No. 21-1131
[And All Consolidated Appeals, Including No. 21-1217]

United States Court of Appeals for the Federal Circuit

VIRGINIA MILTON, AND, ARNOLD MILTON, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED PERSONS, ET. AL.
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

On appeal from the United States Court of Federal Claims
Senior Judge Loren A. Smith
Case Nos. 1:17-cv-01235-LAS, 1:17-cv-09002-LAS, 1:18-cv-00144-LAS and all others connected with the consolidated appeals

Opening Brief of Plaintiffs-Appellants in Consolidated Case No. 21-1217 (*American Home Assurance, et. al. v United States*)

Oral Argument Requested

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CERTIFICATE OF INTEREST

Federal Circuit Rule 28(a)(1) requires a Certificate of Interest be filed with every principal brief. On November 30, 2020, the Plaintiffs-Appellants in *American Home Assurance v United States,* No. 21-1217 (now consolidated with the above-captioned matter) filed a Certificate of Interest. [Case 21-1217 Document No. 6]. Because that filing is 15 pages long, instead of reproducing it again herein, those parties attach the aforementioned Certificate of Interest as Exhibit A to the Addendum to this Brief.

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STATEMENT OF RELATED CASES

In Attachment C to Plaintiffs-Appellants' Certificate of Interest, filed in *American Home Assurance v United States,* No. 21-1217 [Addendum A11-A15], they provided a spreadsheet of Related Cases as defined in Fed. Cir. R. 47.5. They incorporate that spreadsheet by reference here.

It should be noted that all of the listed Related Cases involving an appeal filed with this Court have now been consolidated for briefing, argument and resolution under Federal Circuit No. 21-1131.

I. JURISDICTIONAL STATEMENT

There are three United States Court of Federal Claims cases relevant to this appeal (and this Court's jurisdiction). The first two are *Milton, et. al. v United States* [U.S. Court of Federal Claims Case No. 1:17-cv-01235-LAS] and *American Home Assurance, et. al. v United States* [U.S. Court of Federal Claims Case No. 1:18-cv-00144-LAS]. *Milton* is a case brought by other counsel on behalf of numerous individuals. [SAppx8-24: Complaint]. *American Home Assurance* is brought by the undersigned counsel's firm on behalf of the Plaintiff-Appellant Subrogated Insurers (who submit this Opening Brief). [SAppx2740-2769: Amended Complaint]. Both cases allege Fifth Amendment takings claims against Defendant, the United States of America ("Defendant"). Consequently, pursuant to the Tucker Act, 28 U.S.C. §1491(a)(1), the United States Court of Federal Claims has jurisdiction over both cases (and many other similar cases filed by other parties).

The United States Court of Federal Claims consolidated these two cases (and many others) into the third case relevant to this appeal -- *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, No. 1:17-cv-090002-LAS (hereinafter referred to as "the Downstream Sub-Docket"). On February 18, 2020, Senior Judge Loren A. Smith of the United States Court of Federal Claims (hereinafter referred to as "the Trial Court") issued an Opinion and Order in the Downstream Sub-Docket. [Appx1-19, also attached hereto as Exhibit B of the

Addendum]. He granted Defendant's Motions to Dismiss and for Summary Judgment. This decision applied to all consolidated cases in the Downstream Sub-Docket.

On September 9, 2020, the Trial Court ordered that final judgment be entered in all but eleven cases in the Downstream Sub-Docket (neither *Milton* or *American Home Assurance* were included in the eleven exceptions). [Appx22-23, also attached hereto as Exhibit C of the Addendum]. Two days later (September 11, 2020), the Trial Court entered Final Judgment in *American Home Assurance*. [SAppx2770, also attached as Exhibit D of the Addendum]. By virtue of this Judgment, the February 18, 2020 Opinion and Order in the Downstream Sub-Docket is final and appealable.

Pursuant to Fed. R. App. P. 4(a)(1)(B), the Plaintiff-Appellant Subrogated Insurers had 60 days from entry of Final Judgment (i.e., no later than November 10, 2020) to file a Notice of Appeal in *American Home Assurance*. The Plaintiff-Appellant Subrogated Insurers timely filed an Amended Notice of Appeal on November 4, 2020 [SAppx2775-2778], and it was assigned Federal Circuit No. 21-1217. Consequently, this Court has jurisdiction over the Plaintiff-Appellant Subrogated Insurers' appeal.

Based on a subsequent unopposed Motion to Consolidate all pending Downstream appeals, this Court has now consolidated all these appeals into the

Milton case. The Plaintiff-Appellant Subrogated Insurers are one of four groups of Appellants who are authorized to file briefs in this consolidated matter. This is why this Opening Brief is being submitted under the *Milton* case, instead of in the *American Home Assurance* matter.

II. STATEMENT OF THE ISSUE

DID THE TRIAL COURT REVERSIBLY ERR BY HOLDING PLAINTIFFS DID NOT POSSESS A COGNIZABLE PROPERTY INTEREST THAT COULD BE TAKEN BY DEFENDANT, WHERE, PURSUANT TO CONTROLLING TEXAS LAW, PLAINTIFFS -- FEE SIMPLE OWNERS OF THEIR PROPERTY -- DID INDEED HAVE COGNIZABLE PROPERTY INTERESTS THAT COULD BE TAKEN?

III. STATEMENT OF THE CASE

The focus of this appeal is the Trial Court's February 18, 2020 Opinion and Order[1] granting Defendant's Motions to Dismiss and for Summary Judgment. [Appx1-19, and Addendum Ex. B].[2] In the Opinion, the Trial Court discusses some (but not all) of the relevant facts. Consequently, where the Plaintiff-Appellant Subrogated Insurers[3] refer to a fact accurately set forth in the Opinion, they will cite to the Opinion as supporting evidence. Where additional relevant facts require discussion, the Subrogated Insurers will cite to supporting evidence from other sources in the appellate record.

A. Underlying Facts

1. Defendant intentionally flooding downstream properties

a. The Addicks and Barker Reservoirs

Between 1854 and 1935, the Houston, Texas area experienced six major flood events along the Buffalo Bayou. As a result, in 1938 Congress authorized the

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1 The Opinion and Order ("Opinion") can also be found at 147 Fed. Cl. 566.

2 References to the Appendix ("Appx") pertain to the 11-volume Omnibus Joint Appendix, while references to the Supplemental Appendix ("SAppx") pertain to the 5-volume Supplemental Omnibus Joint Appendix. Both are applicable to all consolidated Downstream appeals.

3 When reference is made to "Plaintiffs," this means the 13 individuals and/or entities that own the 13 "Test Properties" previously selected by the Trial Court. Conversely, the Plaintiff-Appellant Subrogated Insurers will be referred to as "the Subrogated Insurers."

construction of the Addicks and Barker Reservoirs and Dams. [Appx3: Opinion]. The Reservoirs were intended to protect the City of Houston and the Houston Ship Cannel by mitigating downstream flooding -- the Reservoirs would collect excessive amounts of rainfall, which would then be released into the Buffalo Bayou at a controlled rate. [Appx3: Opinion].

