that caused damage.[6] *Indeed*, in rejecting to consider a "consequential damages" defense because it was not the basis of decision

below, that issue remained alive for remand. The Court gave guidance on the issue by reminding the parties that "whether a taking has occurred includes consideration of the property owner's distinct investment backed expectations, a matter often informed by the law in force in the state in which the property is located."[7] Those expectations must be reasonable, and take into account the severity and frequency of natural flooding if the land is located in a flood plain. The Court also noted that while a single act is not enough usually, a *series* of actions which interfere with property "adds to the force of the evidence."[8]

Moreover, the Court also recounted that prior decisions on the issue of a taking look to the amount of time the interference in use occurred (*citing Loretto*, 458 U.S. at 435, n. 12), as well as the "degree to which the invasion is intended or is the foreseeable result of authorized government action," *citing YMCA*, 395 U.S. at 93 (1969) (temporary, unplanned occupation of a building by troops under exigent circumstances is not a taking). *Id.*

The Supreme Court remanded for consideration of the taking analysis, so the game has still not been won by the owner, despite seven years of litigation. More broadly, the *Arkansas Game & Fish* decision can properly be viewed as a reminder to all practitioners in this field that the detailed facts remain critical to allow a taking to be found in circumstances short of an overt and permanent physical occupation. That need for factual evidence should guide the scope and assiduousness of discovery.

The absence of black-and-white boundaries as confining takings claims under the Fifth Amendment articulated in *Arkansas Game & Fish* was recently the subject of the author's litigation with the U.S. Army Corps of Engineers on behalf of *National Food & Beverage Corp.* for an unusual taking related to Hurricane Katrina.[9] Both *Arkansas Game & Fish* and the Katrina case (discussed below) reinforce the truism that all practitioners can and should take time to periodically review the basics of their particular practice areas in order to maximize their chances of success. This article is a humble attempt to provide some refresher of both practical and strategic aspects that the practitioner should keep in mind when litigating takings claims against the U.S. Government.

Background of National Food & Beverage Corp. v. U.S.

Hurricane Katrina laid waste to dozens of square miles in the Greater New Orleans area. Hurricane Katrina's devastation of New Orleans neighborhoods when the levees broke on August 30, 2005 is well known. Less known is that the thinly populated outlying parish (county) of Plaquemines, just south of New Orleans was inundated by direct storm surge that overtopped and scoured storm protection levees. Hurricane Rita, six weeks later, actually produced more widespread flooding due to weakened federal levees along the river and generally inadequate local levees.

Immediately after Hurricane Rita, the Corps of Engineers sought to repair and raise to existing design heights of some 60 miles of federal river levees in Plaquemines Parish that were located on the banks of the Mississippi River. The existing Stafford Act provided pre-approval of repairs to original design height. Needing water resistant clay totaling 7.5 million cubic yards (embanked measure), and desiring to accomplish the work before the next hurricane season starting June of 2006, the Corps entered into supply contracts where it purchased clay on the open market, at a delivered price of about $25 per cubic yard. At the same time, it chose to target a dozen local land tracts that the Corps knew to hold large quantities of clay, and developed a novel way of proceeding to access that clay.

The Corps came up with an approach that it apparently thought would be both speedy and allow it to limit its liability. The Corps interposed the local government by entering into a "Cooperation Agreement" that included a unique provision requiring the local parish government to sign *commandeering* orders, purportedly under the state emergency law, which were directed to certain parcels to be selected by the Corps, which it knew contained extractable clay. Those orders purported to provide a "right of entry" on privately held land, with no notice to the owner, giving the Corps the right to take the clay at its discretion.

A Corps contractor showed up one day in January or February 2006 at the 563 acre farm owned by National Food & Beverage Co., and then proceeded to mark and dig out a huge swath of clay, about a half mile long, with a 16 acre surface area.

The Corps' local real estate division then proceeded to get appraisals of the clay land, directing the appraiser to only consider the surface value as pastureland and *not* the value of the clay taken. These appraisals came out in a canned fashion, valuing land at about $2,000 per acre, regardless of the amount of clay the land contained. The Corps, in the meantime, had taken about 31,500 cubic feet of clay from *each* of 16 acres of National's land, clay worth over $126,000 *per acre* at a minimal $4 per bank cubic yard. The total value of the clay taken was thus about $1,535,484 for the 383,871 bank cubic yards if valued at $4 per cubic yard. The Corps, instead, demanded the owner take $101,000 or face legal proceedings.

Many small owners similar to National Food expectedly bowed to the power of the government and accepted what was offered, which was far less than the value of the clay. National Food chose to seek adequate compensation for what was targeted and taken. After threshold standing challenges, an attempt to co-opt the Tucker Act claim via a subsequent district court condemnation action, much discovery, and a trial, on August 29 National Food was awarded a judgment of $1,235,000, plus fees and costs,[10] whereupon the government eventually settled.

Ten Tips

Litigation with the government is something few citizens and small companies can afford to engage in. It should never be undertaken lightly, as it is an area of endeavor filled with legal landmines and many unsuccessful litigants. The following tips will assist the practitioner in evaluating and timely preparing his or her case.

1. Always Be Cognizant Of Your Basic Burden Of Proof

Even though the government took your client's property, *you* have the burden not only of proving that a "taking" occurred at the hands of the United States—one of such nature as to be recognized as such by the Fifth Amendment—and you also have the burden of proving your client's compensable interest (*e.g.,* title) *and* the "just compensation," *usually* at fair market value, excluding demand emanating from the project for which the property was taken. The general rule is that the owner is to be put in as good a position, pecuniarily, as if the property were not taken.[11] How that applies to the facts of a particular case is anything but rote.

