

# Natural Floodplain Functions Alliance

***“Understanding the Arkansas Game and Fish  
Case and the Importance of that Case to  
Protecting Floodplains and Wetlands”***

**December 10, 2012**

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# Howdy!

I appear today in a *pro bono* presentation on behalf of:

**The Natural Hazard Mitigation Association &  
The Natural Floodplain Functions Alliance**

*This is not and cannot be legal advice; nor does this presentation necessarily represent the views of anyone other than Ed Thomas*

This presentation based on general principles of law, and public policy

# First Some Words From Our Sponsor

What is NHMA?

NHMA WAS CREATED IN 2008  
TO BRING TOGETHER THE VARIOUS  
INDIVIDUALS AND ORGANIZATIONS  
WORKING IN THE FIELD OF  
CLIMATE ADAPTATION &  
HAZARD MITIGATION.



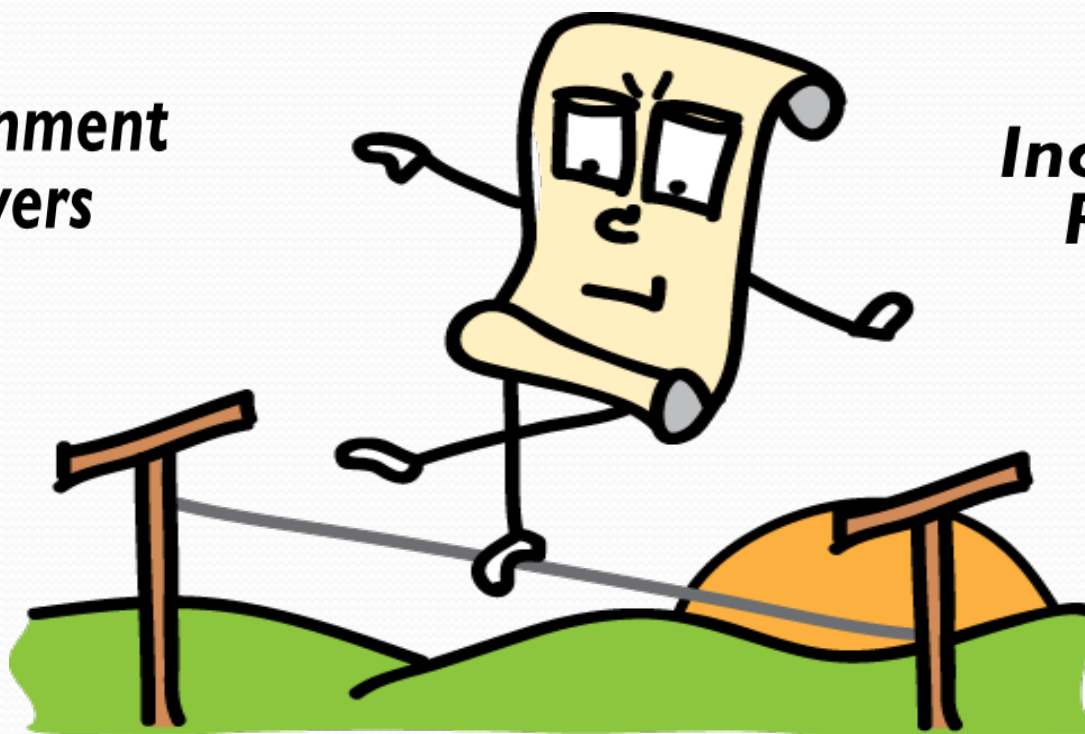
## The Case

- *Arkansas Game & Fish Commission v. United States*, No. 11-597 (Dec. 4, 2012)
- Unanimous decision by the US Supreme Court
- Incredibly important to Floodplain Managers, Wetland Managers and anyone who cares about Hazard Mitigation
- Why is it important?
- What does it mean?