The Barker Reservoir/Dam was completed in 1945, and the Addicks Reservoir/Dam was completed in 1948. [Appx3: Opinion]. As of 1963, each Reservoir had 5 gated outlet conduits (gates) through which water could be released. [Appx3: Opinion]. However, both Reservoirs are "dry dams," meaning they generally do not hold water. [Appx3: Opinion]. In order for the Reservoirs to fill, the gates must be closed (under normal/dry conditions the gates remain open).

Anticipating a substantial amount of water would be impounded by the Reservoirs during rain events, Defendant purchased land immediately upstream of the Reservoirs. However, Defendant did not make commensurate purchases of downstream land (below the Reservoirs) that could be adversely impacted by large releases of water. [Appx2605: 1981 Environmental Assessment re Addicks and Barker Dams][Appx2662-2664: 1979 Army Corps of Engineers Memorandum re: Addicks and Barker Spillways].

The Reservoirs are operated and maintained by the United States Army Corps of Engineers ("the Corps") in accordance with a Water Control Manual ("the

Manual"). [Appx3: Opinion; Appx975-1131: 2012 Army Corps of Engineers Water Control Manual]. The Reservoirs are operated in accordance with the Manual's "Normal Flood Control Regulation." The gates are closed when 1 inch of rainfall occurs over the watershed below the Reservoirs in less than 24 hours, or when flooding is predicted downstream. [Appx3: Opinion]. The gates remain closed as long as necessary to prevent downstream flooding. [Appx3-4: Opinion].

In 2009, the Corps evaluated upstream and downstream flooding risks connected to the Reservoirs. It determined the Reservoirs "are operated strictly to prevent downstream flooding; therefore, the gates remain shut even if pool levels increase and flood upstream properties [beyond the land previously purchased by Defendant]." [Appx1154: 2009 Army Corps of Engineers Draft Operational Assessment of the Addicks and Barker Reservoirs].

Notwithstanding the foregoing, the Manual does contain instructions for "Induced Surcharge Flood Control Regulation," under which the gates will be opened when the Reservoir pools reach or exceeds certain specified elevations (101 feet for the Addicks Reservoir, and 95.7 feet for the Barker Reservoir). [Appx4: Opinion]. When water levels reach or exceed those elevations, the gates are gradually opened until water levels decrease to the point where the Corps can return to normal flood control operations. [Appx4: Opinion].

Prior to the events at issue in this litigation, the Corps had never released water from the Reservoirs pursuant to the Induced Surcharge Flood Control Regulation. [Appx6: Opinion]. In other words, Defendant had never previously taken any action that resulted in the flooding of downstream properties.

b. Defendant's release of water from the Reservoirs

On August 25, 2017, Hurricane Harvey made landfall along the Texas gulf coast as a Category 4 hurricane. Within 12 hours of making landfall it weakened into a tropical storm, but stalled over the Houston area until moving on to Louisiana on August 30, 2017. [Appx5: Opinion].

Prior to Hurricane Harvey making landfall, both Reservoirs were empty, and the gates were at their normal (open) settings. Anticipating possible flooding from the hurricane, on the evening of August 25, 2017 the Corps closed all Reservoir gates. [Appx5-6: Opinion].

On August 26, 2017, the Corps noted that with rainfall expected to continue over the next 5 days or more, the Reservoirs are expected to exceed record pool levels. However, the Corps did not expect to have to make any Induced Surcharge releases of water. [Appx6: Opinion].

On August 27, 2017, conditions changed. Peak inflows of water into the Addicks Reservoir were approximately 70,000 cubic feet per second ("cfs"), and peak inflows into the Barker Reservoir were approximately 77,000 cfs. [Appx6:

Opinion]. Later that day, the pool of water behind the Barker Reservoir exceeded the government-owned land, and the same thing happened at the Addicks Reservoir the following day. [Appx6: Opinion].

As a result, shortly after midnight on August 28, 2017, for the first time in history, the Corps opened the Reservoirs' gates to make Induced Surcharge releases of massive amounts of water. [Appx6: Opinion]. As discussed below, the results were both catastrophic and inevitable.

There were two primary reasons for the opening of the gates. First, the Corps was concerned over the integrity of the Addicks and Barker Reservoirs (and related Dams). [Appx1415-1416: Thomas[4] Deposition][Appx2159: Zetterstrom[5] Deposition]. The Corps knew its actions were "making people hurt downstream," but that was justified by "ensur[ing] the integrity of the dam and operat[ing] the reservoirs for the entire population." [Appx2128: Long[6] Deposition].

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[4] Robert Thomas, Chief of the Corps' Engineering and Construction Division at Galveston, was Defendant's designated 30(b)(6) witness to testify regarding policies for releases of water from the Reservoirs. [Appx2173: Response to Notice of Deposition].

[5] Colonel Lars Zetterstrom is the Corps Commander for the Galveston District. [Appx2160: Zetterstrom Deposition].

[6] Richard Long is a Natural Resource Management Specialist for the Corps.

Second, the Corps' action was intended to protect properties surrounding the Reservoirs -- including the upstream properties. [Appx2157-2162: Zetterstrom Deposition][Appx4183: Thomas E-Mail re Plan to Release Water]. In short, the Addicks and Barker Reservoirs and Dams, and surrounding property, were protected at the expense of downstream properties.

In any event, approximately 7,500 cfs of water was released downstream from the Addicks Reservoirs, and 6,300 cfs from the Barker Reservoir. [Appx6: Opinion]. Because this did not have the immediate effect of sufficiently lowering water levels in the Reservoirs to "normal" operational levels, the gates remained open until September 16, 2017, at which point normal operations resumed. [Appx6: Opinion].

