

ML Marzulla Law Legal Report

When it's Inverse Condemnation, We Help Property Owners Get Paid

Happy Holidays!

All of us at Marzulla Law wish everyone a safe, happy and prosperous New Year.

Marzulla Law, LLC is the nation's leading law firm for takings claims against the federal government. ML represents landowners, developers, water districts, Indian tribes, business, and corporate interests in litigation of property rights and contract claims. ML also represents clients in environmental enforcement actions, and litigation involving natural resources and permitting issues, in federal district courts and courts of appeal. We hope that this Newsletter will serve as a resource for you.



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Where The Antelope Play: The Fight To Save Exotic Species

What People Are Saying About Marzulla Law...

"Nancie and Roger have been a pleasure to work with. They are extremely knowledgeable and



On October 17, 2011, the Exotic Wildlife Association (EWA) filed a complaint with the United States District Court for the Northern District of Texas (San Angelo Division) seeking to compel the Secretary of the Interior to act on a petition to remove three exotic antelope species from the endangered species list. The suit was filed on behalf of the EWA and its members, all of whom are Texas ranchers who raise one or more of the three antelope species: the scimitar-horned oryx (*Oryx dammah*), the addax (*Addax nasomaculatus*), and the dama gazelle (*Gazella dama*) in a captive-breeding program. In some cases ranchers have been raising the exotic antelope for over twenty years.

The U.S. captive breeding program and the activities of the EWA and its members in the United States have been what has stood between these three antelope species and extinction. Indeed, the scimitar-horned oryx is already extinct in the wild in its native range in northern Africa. The Addax and dama gazelle also occur in very low numbers in the wild in their native ranges in Africa, and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively).

The roots of the case go back to 1991, when the EWA urged the U.S. Fish and Wildlife Service (FWS) not to list the U.S. captive-bred populations of the three antelope species as endangered. The EWA's position was that listing the antelope as endangered would inhibit ranchers from privately breeding and raising them and thus increasing their numbers, and that such inhibition would, ironically, result in the animals becoming more truly endangered.

What followed was a series of deliberations over twelve years by the FWS over the listing status of the three species, due largely to the dilemma of how to protect them in the wild without severely undermining the conservation efforts in the United States that had greatly benefitted their health and numbers. Listing them as endangered would be accompanied by severe restrictions on managing and trading in the animals.

The Species Thrive Under An Exemption

In 2005, the FWS lumped together the truly endangered populations of these three antelope species in the wild with the thriving populations of the species in the United States, and listed the three antelope species as endangered. But the compromise

compassionate, but are very tough litigators. You could not have a better team of lawyers in your corner than the Marzullas."

Charly Seale
Exotic Wildlife Assoc.

Spotlight: **Paul M. Terrill**



Paul M. Terrill is working with Marzulla Law as local counsel, representing the EWA and the member ranchers in *Exotic Wildlife Association, et. al v. United States Department of The Interior*.

"Victories against the Fish and Wildlife Service are few and far between," says Mr. Terrill "but Marzulla Law has won a disproportionate share of them. It is a real pleasure to be working on this case with them—on behalf of the Exotic Wildlife Association in an effort to save these three antelope species from extinction."

struck was that the FWS would at the same time adopt a regulation that excluded U.S. captive-bred populations of the antelope from certain "take" provisions of the Endangered Species Act (ESA) that would otherwise have restricted ranchers' efforts to raise, manage, and trade in the animals (Congress has defined "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"):

We are amending 50 CFR § 17.21 by adding a new paragraph (h), which will apply to U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle. The provision allows for the take; export or re-import; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce of U.S. captive-bred live scimitar-horned oryx, addax, and dama gazelle, including embryos and gametes, and sport-hunted trophies, as long as certain criteria are met.

In short, the FWS in 2005 recognized this essential role that captive breeding in the United States played in preventing these three antelope species from disappearing altogether, and promulgated in a tandem rule published contemporaneously with the listing of these three species, FWS authorized certain otherwise prohibited activities for U.S. captive-bred populations of the three species that enhance the propagation or survival of the species. As a result of the exemption, the antelope continued to thrive. In 2010 the EWA completed a survey updating a previous report on the population increases of the three gazelle species. The survey showed that numbers of the three antelope were exploding: the scimitar-horned oryxes increased 414% from 2,145 in 1996 to 11,032 in 2010. Dama gazelles increased 882%, from 91 in 1996 to 894 in 2010. The addaxes increased 180%, from 1,824 in 1996 to 5,112 in 2010.

"We have been very successful in propagating the Scimitar Horned Oryx species on our ranch," said Nancy and Joe Green, two of the Texas ranchers who are plaintiffs in the case. "We have over 70 head which roam over a large acreage, interact naturally, and have increased their numbers dramatically. The ESA listing would greatly decrease the value of our animals because no rancher can afford to deal with permits and red tape and delays when trying to raise these animals."

