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## FEDERAL GOVERNMENT SETTLES WATER TAKINGS CASE FOR ALMOST \$17 MILLION

Several years ago, the Court of Federal Claims ruled that water users were entitled to compensation under the Fifth Amendment to the United States Constitution for actions taken by the government under the Endangered Species Act (ESA) to protect certain species of fish. The court concluded that although the government had the authority to protect the fish under the ESA, it could not impose the burden of this protection solely on the water users whose allocations of water had been taken. Because the water users had rights to a specified amount of water, the government's failure to provide that quantity constituted a compensable taking: "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."

The Fifth Amendment provides for just compensation when an owner's property is taken by the government for public use. Just compensation is generally based on the fair market value of the property on the date that the property is appropriated. In the event that significant time has elapsed between the date of the taking and the date of payment, the Fifth Amendment requires that the property owner be compensated not only for the value of the property on the date of the taking, but also for any delay in payment of that amount.

Last year, the court ruled that the water users were entitled to almost \$24 million, including approximately \$10 million in interest, for the taking. The water users sought reconsideration of the interest computation, arguing that the court should have used the higher rate of return that the water users actually achieved during the relevant time period, rather than the 52-week Treasury bill rate originally employed by the court. In granting the water users' reconsideration request, the court applied the "prudent investor rule" which provides that the appropriate interest rate for a taking is to be calculated on how a reasonably prudent person would have invested the funds to produce a reasonable return while maintaining safety of the principal. The court concluded that the water users' investments in a variety of state-sanctioned accounts which included a mix of investment instruments provided a reasonable rate of return consistent with a high level of safety. In using this benchmark, the court did not focus on the water users' actual investment experience but rather found that, in this case, the water users' actual experience best reflected application of the prudent investor rule.

After the trial court's ruling on the interest question last summer, the parties engaged in settlement negotiations and eventually agreed to resolve the case for almost \$17 million. Although this amount is significantly less than the final amount to which the trial court found the water users entitled, the settlement avoided an appeal of both the underlying determination of the government's liability for the taking as well as the trial court's damages and interest computations. ■

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*Legal Briefs* is published periodically by Saltman & Stevens, P.C. to update developments of concern to the forest products industry. It is not intended to provide legal advice. Such advice may be given only when related to specific facts. Those desiring further information may contact Alan Saltman, Gary Stevens, Ruth Tiger (editor), or Richard Goeken at (202) 452-2140.

## **CONTRACTOR BOUND BY TERMS OF CONTRACT MODIFICATION HE SIGNED**

In order to prove duress, a contractor must demonstrate that it involuntarily accepted the government's terms, circumstances permitted no other alternative, and the circumstances were the result of the government's coercive acts. The contract required the Forest Service to provide a manager during helicopter operations and prohibited operations when no manager was present. Without the presence of a helicopter manager, the Forest Service would have had to suspend work under the contract. Because of an active fire season, the Forest Service was unable to continue to provide a helicopter manager without going to an outside source. The Forest Service therefore presented the contractor with a contract modification which provided that the contractor would be responsible for the cost of providing a helicopter manager. Although it did not agree that it had this responsibility, the contractor signed the modification because he did not want the Forest Service to shut the job down. By entering into a modification of its contract without a reservation of rights or otherwise informing the Forest Service that it was signing under protest, the contractor was bound by the modification. The Department of Agriculture Board of Contract Appeals (AGBCA) rejected the contractor's argument that it entered into the contract modification under duress because even though the contractor felt economically threatened, it signed the modification without evidencing protest to the Forest Service and there was no direct coercive action by the Forest Service or action that the Forest Service should have known would be perceived by the contractor as coercive. Although expressing sympathy for the contractor's predicament, the AGBCA rejected the contractor's claim for the cost of the helicopter manager. ■