Ironically, as rainfall from Hurricane Harvey ceased, the discharge of water from the Reservoirs quickly became the sole source of flooding water in the Buffalo Bayou. For example, the period of maximum release of water from the Reservoirs was between 5 PM on August 29, 2017 and 10 PM on August 31, 2017. During this period, there was little (if any) rain falling, and the flooding waters in the Buffalo Bayou were primarily a consequence of the Reservoir releases. [Appx2238: Nairn[7] Report]. In other words, the water released from the Reservoirs was more than

[7] Robert Nairn is Defendant's hydrology expert. [Appx2208-2209: Nairn Report].

sufficient on its own to flood downstream properties. [Appx2315: Nairn Report (summary of modeling)].

c. Defendant knew the release of water from the Reservoirs would flood downstream properties

The Corps knew in advance that by opening the Reservoirs' gates, it would flood, damage and possibly destroy downstream properties. The Corps was constantly calculating, and recalculating, flow rates from the Reservoirs which would result in flood damage to downstream properties. By 2016, the Corps knew properties along the Buffalo Bayou -- many miles downstream from the Reservoirs -- would suffer flood damage at discharge rates greater than 4,100 cfs (easily less than the 13,800 cfs combined rate of discharge from the Addicks and Barker Reservoirs when the gates were opened here):

> Using USACE surveys of 1st floor elevation data, it was determined that the lower level of homes in the vicinity of the West Beltway Bridge (approximately 6.5 miles downstream of the reservoirs) experience flooding at discharges in Buffalo Bayou of 4,100 cfs. . .At flows greater than 4,100 cfs, a large percentage of the structures incurring flood damage are located between the bridges over Buffalo Bayou at North Wilcrest Drive (approximately 5 miles downstream of the reservoirs measured along the streambed) and Chimney Rock Road (approximately 16 miles downstream of the reservoirs).

[Appx1255: Corps Memorandum for Record re: Addicks and Barker Dams].

Furthermore, at the time of Hurricane Harvey, the Corps had the capacity to use its hydrologic models to know (in advance of opening the Reservoirs' gates) the full extent of downstream inundation that would likely occur by street, intersection

and block. [Appx1426-1429: Thomas Deposition]. Therefore, based on its models, the Corps knew is decision would inundate the downstream properties. [Appx2135: Long Deposition].

2. Plaintiffs' downstream properties

a. Plaintiffs' fee simple ownership of their properties

Plaintiffs acquired their properties (the 13 "Test Properties") between 1975 and 2015. All are located along the Buffalo Bayou, and downstream of the Reservoirs. [Appx4: Opinion]. Nine of the 13 properties had never previously experienced any flooding, while the other 4 had experienced some minor flooding. [Appx5: Opinion].

It is undisputed that each of the Plaintiffs owned their property in fee simple at the time of the underlying event. [Appx3014-3175: Collected Ownership Documents][Appx1436-1470: Deposition Excerpts re: Property Acquisition].

b. Defendant's flooding of Plaintiffs' properties

As the Corps anticipated, the inundation of Plaintiffs' properties began hours after the Corps' began Induced Surcharge releases of water from the Reservoirs. [Appx2334-2347: Nairn Report (charts showing timing of inundation of Plaintiffs' property)]. For seven Plaintiffs, water levels at their properties eventually reached three feet or more above the first floor level (for two, maximum depths exceeded 8 feet above the first floor level). The other six Plaintiffs' properties experienced

significant (albeit less) flooding. [Appx1639-1673: Plaintiffs' Deposition Excerpts re: Height of Floodwaters][Appx2015-2126: Plaintiffs' Fact Sheets (Question 5)].

Needless to say, the flooding had catastrophic consequences. To start, people had to be evacuated from at least nine of Plaintiffs' properties -- often under harrowing circumstances. [Appx1674-1694: Plaintiffs' Deposition Excerpts re: Evacuations]. Furthermore, Plaintiffs' properties remained inundated for many days, with some Plaintiffs unable to gain access to their property for up to two weeks. [Appx1695-1720: Plaintiffs' Deposition Excerpts re: Inaccessibility]. In the end, the flooding substantially destroyed Plaintiffs' homes, businesses and personal property (often resulting in several hundreds of thousands of dollars in damages for each property), and precluded some Plaintiffs from returning to their property for up to a year. [Appx1721-1861: Plaintiffs' Deposition Excerpts re: Damage to Test Properties][Appx1862-1945: Plaintiffs' Deposition Excerpts re: Exclusion From Ordinary Use].[8]

According to Defendant's own expert, for at least eight of the Plaintiff Test Properties, flooding would not have occurred but for the Corps' releasing a total of around 13,000 cfs of water from the Reservoirs. [Appx2223-2224, Appx2570-2571,

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[8] When the Subrogated Insurers filed their Amended Complaint, they had already paid over $25 million in property insurance benefits for damage caused by the flooding, with an additional $50 million in claims pending payment. [SAppx2755: First Amended Complaint, ¶25]. The total figure (paid and pending) has only increased since then, possibly approaching (if not exceeding) $100 million.

Appx2636, Appx2726: Nairn Report]. Plaintiffs' expert agrees that Defendant's release of water from the Reservoirs was the sole cause of flooding for these eight properties. [Appx2804-2811: Bardol Report]. For three of the other five Test Properties, the parties' experts also concur that the flooding was substantially worse than what would have been experienced had the Reservoirs' gates remained closed. [Appx2726, Appx2315; Nairn Report (compare actual Harvey model with "gates closed" model)][Appx2828-2829: Bardol Affidavit].[9]

B. Proceedings Below

1. The Downstream and Upstream Sub-Dockets

Beginning in September of 2017, property owners began filing complaints against Defendant in the U.S. Court of Federal Claims. They alleged the flooding which occurred in connection with the Corps' operation of the Addicks and Barker Reservoirs was an unconstitutional taking of their property. All related cases were joined under a Master Docket, and then bifurcated into an Upstream Sub-Docket (for properties upstream of the Reservoirs) and a Downstream Docket (for properties downstream of the Reservoirs). [Appx6: Opinion].

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[9] Unfortunately, this very same catastrophe could occur again. Defendant's Climatologist confirms a rain event similar to Hurricane Harvey will inevitably occur in the area of the Addicks and Barker Reservoirs. [Appx2728: Barry Keim Deposition]. If so, the Corps will "inevitably" take the same action it did here. [Appx2132: Long Deposition].

The two Sub-Dockets were litigated independently of one another. The Upstream Sub-Docket was assigned to Senior Judge Charles F. Lettow, and the Downstream Sub-Docket was originally assigned to Senior Judge Susan G. Braden.[10]

2. The Downstream litigation

To streamline the Downstream litigation, Judge Braden administratively stayed all pending and subsequently filed Downstream cases, and designated a group of 13 "test" properties that would be the focus of discovery, motion practice and trial. [Appx6: Opinion]. This resulted in the Subrogated Insurers' particular Downstream suit[11] being stayed upon filing, and remaining stayed throughout the pendency of the Downstream litigation.

In addition to staying all cases, Judge Braden designated certain counsel as "Lead Counsel" for all Downstream plaintiffs. These counsel were the only

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[10] As only Downstream cases are before this Court, there is no need to discuss the progress of litigation of the Upstream cases. However, as will be discussed in greater detail below, in many respects Defendant made the same arguments in the Upstream litigation that it made in the Downstream litigation. The major difference is that Judge Lettow rejected these arguments in the Upstream litigation, while Judge Smith accepted several of them in the Downstream litigation.