# Fundamental Law Involved: The Constitution of the United States

**Government  
Powers**

**Individual  
Rights**



# The Constitution of the United States

- **Fifth Amendment to the Constitution: “... *nor shall private property be taken for public use without just compensation.*”**
- **Was this Some Theoretical Thought, or Passing Fancy?**
- **Normally my lectures and writing focus on "regulatory takings"**
- ***Pennsylvania Coal Company vs. Mahon 260 US 293 (1922). But See: Keystone Coal 480 US 470, 1987.***

## Arkansas Game and Fish

- Not a “regulatory takings” case
- This case is about direct damage or intrusion to a property by government action

# The Facts of the Case

- Arkansas is suing the US Army Corps of Engineers alleging damage to Dave Donaldson Black River Wildlife Management Area (WMA), located along the Black River
- WMA covers about 24,000 acres in Clay, Randolph and Greene Counties, Arkansas
- The majority of the area was purchased to preserve bottomland habitat and provide top-quality waterfowl hunting.
- The Donaldson WMA represents a significant portion of the remaining bottomland hardwood habitat in eastern Arkansas and provides critical wintering habitat to thousands of migratory birds.



# **Dave Donaldson Black River Wildlife Management Area (WMA)**

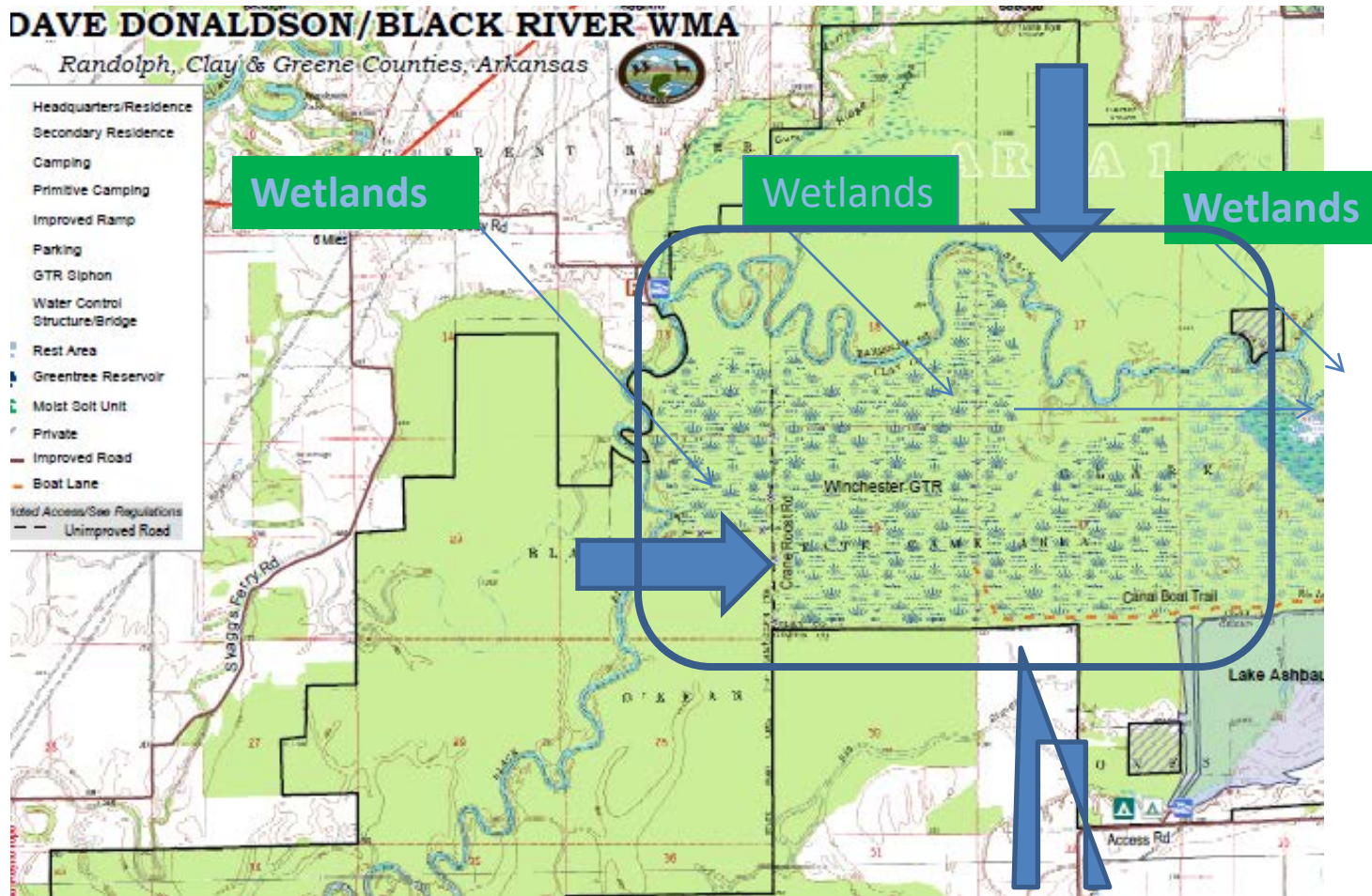