Your client must be shown to have held a compensable interest *at the time of the taking*, not necessarily as of the time of suit.[12] A compensable interest includes, but is not limited to title. Generally

such interests must be of a type that would be of material value to and can be transferred to third persons.[13] Proving your client's compensable interest is usually by proof of title or leasehold interest as of the date of taking. The federal court will rely on the local (state) law of ownership.[14] The effectiveness of reservations of rights by the ancestor in title (*i.e.*, the seller) in an act of sale are judged by local law.[15]

Be sure that your client's property interest asserted as of the time of suit was not assigned to him after the actual taking occurred, unless the requisites of the Assignment of Claims Act were *then* complied with. The Assignment of Claims Act, 31 U.S.C. § 203, does not allow unilateral private assignments of rights to recover for a taking.[16] If there is any hint of a taking prior to any sale of property, be sure to reserve to the seller all rights to compensation for takings that occurred prior to the act of sale.

The actions taken by the government must, from a practical standpoint, rise to the appropriation of some interest in the property (e.g. a flowage easement). Merely reducing value of the land by damaging it is potentially a tort and is not a taking.

The government must be shown to have been the taker. Where an intermediary entity, such as a state or local agency is involved, the government is still liable as the taker where it benefitted from the taking and it was one orchestrated and planned by a federal agency.[17] Whether a taking at the hands of a Government agency occurred is highly fact dependent.[18] The government's actions must usually be shown to have been "sufficiently direct and substantial" cause of the loss.[19] Common law agency is *not* the only basis on which the government would be liable for a taking involving another governmental entity.[20] Asking another sovereign to act on its behalf does not insulate the federal Government from its obligations.[21]

A taking based on physical occupation is usually multiple times easier to prove and collect on than a regulatory, or nonphysical/indirect taking. To avoid potentially fatal problems down the road, a lot of homework is required *before* filing your complaint. To protect the government from incessant liability flowing from virtually all changes made in the legal or regulatory landscape, broad doctrines have developed to exclude most losses as not being "takings" under the Fifth Amendment. As was held in *Louisville & Nashville R.R. Co. v. Mottley*,[22] "consequential loss or injury resulting from the exercise of lawful power" are not compensable taking. This concept is discussed at length below. Physical taking is a (a) *governmental* action (b) of a purposeful nature, that (c) "interferes with or substantially disturbs the owner's use and enjoyment of the property,"[23] but that interference must be "so complete as to deprive the owner of all or most of his interest in the subject matter."[24] Permanent installation of a physical thing on or in private property is a *per se* taking.[25] While a mere trespass of short duration is usually not a taking, certain actions not involving the physical entry onto the property can constitute a taking.[26]

A regulatory taking has many more requirements to establish the threshold of a "taking," given that every regulation amendment to a regulation or law affects someone. The critical question is *how much*, as substantially all of the economic value must be destroyed in order for a regulatory taking to be recognized. Moreover, there must be a final decision by the administrative body, considering available procedures.[27] To avoid a potential trap, if a possible tort is involved, timely file your Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) administrative claim form within the two year FTCA statute of limitations and then file your Tucker Act taking claim within six-months from rejection of the FTCA administrative claim. Should it turn out that the taking was not a taking, but was a tort, the Court can *transfer* the case to the district court and preserve the original filing date to prevent exceeding the shorter FTCA statute of limitations.[28]

2. Physical invasion by flooding of property caused by purposeful changes to adjoining land or changes in operation of reservoirs merits special care.

Flooding, especially of the repetitive type, can and does destroy the ability to build on or use property every bit as much as a physical occupation and displacement by the government.[29] Yet a duty to compensate for this loss may not be recognized or properly pled unless you do your homework.

First, the action effecting the taking must be purposeful—either subjectively *or* if the invasion is the "direct, natural or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action."[30] It must be a predictable result of the government action.[31] The actions taken by the government must, from a practical standpoint, rise to the appropriation of some interest in the property (*e.g.*, a flowage easement).[32] Merely reducing value of the land by damaging it is potentially a tort and is not a taking.[33] However in *United States v. Dickenson*[34] the Court held that there was a Fifth Amendment taking of a flowage easement by *intermittent* flooding of landowners abutting a reservoir.[35]

3. Valuation Method

The "default" valuation approach for a taking of real property is the "before and after" market valuation, judged as of the date of the taking. You must carefully evaluate the issue *before* filing suit. If the "value before and after the taking" appraisal approach will not result in a favorable outcome for the owner, it is up to you to prove that "fair and just" compensation can only be found using another approach.[36] The facts must provide a valid reason why the "default" approach does not fit the case-specific situation. Otherwise, the preferred method must be used, often to the detriment of the owner.[37] For example, in *National Food & Beverage Corp. v. U.S.*,[38] the pivotal issue was that a pastureland valuation approach allowed the appraiser to ignore or dilute the clay value, even though it was only the clay that the Corps wanted—clay that had a separate market value as such. Since clay was taken, it logically ought to be valued. Much of the trial evidence dealt with this dynamic. Based on that evidence, the Court of Federal Claims held, with both logic and precedent, that where a mineral was specifically targeted for removal over a short period of time without taking title, it is appropriate to value the mineral taken on a volumetric basis if extraction from the land is within its highest and best use in the reasonably

near future, and supported by a market for the mineral existing independent of the government need for it.[39] This result was not without conceptual precedent.[40]