[11] *American Home Assurance Company, et. al. v United States*, No. 1:18-cv-00144-LAS.

attorneys authorized to file any briefs, conduct discovery, etc. in the Downstream Sub-Docket.[12]

In February of 2018, Defendant filed a Motion to Dismiss, and it was fully briefed by the parties. [Appx7: Opinion]. On April 19, 2018 Judge Braden deferred ruling on the Motion until trial (and she set a pre-trial and discovery schedule). [Appx802-805: Memorandum Opinion and Scheduling Order].

However, on January 7, 2019, the Downstream Sub-Docket was reassigned to Senior Judge Loren A. Smith. He decided to hold a hearing on the Motion to Dismiss, which occurred on March 13, 2019. [Appx8: Opinion]. Judge Smith subsequently deferred ruling on the Motion to Dismiss so he could rule on "to be filed" cross-motions for summary judgment at the same time. [Appx8: Opinion].

Cross-Motions for Summary Judgment were subsequently filed, fully briefed, and argued on December 11, 2019. [Appx8: Opinion]. At oral argument, the Trial Court encouraged the parties to pursue settlement, but on February 13, 2020 the parties informed the court that attempts at settlement were unsuccessful. [Appx8:

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[12] This precluded the Subrogated Insurers (and their counsel) from participating in any meaningful way in the Downstream litigation (despite several attempts to convince the Trial Court otherwise). This is not of any significance regarding the current appeal, as the Subrogated Insurers have absolutely no objection to how designated Co-Lead Counsel handled the briefing and argument on Defendant's Motion to Dismiss and Cross-Motions for Summary Judgment. They bring this up solely to point out that this appeal brief is the first opportunity the Subrogated Insurers have had to actually be heard in any detail during the Downstream litigation.

Opinion]. Five days later, the Trial Court its Opinion and Order, granting Defendant's Motion to Dismiss, denying Plaintiffs' Motion for Summary Judgment, and granting Defendant's Cross-Motion for Summary Judgment. [Appx1-19: Opinion and Order].[13]

3. The Trial Court's decision

Defendant made a plethora of arguments in its motions, all of which Plaintiffs refuted. However, in its Opinion and Order, the Trial Court focused on a single issue -- whether Plaintiffs possessed a cognizable property interest that could be taken by Defendant?

Despite Plaintiffs being fee simple owners of their property, the Trial Court held this was not enough -- "[n]either Texas law nor federal law creates a protected property interest in perfect flood control in the face of an Act of God." [Appx2: Opinion].[14] The Trial Court added:

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[13] The Trial Court subsequently ordered that final judgment be entered in all but eleven Downstream cases. [Appx 22-23: September 9, 2020 Order Directing the Entry of Judgment in Downstream Cases]. Final Judgments were then entered in the vast majority of the Downstream cases, including the Subrogated Insurers' case. [SAppx 2770, also attached as Exhibit D of the Addendum].

[14] As will be established below, the Trial Court reversibly erred when it found there was no cognizable property interest under Texas law. As such, the Subrogated Insurers will not address whether such an interest may also exist under federal law. To the extent one or more of the other three Plaintiff-Appellant groups filing Opening Briefs address the federal right issue, or make any other arguments not set forth herein, the Subrogated Insurers adopt those arguments by reference under Fed. R. App. P. 28(i).

> . . .[T]he State of Texas has never recognized such a property right, and, in fact, that the laws of Texas have specifically excluded the right to perfect flood control from the "bundle of sticks" afforded property owners downstream of water control structures. *See, e.g., Harris Cnty. Flood Control Dist. v Kerr*, 499 S.W.3d 793 (Tex. 2016); *Sabine River Auth. of Tex. v Hughes*, 92 S.W.3d 640 (Tex. App. - Beaumont 2002).

[Appx11: Opinion].

In an effort to bolster its decision, the Trial Court proceeded to discuss several areas of Texas law -- each pertaining to whether a taking occurred -- which it applied to the separate question of whether a property interest existed that could be taken in the first place. The Trial Court began with governmental police power, which it held trumps individual property rights:

> Texas law clearly recognizes the state's authority to mitigate against flooding to be a legitimate use of the police power. Additionally, Texas jurisprudence illuminates precisely how the state's police power is superior to the rights of property owners. . . .As such, the plaintiffs in this case own their land subject to the legitimate exercise of the police power to control and mitigate against flooding.

[Appx12: Opinion].

The Trial Court next turned to the presence of an "Act of God" (Hurricane Harvey) in the chain of events leading to Plaintiffs' flood losses. It concluded the presence of an Act of God, a factor in determining causation, could also be applied in determining (and rejecting) the existence of a property right. [Appx13: Opinion].

Remaining on the causation question, the Trial Court then determined there was another reason why, if causation is lacking, by definition so is the existence of a cognizable property interest. It explained as follows:

> Under Texas law, even an intentional release of water does not give rise to a takings claim unless the flood control structure releases more water than is entering the reservoir. As such, under Texas law, the "bundle of sticks" afforded property owners does not include the right to be free from all flooding, regardless of the intentionality behind the water's release.

[Appx14: Opinion].

Finally, the Trial Court noted Plaintiffs acquired their property after the Reservoirs were constructed. It determined Plaintiffs therefore "acquired their properties subject to the superior right of the Corps to engage in flood mitigation and to operate according to its Manual." [Appx15: Opinion]. In other words, fee simple property owners who purchased their property after construction of a flood control project have sacrificed any takings claims they may have arising out of the operation of that project.

It must be noted that, in the Upstream litigation, Judge Lettow reached an entirely different conclusion. In two decisions, the second after a bench trial,[15] Judge Lettow found 1) under Texas law, property owners upstream of the Addicks and Barker Reservoirs did possess cognizable property interests that could be taken, and

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[15] Plaintiffs brought this decision to Judge Smith's attention prior his ruling. He dismissed this decision in its entirety as "not relevant." [Appx8-9: Opinion].

2) a taking did indeed occur. *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 138 Fed. Cl. 658 (2018) [referred to herein as "*In re Upstream Claims I*"]; *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 146 Fed. Cl. 219 (2019) [referred to herein as "*In re Upstream Claims II*"].

IV. SUMMARY OF ARGUMENT

In order to prevail with a takings claim, a plaintiff must establish 1) she/he holds a property interest for the purposes of the Fifth Amendment, and 2) the government action at issue amounted to compensable taking of that property interest. *Acceptance Insurance Companies, Inc. v United States*, 583 F.3d 849 (Fed. Cir. 2009); *Air Pegasus of D.C., Inc. v United States*, 424 F.3d 1206 (Fed. Cir. 2005); *American Pelagic Fishing Company, L.P. v United States*, 379 F.3d 1363 (Fed. Cir. 2004). Typically, the second requirement presents the greater issue (and receives the most attention by the courts), as it involves various considerations such as causation, severity of the interference with property rights, intent, etc. *See Arkansas Game and Fish Commission v United States*, 568 U.S. 23, 38-39 (2012). That certainly appears to be the case here, as the first requirement is rather clearly established -- Plaintiffs were fee simple owners of properties flooded by Defendant.

