IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., at al.
Plaintiffs,
vs.

THE UNITED STATES,
Defendant.

No. 13-465C
(Judge Sweeney)

REPLY TO DEFENDANT'S OPPOSITON TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

Michael Sammons, pro se, would reply to the "Defendant's Opposition to Motion for Leave to File Amicus Brief" as follows:

First, the Government argues that Sammons is prematurely raising an issue "that the Court has not yet ordered the parties to address and the parties have not raised." True, but beside the point: the Federal Court stated that this Court "***must***" consider the Article III jurisdictional issue.

Second, the Government suggests Sammons "attempts to circumvent the Court's denial of his motion to intervene." Not true: had the Federal Circuit not ***explicitly*** ordered this Court to consider the Article III jurisdictional issue Sammons would not have had any reason to file this amicus brief.

Third, the Government argues that amicus briefing on the Article III issue is unnecessary because "the parties are represented by competent counsel and are fully capable of presenting their respective arguments." True enough, but "capable" and "willing" are two different matters, not to mention that all parties, in opposing the intervention appeal, simply parroted this Court's erroneous

belief that "statutory" jurisdiction under the Tucker Act was the same as "constitutional" authority under Article III.[1]

Of course, perhaps one or two of the more conscientious of the attorneys in this case have by now read the law review article referred to by, and which clearly troubled, the Federal Circuit. Frankly, "if" this Court takes the time to review that treatise, as the Federal Circuit obviously did, an amicus brief is unnecessary and the Court need only explain where Professor Goodman is in error. The Federal Circuit clearly wants, and deserves, such an intelligent analysis and opinion, and such an opinion would no doubt also be helpful to the Fifth Circuit as well as it must soon also try to find some error in Professor Goodman's legal analysis.

Finally the "conclusion" in the Appellant's Brief now before the Fifth Circuit captures the difficulty of the Article III issue:

> **"CONCLUSION:** It is fair to say that few constitutional law professors now believe that Congress delegating takings claims to an Article I or legislative court, or any other agency or entity Congress happens to create, comports with the requirements of Article III.
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> **The above brief is taken almost *entirely* from a scholarly 58 page law review article by Law Professor Michael P. Goodman, J.D., Ph.D: *"Taking Back Takings Claims: Why Congress Giving Just Compensation Jurisdiction to the Court of Federal Claims is Unconstitutional*", 60 Vill. L. Rev. 83 (2015).** That law review article clearly troubled the Federal Circuit, as its 58 page analysis seemingly foreclosed every conceivable intellectual rationale for allowing a legislative entity (as is the Article I Court of Federal Claims) to hear Article III takings cases.

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[1] Both the Plaintiffs and Defendant opposed the motion to intervene, in part, by citing many many cases from this Court, the Federal Circuit, and the Supreme Court, holding that it is well established that the Court of Federal Claims has "statutory" jurisdiction for takings claims. While this Court and all the parties failed to realize that "statutory" jurisdiction (which certainly exists under the Tucker Act) is not the same thing as "constitutional" jurisdiction (which is highly questionable under Article III), a unanimous panel of the Federal Circuit had no difficulty in making the distinction.

In his detailed treatise on this precise issue, Professor Goodman, in painstaking and thorough detail, recounted the complete history of the relevant courts and takings precedent pertaining to the question of whether an Article I or legislative court, or any other entity Congress happens to create, or for that matter Congress itself, has the "constitutional" authority under Article III to decide takings claims.

But the lower court misread Professor Goodman's treatise in concluding:

> "Although Professor Goodman argues that takings claims must be brought before Article III judges, he calls on Congress – not the courts – to rectify the problem." Order, pg. 3.

While Judge Biery was certainly correct to recognize that there is, indeed, an "(Article III) problem," Professor Goodman certainly did not, as Judge Biery suggested, conclude that only "Congress ... (can) rectify the problem."

Responsibility for defending the Constitution, including invalidating unconstitutional statutes, as passed by Congress or *as applied*, must, and has always, fallen first and foremost to the judiciary. No federal court has ever before held that the judiciary cannot or should not intervene when it finds that a statute is unconstitutional "as applied" in a specific case.

Professor Goodman unequivocally opined that the status quo – allowing an Article I legislative entity to hear takings claims – is an illegal and unconstitutional violation of Article III ... period. Therefore, the duty to act – and to act now - falls upon the judiciary.

But even had Judge Biery explicitly agreed with the United States that there is no "(Article III) problem" because a takings claim is a "legislative matter" or "public rights matter" which Congress could itself decide, as could any legislative court, agency, or any other entity Congress happens to create, such a holding squarely conflicts with *explicit* Supreme Court precedent that takings claims, rather than being a "legislative matter," are a "judicial matter."

In 1893 the Supreme Court, in Monongahela Navigation Co. v. United States, *supra*, explicitly declared that deciding a takings claim "**does not rest with ... the legislature**" but rather is a "**judicial inquiry**." The Supreme Court has never strayed from that "well established" constitutional principle. See Kelo v. New London, 545 U.S. 469, 497 (2005)(O'Conner dissenting)("It is well established that ... the question of what is a (taking) is a **judicial one**.").

> The Government, in citing many cases in which the Supreme Court has approved Congress delegating "legislative matters" to Article I legislative courts (matters assigned by the Constitution to the Congress, or "public rights" matters requiring a waiver of sovereign immunity, or "public rights" matters arising from statutes passed by Congress), has so far failed to cite a single case overturning the 1893-2005 Supreme Court precedents that takings claims are a "judicial matter" which can only be heard by an Article III judge. "

In Stern v. Marshall, the Supreme Court reviewed every one of its many exceptions allowing Article I courts. But every exception, including those voiced by the dissent, makes clear that Congress can only delegate matters to Article I legislative courts matters which Congress itself has substantial control over. But if "Congress has nothing to do with it," as in Monongahela (takings clams) and in Stern (common law claim), the claim must stay with the Article III courts.

In conclusion – as to this reply – no party in this case will voluntarily press the Article III issue. Yet the Federal Circuit has ***explicitly*** ordered this Court to consider that constitutional issue – and while lower courts may brush aside the archaic Article III issue as "who really cares," the Federal Circuit (not to mention the Fifth Circuit) is going to want a cogent argument as to why Professor Goodman is wrong, and how, consistent with Monongahela and Stern, the legislative branch can now be put in complete charge of a takings claim.

Respectfully submitted,

Michael Sammons, pro se
15706 Seekers St.
San Antonio, TX 78255
michaelsammons@yahoo.com
210-858-6199

Certificate of Service

A true and exact copy was mailed and electronically delivered to all parties this 10th day of April, 2017.

Michael Sammons