4. Delay-In-Payment Damages

While interest is part of "just" compensation under the Fifth Amendment, you have the burden of *proving*, by admissible evidence, the rate of interest appropriate to the time period involved, and whether it should be compounded, all to compensate for the delay in payment of compensation from the date of taking.[41] You must prove how a "reasonably prudent person" would invest such a sum, preserving the principal against risk of loss.[42] The legal fiction is that the government should have paid the adjudicated amount of compensation as a lump sum on the day of the actual taking. How a reasonable investor would handle the money is relevant—but it must be proved by the claimant. If you prove that compounding interest would be necessary "to accomplish complete justice," and such prudent investment was available at the time of the taking, it will be awarded.[43] "Separately Trading of Registered Interest and Principal Securities," or STRIPS interest rates are the easiest to determine and a recognized compounded rate that has found favor with the Court of Federal Claims.[44]

5. The "Burden of Common Citizenship"

Another doctrine to watch out for is the government-protective doctrine of exclusion of consequential damages.[45] Here the road forks quite widely between federal and state-based takings. For example, for federal fee takings of a property on which a business is operated, substantial costs incurred in moving the business to another suitable location are NOT considered part of "fair compensation" due for the property taken. Many states provide compensation for such consequential damages that flow from an actual condemnation. *E.g.*, La. Const. Art. I, § 4. You must generally be able to pass the "transferrable value" test. The Court in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949), for example, observed that only the "transferrable values" can have "an external validity which makes it a fair measure of public obligation to compensate the loss." Thus, any unique needs of, or attachment by the owner to the property, cannot be allowed to enter the compensation calculus, because they do not translate to a transferrable value recognized in the market.

A broad doctrine to watch out for before filing is that compensation under the Fifth Amendment is to be based *not* on what the government gained, but rather, it is what the owner lost.[46] A temporary or permanent taking of a business *to operate it*, such as a utility, condemns not only the physical property but also the *going concern value*, and therefore it must be compensated for as well.[47] In *Kimball*, the Court took pains to discuss the conceptual difference between a fee taking of the (tangible) real property on which a business is conducted lies and the (intangible) ongoing value of the business, *e.g.*, of customer lists. The latter, in some circumstances, of even a temporary taking, cannot be recaptured by, and is therefore lost to, the condemner who remains the owner of the existing business location to whose use it will revert only when the government releases the property when it desires to do so. *Id.* Only the value that *would* have been transferrable upon a volitional sale of the entire business can be recovered. *Id.* at 13.

As always, general rules will bend to peculiar facts of a given case which compel a custom approach. An expert who can explain these facts is critical to success. Watch for exclusion for evidence as "too elusive" or "too speculative," especially as to allowable intangible losses. We can see from *Kimball Laundry* that capitalized value of customer service lists and "trade" capital with them is recoverable in some instances, *e.g.*, where the government takes over the land *and* the business itself for its own use, either temporarily or permanently. However, the Supreme Court has noted that district courts can and should exclude damages that are not based on "solid evidence,"[48] i.e. that which is not speculative and is customarily relied on by informed purchasers in the actual market.[49] The views of market participants are thus relevant and can come in as lay expert opinions under F.R.E. 701. Such persons with real life experience can provide powerful evidence and should be sought out.

6. Date of Valuation—Beware of Potential Manipulation To a Date Suggesting a Lesser Value

In *United States v. Dow*,[50] the Supreme Court found that a physical occupation that began in 1943 and continued thereafter, would establish the date of taking. The date of taking, in turn, establishes the date the compensation is to be valued and when interest begins to run.[51] As was demonstrated in *Dow*, there may be a declaration of taking that follows the physical occupation (*e.g.* by building a road or laying a pipeline), by years or even decades. The government will often seek to use whatever date produces the least compensation, *i.e.*, if the market value was appreciably different between the available dates. The government may also assert the earlier taking as an inverse taking so as to entirely defeat the recovery by triggering the six-year statute of limitations bar of the Tucker Act. A landowner asserting the later, "straight" condemnation as the triggering event that breathes life into a state inverse taking claim has been rejected by the court. *Dow* held that the filing of a declaration of taking (of title) (under 33 U.S.C. § 594) does not set the date of valuation where there was an earlier actual (inverse) taking. 357 U.S. at 23-24.

As all practitioners know in litigating with an opponent with unlimited resources, whatever budgeted amount of time you expect to spend, triple it, as you will likely face tribulations only limited by the imaginations of the highly skilled and equally determined Justice Department litigators. The government will test your mettle early on.

In the *National Food & Beverage* litigation, the government three years after the temporary taking had ceased, and months after the Tucker Act claim was filed, filed in the local federal district court a straight condemnation of and issued a declaration of taking for the same land from which the clay was taken. It then argued to the dis-

trict court that the action was retroactive and coopted the earlier-filed Court of Federal Claims Tucker Act suit. Neither the Court of Federal Claims (*see* 96 Fed. Cl. at 264) nor the district court were impressed with this argument. A word to the wise is to anticipate such rear-guard maneuvering and be ready with comity, collateral estoppel and *res judicata* arguments to protect your Tucker Act suit from interference or "end-around" maneuvers.[52]