However, the Trial Court dismissed Plaintiffs' claims based on their purported failure to satisfy the first step of the test (it never addressed the second). The Trial Court did this by accepting a rather Orwellian assertion made by Defendant -- under Texas law, all fee simple property interests are created equal, but some are more equal than others. Specifically, while typically owners of fee simple property interests are entitled to compensation when these interests are taken by the government, that is not the case when the underlying properties can be impacted by

governmental flood control projects. In those instances, fee simple property interests are diminished to the point of being non-compensable under the Fifth Amendment, as a property owner has no interest in "perfect flood control."

With all due respect to the Trial Court, for several reasons its decision is erroneous. First, its analysis is absolutely at odds with Texas law, which broadly defines property (and property interests), finds such individual property interests are entitled to the utmost respect and protection, and holds the fee simple title to property is something that can be taken by governmental action.

Second, the Trial Court cites two Texas as directly supporting its conclusion (there is no protected property interest in perfect flood control in the face of an Act of God). *See Harris County Flood Control District v Kerr*, 499 S.W.3d 793 (Tex. 2016); *Sabine River Authority of Texas v Hughes*, 92 S.W.3d 640 (Tex. App. - Beaumont 2002). They do nothing of the sort. Indeed, *Harris County Flood Control District*, other Texas state court cases[16], as well as Judge Lettow's decision in the Upstream litigation, support the opposite conclusion.

Finally, the Trial Court cites to a pastiche of Texas state court decisions, addressing various legal concepts (causation, Act of God, police power and the alleged prior right of Defendant to flood Plaintiffs' properties), as providing indirect

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[16] The most factually analogous being *San Jacinto River Authority v Burney*, 570 S.W.3d 820 (Tex. App. - Houston [1st Dist.] 2018), *review granted* (6/5/20).

support for its conclusion. As discussed below, the Trial Court's analysis of these elements is inaccurate and/or incomplete.

More important, its reliance on these decisions is misplaced. In none of these cases did the court address whether a property interest existed that could be taken. Rather, they analyzed the next step of the takings inquiry -- whether a taking occurred. That step (which the Trial Court never got to) is also governed by federal, not Texas, law. In short, none of these Texas cases are relevant to the "cognizable property interest issue" before this Court. Consequently, the Trial Court reversibly erred.

V. ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED BY HOLDING PLAINTIFFS DID NOT POSSESS A COGNIZABLE PROPERTY INTEREST THAT COULD BE TAKEN BY DEFENDANT

A. Standard Of Review

The Trial Court granted both Defendant's Motion to Dismiss, as well as its Cross-Motion for Summary Judgment. As the Trial Court relied on matters outside of the pleadings in reaching its decision, the standard of appellate review applicable to summary judgment motions applies. *Colvin Cattle Company v United States*, 468 F.3d 803, 806 (Fed. Cir. 2006).

This Court reviews the grant of summary judgment *de novo*, utilizing the same standards applied by the Trial Court. *Ladd v United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010); *American Pelagic Fishing Company,* 379 F.3d at 1371. Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v Catrett*, 477 U.S. 317, 322 (1986). A fact is material if it might affect the outcome of the suit under governing law, and an issue is genuine if it may reasonably be resolved in favor of either party. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986).

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Ind. Co. v Zenith*

Radio Corp., 475 U.S. 574, 587 (1986). However, the court must not weigh the evidence or make findings of fact. *Anderson*, 477 U.S. at 249.

Due to the often factually intensive nature of the claims asserted against the government, in a takings case courts should avoid precipitous grants of summary judgment. *Yuba Goldfields, Inc. v United States*, 723 F.2d 884, 887 (Fed. Cir. 1983).

B. The Two-Step Takings Test

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The purpose of the Takings Clause is to prevent the 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. *Murr v Wisconsin*, __ U.S. __, 137 S.Ct. 1933, 1943 (2017); *Arkansas Game and Fish Commission v United States*, 568 U.S. 23, 31 (2012).

There is a two-step test for evaluating whether governmental action constitutes a taking. A court should not go to the second step unless it finds the first step has been satisfied. *Acceptance Insurance*, 583 F.3d at 854; *Air Pegasus*, 424 F.3d at 1212-1213; *American Pelagic Fishing Company*, 379 F.3d at 1372.

First, the plaintiff must establish that she/he holds a property interest for the purposes of the Fifth Amendment. As the U.S. Constitution does not create or define property rights or interests, "existing rules and understandings and background

principles derived from an independent source, such as state, federal, or common law" control as to whether a property interest exists that could be taken. *Acceptance Insurance*, 583 F.3d at 857; *Air Pegasus*, 424 F.3d at 1213.

Second, the plaintiff must establish the government action at issue amounted to compensable taking of that property interest. *Acceptance Insurance*, 583 F.3d at 854; *American Pelagic Fishing Company,* 379 F.3d at 1372. Unlike the first step of the test, this second step is exclusively governed by federal law. Otherwise, the federal test (based on decisions from this Court and the United States Supreme Court) would effectively be supplanted by state law.

In flooding cases, at a minimum 5 factors should be considered in determining whether the second step has been satisfied:

> . . .[The factors are] (1) time - duration of the physical invasion; (2) causation; (3) intent or foreseeability, that is, "the degree to which the invasion is intended or is the foreseeable result of authorized government action;" (4) "the owner's reasonable investment-backed expectations regarding the land's use," including "the character of the land;" and (5) the "[s]everity of the interference."

In re Upstream Claims I, 138 Fed. Cl. at 665. *See also Arkansas Game and Fish*, 568 U.S. at 38-39; *Orr v United States*, 145 Fed. Cl. 140, 149 (2019).

Based on the Trial Court's ruling, only the first step of the test is at issue here. Nevertheless, it should not be overlooked that a physical taking (what occurred here) is the "paradigmatic taking," and occurs by a "direct government appropriation or [a] physical invasion of private property." *Lingle v Chevron USA, Inc.*, 544 U.S.

528, 537 (2005). *See also Palazzolo v Rhode Island*, 533 U.S. 606, 617 (2001)('[t]he clearest sort of taking occurs when the government encroaches upon or occupies private land"); *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 433 (1982)("[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government. . .[it is an] intrusion of an unusually serious character").