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## **FORMER NATIONAL WILDLIFE REFUGE MANAGER PAYS FINE TO AVOID CRIMINAL CHARGE FOR MOVING THREATENED SPECIES WITHOUT STATE PERMIT**

A former National Wildlife Refuge manager recently paid a \$3,500 fine to avoid a criminal charge for moving several hundred tadpoles that are listed as threatened under the Endangered Species Act from a backyard pond to the Refuge. Concerned that the tadpoles would be eaten by frogs, the Refuge manager moved the tadpoles even though the cognizant state agency had refused to issue a permit for the tadpoles to be moved. The manager justified his conduct by claiming that the movement of the tadpoles was necessary to save the species from becoming extirpated in the Refuge area. Under the Lacey Act, it is illegal to knowingly remove and transport plants and animals protected under the Endangered Species Act without a state permit. There is no "good intentions" exception to the state permit requirement. ■

## **BIDDER PERMITTED TO PARTICIPATE IN ORAL AUCTION DESPITE DISCREPANCY IN SEALED BID**

The Government Accountability Office (GAO) recently ruled that the Forest Service properly allowed a bidder to participate in a timber sale oral auction even though the bidder had included the sale's minimum acceptable bid rate in the block of the bid form for the total sale value bid. After opening the sealed bid, the sales officer determined that the intent of the bid was easily discernible by multiplying the minimum acceptable bid rate by the volume of sawtimber on the sale and that the bidder intended to bid the minimum amount necessary to participate in the oral auction. She also verified the total bid value with the bidder. In these circumstances, GAO determined that the Forest Service properly allowed the bidder to participate in the oral auction despite the discrepancy in his sealed bid. ■

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## **CENTER FOR BIOLOGICAL DIVERSITY ORDERED TO PAY RANCHER \$600,000**

Several months ago, an Arizona jury awarded \$600,000 to a rancher who proved that the Center for Biological Diversity (CBD) defamed him with photographs and statements in a press release and in website postings regarding the rancher's 21,500-acre Forest Service grazing allotment. The rancher proved that the material CBD published was false, that he suffered damages, and that CBD lied or displayed a reckless disregard for the truth when it published the news release and posted the pictures and statements on its website. The jury awarded the rancher \$100,000 in actual damages and \$500,000 in punitive damages. The trial judge has since confirmed the jury award, declaring that CBD "made false statements" and that the press release and website postings "contained misleading photographs" and "did not accurately describe the condition" of the rancher's grazing allotment. The parties have spent the last few months briefing a number of post-trial motions. CBD is expected to appeal to the Arizona Supreme Court once the proceedings at the trial court level are concluded. ■

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### **BE SURE TO NOTIFY CONTRACTING OFFICER IF YOU BELIEVE YOU ARE BEING REQUIRED TO PERFORM EXTRA WORK**

A logging contractor could not recover for additional work it was required to perform on a fuels reduction project because it failed to timely notify the Forest Service that it believed the work was beyond the scope of what was required by the contract. The Forest Service had issued a Request for Proposals (RFP) for the fuels reduction project. The RFP required helicopter removal of small logs and other material and lopping and scattering of any material over 3" that remained after the helicopter removal operation. In its proposal, the contractor proposed to use its best effort to fly all material over 3" and offered the Forest Service a per acre price reduction if the Forest Service was satisfied with the small amount of slash left behind and agreed to forego the lop and scatter requirement. The Forest Service incorporated the terms of contractor's proposal into the contract.

During contract performance, the contracting officer's representative (COR) required the contractor to remove all material over 3" as part of the helicopter operation. As a result, the Forest Service determined that the amount of slash on the ground did not need to be lopped and scattered and therefore reduced the contract price. After completing contract performance as directed by the COR, the contractor filed a claim seeking compensation for additional work. Specifically, the contractor claimed that the Forest Service improperly required the removal of essentially all small material as part of the helicopter operation rather than allowing the contractor to leave 10-15% of the material to lop and scatter.