7. Jurisdiction Is Limited and Sometimes Tricky.

If your inverse taking claim exceeds $10,000, whether you like it or not, there is only one place it can be filed—in the Court of Federal Claims in Washington. Do not play games with jurisdiction, as you have the burden of proving jurisdiction at the outset, and the penalty for being wrong is draconian. The Fifth Amendment provides the waiver of sovereign immunity for inverse takings, but Congress gets to specify if and which court shall have jurisdiction to adjudicate claims that are founded on the Constitution. Congress grants jurisdiction for Fifth Amendment compensation claims to the Court of Federal Claims in 28 U.S.C. § 1491 (a)(1) and 28 U.S.C. § 1346. The so-called "Little Tucker Act" found in 28 U.S.C. § 1346(a)(2) contains a *de minimis* exception allowing concurrent jurisdiction in the district courts only for inverse taking claims below $10,000 in value.[53]

Direct condemnation cases, on the other hand, are given to the jurisdiction of the district courts at 28 U.S.C. § 1355, and are governed by the special procedure set out in F.R.C.P. Rule 71.1, where a jury trial *is* available if timely requested in the answer, filed within 21 days of service. F.R.C.P. Rule 71.1(h)(1)(B). Note that the only fact issue ruled on by a jury is compensation amount. All other issues factual, and all legal issues, are decided by the district judge. F.R.C.P. Art. 71.1(h)(1).[54] It has been held that the district court decides the factual issues of highest and best use, even though it is an integral (and pivotal) factual basis for the ultimate compensation award.[55] It should be noted that a defendant landowner in a condemnation action, including a condemnation where 40 U.S.C. § 3114(b) Declaration of taking modality is utilized, cannot seek to enlarge the compensation issue by counterclaim, or otherwise enlarge the scope of the taking beyond that strictly set forth in the Declaration of Taking or complaint of condemnation.[56] This limitation arises because the sovereign immunity of the United States is narrowly waived, and is conferred to the court only within the jurisdictional limitations set by Congress.[57] The condemnation statutes do not waive sovereign immunity for counterclaims by the landowner. Even if you would prefer a jury determination of value, if there has been an inverse taking, and the government does not file an *overlapping* condemnation within the six-year Tucker Act statute of limitation,[58] you have no choice but to file your complaint in the Court of Federal Claims in strict compliance with the Tucker Act. Otherwise, you will find yourself out of a remedy for compensation for what was inversely taken.

The interesting and novel issue along these lines appeared in *National Food*, being whether a condemnation/declaration of taking of fee title to the land tract from which the government physically removed *the clay three years earlier* included the original clay taking under the rule of *Dow*. The practical effect of this issue was huge. If the condemnation action were retroactive, it could obviate or skirt the Court of Federal Claims action altogether. Detailed motion practice a year before trial resulted in a rejection of the relation-back sought by the government. The court reasoned that there had been a *completed* inverse taking of the clay, not a taking of fee title, and that the condemnation also was not identical to the inverse taking in terms of the land area. 96 Fed. Cl. at 269. A taking that "occurred and then stopped several years prior to the condemnation" is outside the jurisdiction of the district court. 96 Fed. Cl. at 268. The starting and ending of the particular inverse taking in *National Food* is similar to that in *United States v. 266.33 Acres of Land*,[59] and is thus distinguished from the continuous possession of the government found in *United States v. Dow*,[60] and *United States v. Eltzroth*,[61] where opposite conclusions on the date of taking were arrived at.

8. Sufficient Percentage Of Economic Value Diminution Must Be Proved For Regulatory Taking

On the regulatory takings front, takings claims based on new or unilateral and adverse changes to a regulatory scheme look out for the fatal flaw of not having or proving a *sufficient percentage* of loss of value of investment-backed expectations proved to have been caused by the new regulation or regulatory change. As is demonstrated by the recent case of *CCA Associates, Inc. v. United States*,[62] a property or business owner prosecuting a claim against the government for the "taking" of valuable benefits that the owner held or relied on in entering into a commercial investment (here, in Section 8 housing) faces daunting obstacles to any recovery. In *CCA Associates*, the Federal Circuit reversed a $700,000 award for capitalized financial value diminishment to a Section 8 housing developer whose ability to withdraw from the Section 8 financing program after 20 years of participation was taken away by Congress shortly before the claimant's 20-year period expired. By pre-paying the federal-guaranteed loan after 20 years, the owner would be released from any obligation to provide rent-controlled apartments and could revert to leasing of apartments at the higher regular market rates. While an exposition on the field of regulatory takings is beyond the scope of this article, the danger to counsel of taking these cases on a contingency, or to the client paying hourly rates, is illustrated by the ruling of the appellate court to overrule the trial court and find that a 18% reduction in value of the apartment complex did not constitute a sufficiently large effect on the property to cross the minimum threshold of loss needed for a finding of regulatory "takings."[63]

9. Attorney's Fees: Not So Easy

As all practitioners know in litigating with an opponent with unlimited resources, whatever budgeted amount of time you expect to spend, triple it, as you will likely face tribulations only limited by the imaginations of the highly skilled and equally determined Justice Department litigators. For example, a Rule 12 motion to dismiss is *de rigeur* in virtually every case, and its defense cannot be taken lightly. The government will test your mettle early on. A successful resistance to the government defenses requires broad research and exposition sufficient to justify and establish adequate pleading of facts to support all essential elements of your claim. Taking time in advance to contemplate these tactics, and to plead the case anticipating such motions, is a wise move. The wisest, in this author's estimation, however, is protecting yourself from economic hardship. If you are not on a purely hourly rate fee agreement with a client who can afford to pay as he goes, and *especially* if you are providing

services on a contingency agreement with your client, you always should include the following (or equivalent) language:

> Notwithstanding the above, it is specifically agreed that counsel is expected to receive a reasonable fee, that an application to the Court therefor will be made, and that the fee incurred to the undersigned counsel shall not be less than the amount awarded by the Court as a reasonable attorney's fee pursuant to the Uniform Relocation Act or other applicable fee-shifting statute, which award, upon its receipt, shall entirely be paid to the Attorney.