Indeed, with regard to flooding due to governmental action, it can most certainly constitute a taking. A physical taking occurs where real estate is actually invaded by super induced additions of water. *Arkansas Game and Fish*, 568 U.S. at 518; *Loretto*, 458 U.S. at 427; *Pumpelly v Green Bay Company*, 80 U.S. 166, 181 (1871); *State of Mississippi v United States*, 146 Fed. Cl. 693,701 (2020). After all, the government cannot, in effect, impose a flowage easement upon a private landowner without paying just compensation. *Ridge Line, Inc. v United States*, 346 F.3d 1346, 1353 (Fed. Cir. 2003); *Quebedeaux v United States*, 112 Fed. Cl. 317, 321 (2013).

C. Under Texas Law, Plaintiffs -- Fee Simple Owners Of Property -- Possessed Cognizable Property Interests That Could Be Taken

The Trial Court stated it based its decision on Texas law. However, its decision is bereft of any discussion of Texas law that actually addresses the nature of property rights, and whether these rights can be taken. When this law is examined,

there is no question that Plaintiffs' undisputed fee simple ownership of their property is -- in and of itself -- a cognizable property interest that can be taken.

To start, Texas law defines property broadly, encompassing "any matter or thing capable of private ownership," including real property (land, improvements, etc.) and personal property. Tex. Tax Code §1.04(1) and (4). In the context of takings law, "property" means not only the real estate, but every right which accompanies its ownership. *DuPuy v City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965); *Spann v City of Dallas*, 235 S.W. 513, 514 (Tex. 1921); *State v Moore Outdoor Properties, L.P.*, 416 S.W.3d 237, 242 (Tex. App. - El Paso 2013).

Under Texas law, there is a full panoply of fundamental property rights that accompany the ownership of property. These include the right to possess, use, or transfer the property, as well as the right to exclude others. A property owner's right to exclude others is recognized as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Severance v Patterson*, 370 S.W.3d 705, 709 (Tex. 2012); *Marcus Cable Associates v Krohn*, 90 S.W.3d 697, 700 (Tex. 2002); *In re Sun Coast Resources, Inc.*, 562 S.W.3d 138, 157 (Tex. App. - Houston [14th Dist.] 2018).

A right to exclude is most certainly taken when, as here, the government floods private property (here owned in fee simple by Plaintiffs). At the very least,

this is a cognizable right that can be taken, which is all that is required to satisfy the first step of this Court's takings test.

Furthermore, Texas elevates private property rights to the highest degree. These rights are fundamental, natural, inherent, inalienable, not derived from the legislature, and pre-existing even constitutions. *Kopplow Development, Inc. v City of San Antonio*, 399 S.W.3d 532, 535 (Tex. 2013)(noting "one of the most important purposes of our government is to protect private property rights"); *Severance*, 370 S.W.3d at 709; *Eggemeyer v Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977); *In re Sun Coast Resources, Inc.*, 562 S.W.3d at 157 n. 7.

This high regard for property rights must underlie any analysis of the scope of the property interests at issue in a takings case. *See Redburn v City of Victoria*, 898 F.3d 486, 495 (5th Cir. 2018)(applying Texas law). *See also Park v City of San Antonio*, 230 S.W.3d 860, 868 (Tex. App. - El Paso 2007)(physical -- as opposed to regulatory -- takings are relatively rare, easily identified, and usually represent a greater affront to individual property rights). The Trial Court incorrectly took the opposite approach. It minimized the import of fee simple property interests to the degree that it effectively read those rights out of existence. This is absolutely inconsistent with this foundational Texas law.

Finally, and most important, Texas courts have unequivocally found that fee simple property interests can be taken:

> [I]n the constitutional provision as to compensation for property taken for public use, the term "property" includes the fee-simple title to the thing owned. . .and the term "taken" includes the appropriation of such fee-simple title or of some interest or estate in such fee-simple title, by actual, physical possession.

City of Houston v Wynne, 279 S.W. 916, 920 (Tex. App. - Galveston 1925)(underscoring added). *See also McCammon & Lang Lumber Co. v Trinity*, 133 S.W. 247, 249 (Tex. 1911).[17] Judge Lettow correctly reached the same conclusion in the Upstream litigation, holding the fee simple ownership of private properties, not subject to a flowage easement, is sufficient to satisfy the first step of the takings test. *In re Upstream Claims II*, 146 Fed. Cl. at 248-249.

Once again, it is uncommon for a court to find the absence of a property interest in a takings case. Indeed, cases finding no property interests are limited to extreme situations -- alleged property interests far less than a fee simple ownership interest in real and personal property. *See Mildenberger v United States*, 643 F.3d 938 (Fed. Cir. 2011)(a property owner has no protected interest in viewing wildlife in waters adjacent to the property, nor a right to view aesthetically pleasing water); *Acceptance Insurance*, 583 F.3d at 857 (an insurance company has no protected interest in freely selling its portfolio of crop insurance policies to another insurer);

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[17] Far lesser property interests can also be taken. These include a reversionary interest in property, *El Dorado Land Company, L.P. v City of McKinney*, 395 S.W.3d 798, 804 (Tex. 2013), as well as a leasehold interest. *Texas Pig Stands v Krueger*, 441 S.W.2d 940, 944 (Tex. App. - San Antonio 1969).

Air Pegasus, 424 F.3d at 1218 (a heliport operator has no protected interest in access to navigable airspace from its heliport). The instant case is simply not such an extreme situation.

While the Trial Court surprisingly did not discuss any of the foregoing bedrock principles of Texas law, it did cite *United States v Willow River Power Company*, 324 U.S. 499, 502 (1945) in support of its "no property interest" decision. The question in that case was not whether property was flooded or otherwise invaded by government action. Rather, the question was whether a power company should be compensated (for a taking) due to the impaired efficiency of its hydroelectric plant resulting from the United States raising the water level of a river. The court answered "no," as "not all economic interests are property rights."

The Subrogated Insurers do not dispute that proposition. But it has no relevance here. Plaintiffs are not alleging a taking of some indirect economic benefit arising out of their ownership of property. Rather, they are alleging a temporary (but absolute) taking of their properties by virtue of Defendant flooding them. Whether Defendant's actions constitute a "taking" of Plaintiffs' property is an issue yet to be resolved. However, as a matter of Texas law, there is absolutely no doubt that Plaintiffs possessed fee simple ownership rights (and corresponding interests) in their property that could be taken.

D. The Trial Court's Contrary Conclusion (Plaintiffs Possessed No "Protected Property Interest In Perfect Flood Control Against Waters Resulting From An Act Of God") Has No Support Under The Law

Based on controlling Texas law the Trial Court did not discuss, it reversibly erred by holding Plaintiffs' fee simple property rights were not capable of being taken. The Subrogated Insurers will now address the law the Trial Court did discuss, further establishing there is no basis for its decision.

1. There is no authority directly supporting the Trial Court's conclusion

a. The cases cited by the Trial Court do not support its conclusion

In its Opinion and Order, the Trial Court cites two Texas state court decisions which it assets provide direct support for its conclusion regarding the absence of a cognizable property interest here. A closer examination of these decisions reveals the Trial Court's reliance on them is misplaced.