The Department of Agriculture Board of Contract Appeals (AGBCA) first found that the Forest Service's interpretation of the contract's requirement to remove by helicopter "all" of the small material was unreasonable when read in the context of the contract as a whole. The Forest Service should have contemplated that there would be a sufficient amount of residual material to justify a lop and scatter operation. The Forest Service's interpretation of the contract as requiring the removal of all of the over 3" material as part of the helicopter operation was inconsistent with the contract's lop and scatter requirement. But the AGBCA also found that the contractor's interpretation of the contract as permitting it to leave 10-15% of the over 3" material was also unreasonable. Nowhere in the contract was there anything to reflect the contractor's intention to leave 10-15% of the residual material. Nor did the contractor establish that it was well-known industry practice to leave this amount of material or that its intention was reasonable. Although the AGBCA agreed that the contractor removed more material than was called for by the contract, the contractor offered no way for the AGBCA to calculate a specific amount.

More fundamentally, however, the contractor failed to put the Forest Service on notice during contract performance that it believed it was being required to perform extra work. As a result, the Forest Service was denied the opportunity to change its interpretation of the contract or to take steps to mitigate its damages. In these circumstances, the contractor could not demonstrate that it was entitled to compensation for the additional work it performed due to the Forest Service's unreasonable interpretation of the contract.

On the other hand, the AGBCA found that the contractor was entitled to recover for the credit taken by the Forest Service for foregoing the lop and scatter requirement. The credit was contingent on there being lop and scatter material left at the site. The Forest Service dealt with the lop and scatter material by having the contractor remove the material as part of the helicopter operation. The AGBCA reasoned that it would be unfair to permit the Forest Service to take the credit for the lop and scatter work not performed when the reason that the contractor did not perform the work was because the Forest Service required it to clean the site as part of the helicopter operation beyond what was required by the contract. ■

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### **CONTRACTOR ENTITLED TO RECOVER UNDER EMERGENCY EQUIPMENT RENTAL AGREEMENT**

A contractor's bulldozer was damaged while the equipment was assigned to firefighting duty on Forest Service land pursuant to an Emergency Equipment Rental Agreement. The Forest Service officer who was supervising the firefighting activity directed the contractor to put in a fire line next to where the fire had burned, *i.e.*, "to follow the black." The contractor did as he was instructed but ran into a cliff. He was unable to get traction to back up and the bulldozer eventually flipped over the cliff. Fortunately, the dozer operator was not injured. Although the Forest Service argued that it was not at fault for the damage to the contractor's bulldozer, the Emergency Equipment Rental Agreement expressly provided that the Forest Service assumed the risk of loss to the equipment except for ordinary wear and tear, negligence of the contractor, or defect not caused by the government. Therefore, the burden was on the Forest Service to prove that the damage occurred as a result of one of these factors in order to escape the liability it assumed in the contract. The AGBCA found that the contractor's employees did their best to extricate the equipment from the condition they were directed into by the Forest Service's personnel and that they were not negligent. In these circumstances, the contractor was entitled to recover for the damage to its equipment. ■

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***About Us...***

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*Since its inception, Saltman & Stevens has concentrated its practice in matters involving resolving our clients' problems with the federal government. The firm provides counseling and litigation representation to a nationwide clientele on matters such as preparing and litigating contract claims, obtaining and maintaining government contracts and permits, and advising clients on compliance with numerous policies and regulations that significantly affect their ability to deal with the federal government. Our experience in these areas includes handling complex litigation with the federal government, federal antitrust law, small business issues, timber export regulations, suspension and debarment, and compliance with federal regulations governing sealed bid and negotiated contracts. In addition, for nearly 25 years we have had a nationally recognized practice in federal timber contract law and in the use and enjoyment of natural resources within the national forests, national parks, and other federal lands. We work regularly with individual companies and trade associations to resolve natural resource issues critical to their objectives.*

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