Remember that the Uniform Relocation Act ("URA") (42 U.S.C. § 4654(c)) requires the reimbursement of reasonable attorney's fees and litigation costs even in the event of a settlement, so long as the claim settled is one for an inverse taking of property pursued under the Tucker Act, 28 U.S.C. § 1491 or 28 U.S.C. § 1346(a)(2).[64]

The Federal Circuit, in *Awaters v. United States*, [65]recently faced, but declined to rule on the issue of whether the Uniform Relocation Assistance and Real Property Act ("URA") 42 U.S.C. § 4654(c) limits attorney's fees awards to a successful Tucker Act claimant to the contingency percentage specified in the fee agreement, where a lodestar fee calculation would require a larger fee. The *Awaters* court held that where a contingency fee contract for the prosecution of a Tucker Act claim *also* entitled the attorney to the *higher* of the specified contingency percentage "lodestar" method. Because counsel was to receive these fees for his services, they were "actually incurred" as set forth in the URA, and is thus recoverable.

Remaining unadjudicated to date is the recoverability of lodestar-based "reasonable fees" in a situation where a fixed contingency fee was agreed to, yet the manner of the defense-caused expenditure of such large amounts of time by counsel that the contingency percentage would end up at a low hourly rate. The *Atwaters* court declined to rule on that issue because the alternative fee language mooted the issue.

A good argument exists to support a lodestar recovery. There is an express preference for uniform application of attorney fee-shifting statutes.[66] The Supreme Court in *Blanchard v. Bergeron*,[67] in a civil rights context, held that absent unusual circumstances, fee shifting should use the "lodestar" method, where a reasonable rate prevailing in the locality where the attorney worked should be multiplied by the reasonable hours expended, and even where there was a contingency contract. The fee shifting statute in the Civil Rights Act involved in *Blanchard* did not contain the "actually incurred" language of the URA, but the idea of a reasonable attorney's fee being required to ensure availability of competent counsel to pursue these rights cases would be illusory if the defense efforts of the government could oppress that counsel and thus limit availability of competent representation in the long run. Thus, it is not hard to transfer the *Blanchard* rationale from Title VII to the same "reasonable attorney's fees" standard specified in the URA. The court in *Blanchard* held that the contingency fee percentage was but *one* of the twelve *Johnson* factors[68] and did *not* act as an "automatic ceiling" on fee recovery from the court.

To allow a lodestar-based "reasonable fee" to claimant counsel at the end of the day it is critical to giving some economic disincentive to the mighty and well-oiled Justice Department to moderate its defense efforts, especially where there *is* a taking, but the damages are not great. The difficulty in overcoming the various obstacles to prove an inverse taking has been expressly noted in *Pete v. United States*[69] as supporting a fair fee. For this reason, and given the language of the URA, the court has full discretion to award a "reasonable fee," even if it dwarfs the principal recovery.[70] Otherwise, the owner could simply be litigated to financial death by the government.

Note that the language of the URA "incurred because of the proceeding," has been interpreted to exclude pre-filing attorney's fees.[71] The author suggests that careful documentation of specific tasks necessary to comply with Rule 11 duties to investigate and plead the claim may be recoverable as being an essential part of the proceeding, which requires a valid complaint as a basic prerequisite. Hours spent on unsuccessfully challenging a taking in district court must be segregated and accounted for, as they are *not* recoverable under the Tucker Act.[72] If the government abandons a straight condemnation or is found to lack authority, the fees of landowner's counsel *are* categorically recoverable pursuant to the separate authority of 28 U.S.C. § 4654(a)(b).

In straight condemnations, *e.g.*, using a declaration of taking, the owner who seeks greater compensation than that deposited by the government, fee shifting is governed by the far less liberal provisions and thresholds set forth in the Equal Access To Justice Act.[73] To recover attorney's fees, the owner has several hurdles, the first being the "prevailing party," and the second, being able to rebut the government's assertion that its position was "substantially justified," even if incorrect. In addition, there is a means test as well. A "prevailing party" must obtain substantial relief, although it need not prevail on every issue it raises.[74] "Substantial justification" means that the government was "clearly reasonable in asserting its position," not just that it was "colorable."[75] The U.S. Supreme Court ruled on Nov. 5, 2012, in *Lefeming v. Wideman*,[76] that the obtaining of a permanent injunction (there, in a civil rights case), even without recovering money damages, satisfies the "prevailing party" requirement to recover reasonable attorney's fees. For condemnations, a "prevailing party" for purposes of fee shifting is a party whose valuation testimony is closest to the ultimate award. 28 U.S.C. § 2412(d)(2)(H). A settlement does *not* produce a right to fees. *Id.* The prevailing party also faces a disqualifying means test. If its net value or worth is over $2 million as of the

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date of suit filing, recovery of fees is precluded, even if it is the prevailing party.[77]

10. Attorney's Fees Can Be Included In A Settlement or Contract.

The court in *Appelgate v. United States*,[78] held that the government's settlement agreement, providing for reasonable attorney's fees, was an enforceable contract and therefore recoverable. Similarly, the Court in *International Indus. Park, Inc. v. United States*,[79] held that the Corps of Engineers, under its contracting authority, could include a fee shifting provision, which was enforceable as such. Since the Tucker Act waives sovereign immunity for suit for monetary relief based on authorized contracts of agencies, the fee shifting was enforceable. A corollary is that a settlement of the principal of a taking claim can punt the issue of attorney's fees and allow the court to set them. Utilize this option where challenges to fees would otherwise stand in the way of a settlement.