The Exemption Is Removed

In 2009, two environmental groups filed a challenge to the FWS exemption, and on June 22, 2009, the U.S. District Court for the District of Columbia ruled that the exemption violated the ESA because it allowed the "take" of a species listed as endangered without the requirement for case-by-case permit applications and the commensurate public notice and comment opportunities. The court remanded the matter to FWS for further proceedings consistent with the ruling, leaving it to FWS to promulgate a new

Mr. Terrill received his Juris Doctor Degree from the University of Colorado School of Law in 1992, and was a Member and Staff Editor of the University of Colorado Law Review. He received his Bachelor of Arts in History (Phi Beta Kappa with highest honors) from the University of Texas in 1989.

After law school, Mr. Terrill served as an Assistant Attorney General in the Natural Resources Division of the Texas Attorney General's Office and then was in private practice at a large law firm. In 1998, Mr. Terrill formed his own firm, now known as the Terrill Firm P.C., in Austin, Texas. The Terrill Firm and its four attorneys focus on water rights, property rights, regulatory takings and natural resources litigation.

Mr. Terrill has extensive experience representing landowners and companies in various water, natural resource, environmental and land use contexts including groundwater rights acquisition and permitting; groundwater and surface water sales, leasing and transfer; water and wastewater utility rate applications; wastewater discharge permitting; land use

regulation that would not violate the ESA. By invalidating the tandem rule, the district court eliminated the authorized activities that make U.S. captive-breeding programs possible.

On July 7, 2011, in compliance with the district court's order, FWS published a notice of proposed rulemaking that would remove the exemption that allows the Texas ranchers to raise the antelope species on their ranches.

Consequences and Irony

Without the ESA exemption, certain prohibitions and permit requirements would apply to the domestic populations of the three antelope species located on Texas ranches just as they would apply to wild populations of animals. As such, the breeding, herding, feeding, vaccinating, providing medical care, and culling of the three antelope species by the Texas ranchers would at a minimum require compliance with a permitting scheme that most ranchers believe would be economically impossible to comply with.

As a result, the Texas ranchers would have little incentive to continue conserving and increasing the populations of these three species—activities that may soon become unlawful. Populations of the three species are now seen as great potential liabilities, and Texas ranchers have begun to avoid breeding new antelope and are selling off existing stock that are difficult and expensive to care for. Perversely, the inevitable result is a decrease in the populations of the antelope. So, because of the restrictions placed on the Texas ranchers the result will be precisely what the ESA was enacted to prevent—the decline and possible extinction of the three species.

The Petition and the Complaint

On June 29, 2010, the EWA filed a petition with the Department of the Interior to have the three antelope species removed from the list of endangered species on the grounds that they are no longer (if they ever were) endangered in the United States. Despite the mandatory requirement to respond within 90 days after receiving the petition, the Secretary failed and refused to render a decision regarding the merits of the petition. The Secretary further violated a mandatory requirement to render a decision within 12 months of receiving the petition as to whether the petition is or is not warranted.

One year later, on June 30, 2011, EWA served the Secretary with a written notice of intent to sue, in compliance with the ESA. The notice was followed by the October 17 complaint:

"This federal agency failed to act on our petition as required by law to delist these animals born in the United States from the ESA restrictions", said Charly Seale, Executive Director of the Exotic Wildlife Association. "We do agree that these animals are endangered and on the brink of extinction in their native lands but thrive by the thousands on private ranches here in the United States. [But] if they want to see these animals truly become endangered then keep the cumbersome and archaic rules in place that currently exist under the Endangered Species Act of 1973. The current administration that occupies the Department of Interior in general, and more specifically the United States Fish and Wildlife Service, live in a sterile environment and do not have a clue what U.S. ranchers have done to preserve these endangered and threatened species."

development; municipal solid waste permitting; and Endangered Species Act issues.

Mr. Terrill has been lead counsel in several important and precedent-setting cases representing landowners challenging government regulation.



About Marzulla Law

Marzulla Law, LLC is a Washington D.C.-based law firm. Nancie G. Marzulla and Roger J. Marzulla help property owners get paid just compensation when the Government takes their property through inverse condemnation.

ML lawyers practice in the federal courts, especially the U.S. Court of Federal Claims, the Federal Circuit Court of Appeals, and the U.S. District Court for District of Columbia, as well as other federal district courts, appellate courts, and the U.S. Supreme Court. ML also represents clients in administrative agencies, such as the District of Columbia Office of Administrative Hearings or the Interior Board of Indian Appeals.

Chambers has recognized Marzulla Law as one of the top ten water rights litigation firms in the country. Nancie Marzulla and Roger Marzulla have been selected by their peers to be included on the list of Best Lawyers in America, and their firm has the highest AV-rating from Martindale-Hubbell. Nancie and Roger Marzulla have been recognized by Best Lawyers as a Top Tier law firm by *U.S. News & World Report* for environmental law, and Marzulla Law is a proud member of the International Network of Boutique Law Firms.



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