**Dave Donaldson  
WMA is a “Crown  
Jewel” of our state’s  
great wildlife  
management  
heritage....”**

**Arkansas Game & Fish  
Commission Chief Legal  
Counsel Jim Goodhart**

Photo from the Arkansas Game and Fish Commission

# The Area Has Extensive Wetlands



# Management of the Donaldson WMA



**Seasonal flooding of about 7,000 acres of green timber to attract waterfowl is done yearly**

**Selective thinning of trees is done to stimulate the growth of new timber, to provide a diverse habitat type and to remove unhealthy or unproductive trees from the forest**

Photograph of a flooded forest courtesy of Chris Violette in August 2012 Water Log

# US Army Corps of Engineers Involvement

- Corps of Engineers built and operates the Clearwater Dam **in Missouri** about 120 miles away from the Donaldson WMA
- Constructed in 1948 for floodcontrol
- Operating Plan developed in 1953-lays out the release rates from the dam, but provides for allowable deviations
- From 1993-2000 the USACE approved a series of temporary deviations from the 1953 plan in order to **provide Missouri farmers more time to harvest their crops**
- State of Arkansas Game and Fish honks loudly and often, claiming possible damage to Donaldson WMA



# “One of the largest single events that took place in the history of Piedmont...was the official opening of the Clearwater Lake Dam”