Sovereign Immunity Problems

Sovereign Immunity is alive and well in 2013. The court system is highly protective against the idea that a rogue employee, by unauthorized actions, could cost the government money via the Tucker Act, that Congress never approved. Hence, the bedrock threshold to recovery by a citizen is avoiding sovereign immunity—*i.e.*, the government cannot have relief granted against it by a court that it did not first authorize. Such waivers are to be strictly construed.[80] For example, as a general proposition, no tort suits against the government or its agencies would be allowed absent the Federal Tort Claims Act, and only those claims authorized by the FTCA may be pursued. No contract action (which is limited only to monetary compensation—not specific performance) would be cognizable absent the Tucker Act or the Miller Act.

Unusual "side effects" stem from the doctrine that merit extreme caution. For example, the government has entered into settlement agreements with contract claimants which provide for specified dollars for the principal, and allow for reasonable attorney's fees to be adjudicated by the Court. When called to task, the government has, on occasion, resisted by asserting a sovereign immunity defense, *i.e.*, contending that there was no congressional waiver of sovereign immunity for fee shifting, so that there is no authority to recover fees and costs other than per the Equal Access To Justice Act and/or the Tucker Act,[81] complete with their respective limited scopes. Because Congress authorized the Corps of Engineers to enter into contracts and has not evinced a prohibition against attorney's fees, the Court in *International Industrial Park v. United States*,[82] characterized the government's maneuver of inducing settlement only to assert disqualification of the attorney's fee provision of the contact as an unfair "whipsaw." The *International Industrial Park* court cited the holding in *Library of Congress v. Shaw*,[83] that a waiver of sovereign immunity can be by contract *or* statute. Armed with the power to contract for a right of entry, the Corps of Engineers could agree to payment of reasonable attorney's fees as part of a settlement, and held that a provision in the settlement that fees were recoverable "as provided by law," adopted that jurisprudence as part of the "law" that goes beyond the wording of a specific statute.[84]

Conclusion

At the beginning of your engagement, and especially prior to filing your Tucker Act suit, it pays to front-end a painful amount of effort to identify, analyze, and find a way around (or through) the probable defenses that will be thrown your way very soon after you file.

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Endnotes

[1]*Arkansas Game & Fish Commission v. United States*, _____ U.S. _____, 133 S. Ct. 511 (2012).

[2]87 Fed. Cl. 594.

[3]637 F.3d 1366, 1378 (Fed. Cir. 2011). The Supreme Court rejected this *per se* rule and reversed and remanded.

[4]It further held: 133 S. Ct. at 518.

[5]133 S. Ct. at 518-519.

[6]133 S. Ct. at 521.

[7]*Id.* at 522.

[8]133 S. Ct. at 522.

[9]*National Food & Beverage Co., Inc. v. United States*, 105 Fed. Cl. 679 (Ct. Cl. 2012); *National Food & Beverage Co., Inc. v. United States*, 96 Fed. Cl. 258 (Ct. Cl. 2010).

[10]105 Fed. Cl. 679 (2012)

[11]*Olsen v. United States*, 292 U.S. 286, 255 (1934).

[12]*United States v. Dow*, 357 U.S. 17, 20 (1958) (occupation began and continued from 1943 until a declaration of taking was filed in 1946 after the property had been sold to Dow. The prior owner was held to have the claim, not the transferee)

[13]*Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

[14]*Mildenberger v. United States,* 643 F.3d 938, 948 (Fed. Cir. 2011); *Presault v. United States,* 100 F.3d 1525, 1534 (Fed. Cir. 1996) (*en banc*).

[15]*National Food & Beverage Co., Inc. v. U.S.*, 105 Fed. Cl. 679, 692, 2012 WL 3715385 (2012).

[16]*United States v. Dow*, 357 U.S. 17, 20 (1958).

[17]*National Food & Beverage Co., Inc. v. United States*, 96 Fed. Cl. 258, 263-64 (2010); *Langenegger v. United States*, 756 F.2d 1656, 1570 (Fed. Cir. 1985).

[18]*Shewfelt v. United States*, 104 F.3d 1333, 1338 (Fed. Cir. 1997).

[19]*Young Men's Christian Association v. United States*, 395 U.S. 85, 93 (1969).

[20]*Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991) (EPA got a California agency to emplace monitoring wells).

[21]*Turney v. United States*, 115 F.Supp 457, 463 (Ct. Cl. 1953) (U.S. Army asked Philippines government to embargo certain radar surplus items that had been lawfully purchased by the plaintiff); *Pendleton v. United States*, 47 Fed. Cl. 480, 485 (2000) (joint action can obligate both actors); *Cf. Lustig v. United States*, 338 U.S. 74, 78-9, 69 S. Ct. 1372 (1949) (participation in or direction of local authorities' searches violative of the Fourth Amendment); *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978) (Miranda warnings were required as part of Mexican police inter-

rogation of suspect arranged by the U.S. DEA).

[22]219 U.S. 467, 484 (1911)

[23]*Adler v. U.S.*, 785 F.2d 1004, 1008 (Fed. Cir. 1986); *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 59 (2009).