The first case is *Harris County Flood Control District v Kerr*, 499 S.W.3d 793 (Tex. 2016). The plaintiffs' homes (located in the upper White Oak Bayou watershed) suffered flood damage during two different tropical storms, and again during an unnamed storm. They sued Harris County and the Harris County Flood Control District, alleging a taking. The plaintiffs alleged the flooding was caused by defendants' approval of "unmitigated upstream development" along the watershed, plus a failure to implement a flood control plan to address the increased potential for flooding caused by that development. 499 S.W.3d at 796-797.

The Texas Supreme Court's holding was far more limited than portrayed by the Trial Court. The plaintiffs' taking claim was rejected because a) there was no affirmative conduct by the defendants leading to the plaintiffs' loss, and b) the requisite level of intent (government knowledge that its actions will necessarily cause damage to certain private property) was missing:

> . . .[T]he law does not recognize takings liability for a failure to complete [the flood plan]. . .despite the homeowners' attempt to somehow bundle that inaction with the affirmative conduct of approving development. . .[Furthermore, the] government must know that "a *specific* act is causing *identifiable* harm" or know that "*specific property damage* is substantially certain to result from an authorized government action." We have not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction. . .

499 S.W.3d at 800 (italics in original, citations omitted).[18]

The *Harris County Flood Control District* court never went beyond this. It engaged in no discussion whatsoever as to what is or is not a cognizable "property interest" for the purpose of a takings claim. Indeed, the only time the court mentioned the nature of property rights was to emphasize their critical importance, and how one of the key functions of government is to protect such rights:

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[18] As discussed above, neither of that court's concerns are present here. There was affirmative action by Defendant (opening the Reservoirs' gates), along with the requisite level of intent (Defendant knew full well that by opening the gates it would be flooding Downstream properties).

> This Court has repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to freedom itself. Locke deemed the preservation of property rights "[t]he great and chief end" of government, a view we echoed almost 300 years later, calling it "one of the most important purposes of government." Individual property rights are "a foundational liberty, not a contingent privilege." They are, we reaffirm today, "fundamental, natural, inherent, inalienable. . ."

499 S.W.3d at 804 (citations omitted). The Trial Court's definition of a property right in Texas, one that effectively immunizes a governmental agency from takings liability arising out of flood control activities, is certainly inconsistent with this clear statement by the Texas Supreme Court.

Furthermore, not only does *Harris County Flood Control District* fail to support the Trial Court's decision, it actually rejects any "perfect flood control" limitation on property rights:

> This is not a case where the government made a conscious decision to subject particular properties to inundation so that other properties would be spared, as happens when a government builds a flood-control dam knowing that certain properties will be flooded by the resulting reservoir. In such cases, of course the government must compensate owners who lose their land to the reservoir.

499 S.W.3d at 807 (underscoring added). Judge Lettow correctly noted this in his Upstream litigation holdings, finding the government's right to mitigate floodwaters does not excuse the conscious diversion of water by the government onto private properties. *In re Upstream Claims I*, 138 Fed. Cl. at 667; *In re Upstream Claims II*, 146 Fed. Cl. at 249.

The other case cited by the Trial Court is *Sabine River Authority of Texas v Hughes*, 92 S.W.3d 640 (Tex. App. - Beaumont 2002). There, landowners asserted a taking claim, alleging the River Authority flooded their property when it released water from a reservoir during a period of heavy rains. The trial court found for the landowners, but the appellate court reversed.

The appellate court exclusively focused on causation, part of the "taking" element of an inverse condemnation claim. 92 S.W.3d at 642. The court found causation lacking, as 1) the flow of water into the reservoir was greater than the outflow when the gates were opened, and 2) released water from the reservoir mixed with water from other rivers, sources, etc. before it flooded the landowners' land. 92 S.W.3d at 642. As discussed below, questions of causation can not and should not be mixed with question as to whether a property interests exists.

In any event, *Sabine River Authority of Texas* never discussed whether the plaintiff landowners had a property interest that could be taken. It clearly presumed that, as fee simple owners of property, they did. Nor did it come even close to discussing whether there was a property interest in perfect flood control. Simply put, that case has no relevance to the property interest issues before this Court.

b. Other Texas flooding cases support the opposite conclusion

The Subrogated Insurers have already discussed core principles of Texas law, overlooked by the Trial Court, which establish Plaintiffs' fee simple ownership of

their properties represent property interests that can indeed be taken. In addition, they have established the two primary cases cited by the Trial Court fail to support its "no property interest" conclusion. Beyond this, there are several Texas flooding cases, also overlooked by the Trial Court, that are contrary to its conclusion.

For example, in *Taylor v Tarrant County Water Control & Improvement District No. 1*, 86 S.W.2d 511 (Tex. App. - Ft. Worth 1935), the defendant constructed a dam across the Trinity River, impounding water in a reservoir. This was done to control, store, preserve and distribute waters in the River. 86 S.W.2d at 512. The plaintiffs alleged a taking when the defendant opened the gates for the dam, causing the river below the dam to overflow and flood their properties.

The court unequivocally held "if by the alleged flooding their lands were taken, damaged, or destroyed for or applied to public use, then defendant would be liable" for a taking. 86 S.W.2d at 512.[19] Such a holding is inconsistent with the Trial Court's "no property interest in perfect flood control" approach.

Additionally, there is *City of El Paso v Mazie's, LP.*, 408 S.W.3d 13 (Tex. App. - El Paso 2012). The City owned and operated a diversion dam, which diverted water from larger natural arroyos into a drainage system (protecting various

[19] However, because the flooding was temporary, and not a necessary incident to the operation of defendant's water system, the court found no taking had occurred. *Id.* That is not the case here -- as discussed below a temporary taking is compensable under federal law, and release of water which flooded Plaintiffs' properties was unquestionably connected to the operation of the Addicks & Barker Reservoirs.

residential neighborhoods in the area). During a large storm, part of the drainage system failed, resulting in the flooding of various residential and commercial properties. Several damaged parties filed takings claims against the City.

The appellate court concluded the plaintiffs asserted valid takings claims. It began by noting a person's property may be taken if an injury results from either the construction of public works, or their subsequent maintenance and operation. 408 S.W.3d at 19.[20] It then went on to explain:

> Here, Appellees have alleged that the City's construction, maintenance, and operation of the diversion dam and drainage system caused the flood which damaged their property. They also allege that increased diversion of new water from new development in the area created a situation where a large storm event would overwhelm the capacity of the man-made drainage system to transport floodwaters away from all residential and commercial property. We conclude Appellee's pleadings state a valid takings claim. . .