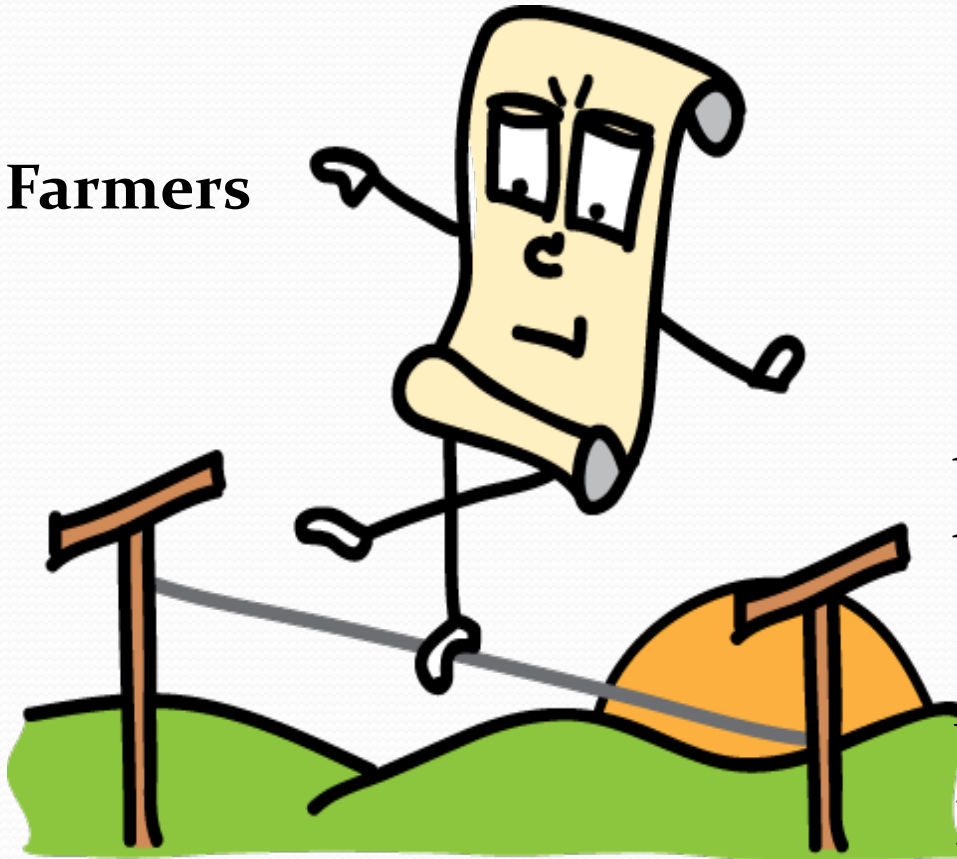
- Although Clearwater Lake's original purpose was allotted for flood control, today it has become one of the largest tourist attractions through out Southeast Missouri
- Little Rock Corps of Engineers estimate that over a million people *per* year travel to Clearwater to enjoy camping, canoeing, boating, fishing, swimming and just plain relaxing

# So We Have a Classic Property Rights Dispute

- **Missouri** Farmers want more time to harvest crops and make money
- Maybe **Missouri** tourism and other money making is playing a role too
- **Arkansas** Game and Fish wants to protect the beauty, value & profitable operations of its “Crown Jewel” in **Arkansas**

# USACE Must Balance Rights Of Competing Parties

Missouri Farmers  
&  
Tourism



Arkansas State  
Agency and  
Crown Jewel  
Donaldson  
Wildlife  
Management  
Area

# Negotiations About The Issue

- USACE forms an Advisory Committee, which includes Arkansas Game and Fish, and attempts to develop formal revisions to the 1953 plan for releasing water from the Clearwater during the period 1993-2000
- A 1999 USACE NEPA Environmental Study finds there is potential damage due the 1993 and then ongoing water releases; so in 2000 USACE reverts to 1953 plan of releases
- Arkansas wants compensation for damages to the Donaldson WMA hardwood forests caused by longer duration of flooding, during critical months of the growing season, caused by the deviations from the 1953 plan, during the period 1993-2000



## In 2005 Litigation Begins

- Negotiations for damage to forest and land restoration were not successful
- **Since this case involves moving water into someone's property, normally it would be considered some sort of Tort Case involving a trespass or a similar action**
- Instead the State of Arkansas makes this into a lawsuit based on the protections of the United States Constitution's Fifth Amendment
- **Why?**

# Special Sovereign Immunity For The United States!

- “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place....” United States Code  
TITLE 33 — NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 15 — FLOOD CONTROL  
33 U.S.C. § 702c.
- Courts Have Found That This Phrase Applies to Flood Control But Not to Other Efforts Such as Navigation(See, *GRACI v. UNITED STATES*, 456 F.2d 20 (5th Cir. 1971)).
- Litigation Pending to Test Constitutional Limits of this Immunity is continuing; the Graci Case holding is very much in question

# We Have long Recognized That There Are Two Major Impediments to Safe Regulation

NOAA recently completed a study which surveyed planners as to impediments to safe development