[24]*United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *R.J. Widen Co. v. United States*, 357 F.2d 988, 993 (Ct. Cl. 1966).

[25]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-7, 102 S. Ct. 3164 (1972).

[26]*United States v. 15.65 Acres of Land*, 689 F.2d 1329, 1334 (9th Cir. 1982) (government actions interfered with merchantable title or ability to lease the land).

[27]*Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985).

[28]*See* 28 U.S.C. § 1631; *Smalls v. United States*, 87 Fed. Cl. 300 (2009).

[29]*E.g., United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 800 (1950); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L.Ed. 557 (1872).

[30]*Columbia Basin Orchard v. United States*, 132 Ct. Cl. 445, 450, 132 F. Supp 707, 709 (1955) (not a taking).

[31]*John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921); *Owen v. United States*, 851 F.2d 1404, 1418 (Fed. Cir. 1988) (*en banc*) (remanded for factual determination on the issue).

[32]*BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998).

[33]*Southern Pacific Co. v. United States*, 58 Ct. Cl. 428 (1923) (consequential damages due to breakwater construction held not a taking). Beware of 42 U.S.C. prohibition of a Tucker Act claim proceeding while a tort claim is also pursued arising out of the same operative facts. *E.g., Passamaguaddy Tribe v. United States*, 82 Fed. Cl. 256 (2008); *National Union Fire Ins. Co. v. United States*, 19 Ct. Cl. 188 (1989).

[34]331 U.S. 745, 748 (1947).

[35]*See also, e.g., Ridge Line, Inc. v. United States*, 346 Fed. 3d 1346, 1156-58 (Fed. Cir. 2003) (repetitive storm water runoff into shopping center parking lot due to post office construction on adjacent parcel held to be a taking of a flowage easement *a la Dickenson*).

[36]*See, e.g., United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949) (no inexorable rules apply as to valuation method in a given case).

[37]*See, e.g., United States v. 91.90 Acres of Land*, 586 F.2d 79, 87 (8th Cir. 1978).

[38]105 Fed. Cl. 679 (2012).

[39]*National Food & Beverage Co., v. United States*, 105 Ct. Cl. 679, 700 (2012).

[40]*See, e.g., United States v. 22.80 Acres of Land, More or Less,* 839 F.2d 1362 n.2 (9th Cir. 1988).

[41]*See, e.g., Seabord Air Line Ry Co. v. United States*, 261 U.S. 299, 306 (1923).

[42]*Tulare Lake Basin Water Storage Distr. v. United States,* 61 Fed. Cl. 624, 627 (2004); *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464-65 (9th Cir. 1980).

[43]*Dynamics Corp of America v. United States*, 766 F.2d 518, 520 (Fed. Cir. 1985); *Waite v. United States*, 282 U.S. 508, 509 (1931).

[44]*See, e.g., Arkansas Game & Fish Commission v. United States*, 87 Fed. Cl. 594, 646-47 (Fed. Cl. 2009), *rev'd on other grounds*, 637 F.3d 1366 (Fed. Cir. 2001), *cert. granted*, 132 S. Ct. 1856 (2011); *reversed*, No. 11-597, _____ U.S. _____, 133 S. Ct. 511 (U.S. 12/4/02). *National Food & Beverage Co. v. United States*, 105 Ct. Cl. 679, 704 (8/29/12).

[45]*E.g., Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467, 484 (1911); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923).

[46]*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.).

[47]*Kimball*, 338 U.S. at 12.

[48]338 U.S. at 20.

[49]*Id.* at 17.

[50]357 U.S. 17 (1958).

[51]*E.g., United States v. Lynah*, 188 U.S. 445, 470-71 (1903).

[52]*See, e.g., Demtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001) (Federal courts recognize claim and issue preclusion as an "integral part" of judicial economy); *New Hampshire v. Maine*, 532 U.S. 742, 748-09 (2001) (*res judicata* is recognized to preclude relitigation of claims); *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) (stay of the second case is an appropriate method to recognize comity for earlier-filed case).

[53]*See, e.g., Jan's Helicopter Service, Inc. v. Federal Aviation Admin.*, 525 F.3d 1304 (Fed. Cir. 2008).

[54]*United States v. Reynolds*, 397 U.S. 14, 20 (1970).

[55]*See United States v. 320 Acres of Land*, 605 F.2d 762, 808, 819 (5th Cir. 1979).

[56]*Narramore v. United States*, 960 F.2d 1048, 1050 (5th Cir. 1990).

[57]*United States v. Mottay*, 476 U.S. 834, 841 (1986).

[58]*See United States v. Dow*, 357 U.S. 17, 21-22 (1958) (relating back a later declaration of taking over a pipeline easement granted three years earlier).

[59]96 F.Supp. 647 (W.D. Wash 1951).

[60]357 U.S. 17 (1958).

[61]124 F.3d 632 (4th Cir. 1997).

[62]667 F.3d 1239 (Fed. Cir. 2011), *cert. denied*, 2012 WL 1642615 (U.S. 10/9/12).

[63]667 F.3d at 1246.

[64]The URA states that as part of any adjudicated award or in any settlement, there shall be a determination an award or allow "as part of such judgment or settlement of any such proceeding, … such sum as will in the opinion of the court or the Attorney General reimburse plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees, *actually incurred* because of such proceedings."

[65]670 F.3d 1221 (Fed. Cir. 2012).

[66]*Gayne v. United States*, 505 U.S. 562 (1992), *Independent Federation of Flight Attendants v. Ziper*, 491 U.S. 754, 758 n.2 (1989).