- Two major reasons cited:
  - Fear of the “taking” issue
  - Economic pressure



# **Hazard and Resiliency Planning: Perceived Benefits and Barriers Among Land Use Planners**

## **Final Research Report**

**National Oceanic and Atmospheric  
Administration Coastal Services Center**

**April 26, 2010**

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**Submitted to:**  
Human Dimensions Program  
NOAA Coastal Services Center  
2234 South Hobson Ave.  
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**Booz | Allen | Hamilton**

# **We Need To Also Recognize A Third Major Impediment To Safe Development: A Perception of Immunity**

- Some public officials believe that they are immune from suit for the consequences of actions they take which harms others**
- Many Floodplain Managers have told me that such an attitude is making their jobs much more difficult**
- This topic was covered at some length in a FEMA funded Workshop put on by the Arkansas Association of Floodplain Managers through the Association of State Floodplain Managers**
- PowerPoints and a CD of the Workshop will soon be available on the Arkansas Floodplain Managers and the NHMA websites**

# The Arkansas Floodplain Management Association

## Legal Workshop for Floodplain Management

### What is My Liability?

September 24-25, 2012

Edward A. Thomas Esq.  
Edward A. Thomas Esq., LLC



## *Arkansas Fish and Game v. US* Litigation

- At Trial Arkansas wins \$5.5 million for damages, and \$176,000 for remediation following an 11 day trial in the US Court of Claims, which finds the flooding was substantial and predictable
- On Appeal, US wins! The US Court of Appeals buys the very clever and carefully crafted US government argument that **since the flooding was temporary it could not be a taking**

# Then, After US Wins First Appeal It Offers to Settle Case



State wants damages for value of dead and dying timber and funding to restore areas where timber died on Donaldson WMA; **especially wants the USACE to change the river flow operations so as to prevent future damage to the timber**

- **US offered to settle for \$13 Million**
- **Will not agree, however, to State request to make a legally binding to return river flow operations to 1953 Plan**



- Just because the flooding was temporary it **might** still be a “Taking”
- Very clever government argument that temporary flooding cannot be a taking is based on *dicta* in an old case, which seemed to indicate that to be a “Taking” flooding must be permanent. [*Sanguinetti v. United States*, 264 U.S. 146 (1924)]
- “We rule today, simply and only, that government induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.

# **Please Note That Litigation for Claimed Harm Is Easier Now Than In Times Past**

- **Forensic hydrologists**
- **Forensic hydraulic engineers**
- **Forensic Wildfire, and other Experts**

# Now What?

- **This case goes back to the lower courts for further proceedings relative to, among other items:**
- **Causation**
- **Foreseeability**
- **Amount of damages-if any**

# **Court Tests for Future Takings Litigation**

- **The Lingle test for a “Taking” described in the writings and lectures of Dr. Jon Kusler, Sam Riley Medlock and me is still in effect for evaluating a “Taking”**
- **We may have an additional factor to add to Lingle:**
- **“degree to which the invasion is intended or is a foreseeable result”**

# **So What?**

## **Why Is This Case Important?**

- **The case strongly affirms the protection of property rights**
- **So much of the legal underpinning of floodplain management, hazard mitigation and wetlands protection is based on concepts of protecting the property and rights of our individuals, communities and the Nation**
- **Our friends in the Property Rights Movement are delighted too**

## **So What?**

## **Why Else Is This Case Important?**

- **If the Supreme Court had held that a temporary invasion of property could not, as a matter of Law, be an unconstitutional deprivation of property contrary to the 5<sup>th</sup> Amendment to the US Constitution:**

**Then, at least some of our existing case law & legal writings which indicate that nobody has the right to use their property in such a manner as to cause damage to others would need to be reexamined so as to distinguish those situations from this very unusual situation**

# In Conclusion

- Fundamentally our society must and will choose either:
- Better standards to protect the economy, the environment, the taxpayer, people & property
- OR
- Current practices which inevitably will result in destruction and litigation

**The Arkansas Game and Fish Case does not hurt but rather supports our efforts to build a safer, more sustainable Nation and World**

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Questions  
Comments?