[67]489 U.S. 87, 93 (1989).

[68]The factors are: 1) Time and labor required; 2) The novelty and difficulty of the questions; 3) The skill requisite to perform the legal service properly; 4) The preclusion of other employment by the attorney due to acceptance of the case; 5) The customary fee; 6) Whether the fee is fixed or contingent; 7) The limitations imposed by the client or circumstances; 8) The amount involved and the results obtained; 9) The experience, reputations and ability of the attorneys; 10) The undesirability of the case; 11) The nature and

length of the professional relationship with the client; 12) Awards in similar cases.

[69]215 Ct. Cl. 377, 380, 569 F.2d 565, 568 (1978).

[70]*E.g., Emeny v. United States*, 208 Ct. Cl. 522, 526 F.2d 1121, 1126-27 (1975) ($341,346 fee award where $221,880 in compensation was recovered); *Cloverport Sand & Gravel Co. v. United States*, 6 Ct. Cl. 178 (1984) (fee award was three times the principal recovery).

[71]*See Yancy v. United States*, 915 F.2d 1534 (Fed. Cir. 1990); *Emeny v. United States*, 526 F.2d 1121 (1975).

[72]*Presault v. United States*, 52 Fed. Cl. 667 (2002).

[73]28 U.S.C. § 2412(d)(1)(A).

[74]*E.g., Texas State Teachers Ass'n v. Garland Independent School Dist*, 489 U.S. 782, 791, 109 S. Ct. 1486, 1494 (1989).

[75]*Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986).

[76]2102 WL 538, 602.

[77]*Broadders v. United States Army Corps of Engineers*, 380 F.3d 162 (4th Cir. 2004).

[78]52 Fed. Cl. 751, 756 (2002).

[79]102 Fed. Cl. 111, 114 (2011).

[80]*Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1294 (Fed. Cir. 2002).

[81](28 U.S.C. § 1491 (a)(1)).

[82]102 Fed. Cl. 111 (2011).

[83]478 U.S. 310, 317 (1986).

[84]102 Fed. Cl. at 114-15.

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Endnotes

[1]The onset of disability is generally from the date alleged by the claimant in Title II cases or from the date the claimant filed his or her petition for disability in Title XVI cases, although this may sometimes become a controverted issue involving alleged onset date, work history, and medical evidence. For a full discussion of these issues, *see* SSR 83-20 and other materials that may all be accessed on the Social Security website www.ssa.gov.

[2]Substantial gainful activity is defined in 20 C.F.R. §§ 404.1572, 416.972 (2012). Often, this would constitute gross wages above a certain dollar amount in certain years, e.g., $1,000 per month in 2010 and $700 per month in 2000, although there are other factors to be considered, including available work-related expenses and different standards for self-employment earnings, as noted in 20 C.F.R. § 404.1574(a), .1575, .1576 (2012), and other issues, none of which are directly relevant to this Article.

[3]20 C.F.R. §§ 404.1505, .1508, .416.905, .908 (2102); *see also* Ruskell, (discussing severe impairments and the signs, symptoms, and medically acceptable clinical, diagnostic and laboratory findings essential to their determination).

[4]20 C.F.R. §§ 404.1525, 416.925 (2012).

[5]20 C.F.R. §§ 404.1545, 416.945 (2012); *see also* Ruskell, *supra* note 3, § 2:29 (discussing in detail RFC and its relevancy to the hearing process including the sequential evaluation).

[6]20 C.F.R. §§ 404.1545, 416.945; Ruskell, *supra* note 6, § 2:29 (an excellent discussion of these activities and their relevance to the sequential evaluation).

[7]20 C.F.R. §§ 404.1520(f), 416.920(f) (2012).

[8]20 C.F.R. §§ 404.1520(g), 416.920(g) (2012).

[9]For a more complete discussion of the role of the vocational expert, the Grids, and other vocational aspects of the process, *see* Ruskell, *supra* note 3, § 2:30 and 20 C.F.R. §§ 404.1561, 416.961 (2012).

[10]E.g., Sedentary is defined as sitting six hours in an eight-hour day and occasionally lifting objects no more than ten pounds. *See Ripley v. Chater*, 67 F.3d 552, 557 n.25 (5th Cir. 1995) and RUSKELL, supra note 6, § 2:30(a-f).

[11]Relevant sources for agency rulings and policies include Social Security Rulings (SSR), a series of precedential decisions published under the authority of the SSA Commissioner; Acquiescence Rulings, which explain how the Agency will apply a holding by a U.S. Court of Appeals that varies with SSA policies; the Program Operations Manual System (POMS), for use in internal SSA guidance for employees; and HALLEX, the Commissioner's procedures for carrying out policies and for guidance in the processing and adjudication of claims within the Agency.

[12]20 C.F.R. §§ 404.1512(d), 416.912(d) (2012).

[13]See *Clark v. Commissioner of Social Security*, 143 F.3d 115,118 (2d Cir. 1998) and *Goatcher v. U.S. Dept. of Health & Human Services*, 52 F.3d 288, 290 (10th Cir. 1995)(for the opinions cited by the Fifth Circuit in adopting its rationale in *Newton).* The Fifth Circuit's *Newton* rationale was subsequently followed in *Bordes v. Comm'r of Soc. Sec.*, 235 Fed. Appx. 853 (3rd Cir. 2007) and *Meyer v. Astrue*, 662 F.3d 700 (4th Cir. 2011).