City of El Paso, 408 S.W.3d at 22. *See also City of Borger v Garcia*, 290 S.W.3d 325, 331 (Tex. App. - Amarillo 2009)(if "the City intentionally diverted flood waters to appellees' property to prevent flooding of other neighborhood property owners

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[20] Several prior Texas state court decisions reached a similar conclusion. *See City of Temple v Mitchell*, 180 S.W.2d 959, 962 (Tex. App. - Austin 1944)("it is now firmly established in this State that where land is injured by the establishment and maintenance of public works" compensation is required); *Hidalgo County Water Improvement District No. 2 v Holderbaum*, 11 S.W.2d 506, 507 (Tex. App. 1928)(a taking includes injury to property caused by the establishment, maintenance and operation of public works).

appellees would [have]. . .a claim for a taking"). These cases clearly do not recognize any sort of "perfect flood control" limitation on fee simple property rights.

Finally, there is the most factually analogous Texas case to this one -- *San Jacinto River Authority v Burney*, 570 S.W.3d 820 (Tex. App. - Houston [1st Dist.] 2018), *review granted* (6/5/20).[21] In 1973, the River Authority constructed a dam across the San Jacinto River, resulting in the formation of a reservoir named Lake Conroe. In late August of 2017, during Hurricane Harvey, the River Authority released rising water from Lake Conroe in the San Jacinto River, causing or exacerbating the downstream flooding of the plaintiffs' homes.

The court held the plaintiffs had alleged a viable taking claim, as they had alleged sufficient facts that the River Authority's release of water was either intended (or known to be substantially certain) to result in the flooding (or exacerbated flooding) of the plaintiffs' downstream properties. 570 S.W.3d at 835. The court explained further:

> . . .[T]he homeowners alleged that in the face of Hurricane Harvey and other circumstances, the River Authority faced a choice. The River Authority could do nothing as the water level rose and accept all the associated risks. Or it could release floodwaters that it knew would cause "devastating flooding downstream" with "catastrophic consequences." The River Authority "chose the latter option and. . . sacrificed the homeowners' property for the greater public good.

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[21] The Trial Court made no mention of this decision in its Opinion and Order.

> . . .[The homeowners claim] intentional flooding of their properties to avoid flood damage to the dam, the lake's infrastructure, and properties on the lake and upstream. . .[T]he River Authority admits. . .that it "released water from the dam on Lake Conroe in order to prevent a failure of the dam due to substantial inflow resulting from Hurricane Harvey.". . .We conclude that the homeowners have sufficiently pleaded the public use element of their constitutional takings claims. The same allegations also sufficiently support the homeowners' constitutional takings claims for an "inundation, flood, flowage or drainage easement over their property," or for a partial taking.

570 S.W.3d at 837-838 (underscoring in original).[22]

In *San Jacinto River Authority*, the court found takings claims could be based on the discharge of water from a government dam/reservoir during an Act of God (Hurricane Harvey), flooding the plaintiffs' properties. Needless to say, if the Trial Court's approach truly represented Texas law, there would have been an entirely different holding in that case. The *San Jacinto River Authority* court would have held that, despite their fee simple property interests, the plaintiffs have no cognizable property interest in perfect flood control in the face of an Act of God, and that would have been the end of it. It reached the opposite conclusion (the one advocated by Plaintiffs in the Downstream litigation). This is compelling proof that the Trial Court's holding is contrary to Texas law, and should be reversed.

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[22] Faced with similar arguments in a related matter, the same court reached the same conclusion 6 months later in *San Jacinto River Authority v Bolt*, No. 01-18-00823-CV (Tex. App. - Houston [1st Dist.] 6/13/19)(2019 W.L. 2458987).

2. There is no authority indirectly supporting the Trial Court's conclusion

The Subrogated Insurers have established that Plaintiffs, as fee simple owners of their properties, possessed cognizable property interests that could be taken. They have also established there is no Texas authority directly supporting the Trial Court's contrary conclusion (if anything, there is on-point authority rejecting its approach).

What remains are various Texas (and some federal) court decisions the Trial Court (in essence) believes indirectly support its "no property interest" conclusion. They pertain to four different legal concepts: 1) causation, 2) Act of God, 3) police power, and 4) pre-existing limitations on property.[23] Each is addressed below.

However, all four concepts share a common characteristic. None are relevant as to whether a property interest exists that can be taken (the first step of the two-step takings test). Rather, they all are relevant as to whether a taking has occurred (the second step of the takings test -- which the Trial Court never addressed). Consequently, by definition none of these concepts (or the cases cited by the Trial Court) provide any support (indirect or otherwise) for the erroneous conclusion that Plaintiffs did not possess cognizable property interests that could be taken.[24]

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[23] For ease of discussion, these are addressed in a different order than laid out in the Trial Court's decision.

[24] Furthermore, any Texas decisions cannot be considered in the context of whether a taking has occurred. That is exclusively a question of federal law.

a. Causation

i. Causation is irrelevant as to whether there is a property interest that can be taken

The Trial Court observed that, under Texas law, to satisfy the causation element of a flood taking claim, the water released from the dam or reservoir must exceed the water entering the reservoir via rainfall. *Sabine River Authority*, 92 S.W.3d at 642. Whether or not this is an accurate statement of Texas causation law, it does not matter here.

Causation is a prime example of the Trial Court improperly applying state law principles that might be relevant to the second part of the takings test (whether a taking has occurred), and applying them to the first part (is there a property interest that could be taken). Causation is unquestionably one of the *Arkansas Game and Fish* factors to be examined in determining whether a taking occurred. *See In re Upstream Claims II*, 146 Fed. Cl. at 257. It has absolutely no relevance to whether a cognizable property interest exists. Most certainly, none of the Texas cases cited by the Trial Court purport to apply causation principles to the determination of whether a property interests exists.[25]

[25] Indeed, these Texas cases recognize causation is only relevant to whether a taking has occurred. For example, *see Sabine River Authority*, 92 S.W.3d at 642 (the River Authority's causation evidence is sufficient "to negate the 'taking' element in appellees' inverse condemnation claim").

Not only is causation irrelevant regarding the property interest question, so are any Texas decisions regarding causation. To date, there has been no causation determination made in the Downstream litigation (the Trial Court never got to the second step of the takings test). If the Trial Court's decision is reversed, and this matter is remanded, presumably at some point causation will be addressed. If it is, federal, not Texas, causation principles must be applied. Under federal law, causation "focuses on comparing the plaintiff's property interest in the presence of the challenged government action and the property interest the plaintiff would have had in its absence." *Caquelin v United States*, 959 F.3d 1360, 1371 (Fed. Cir. 2020)(underscoring added). In other words, what would have occurred if the government had not acted? *State of Mississippi*, 146 Fed. Cl. at 701.

In this case, causation will be analyzed in the context of whether Plaintiffs' properties would have flooded had Defendant not opened the Reservoirs' gates (federal standard), and not based on a comparison of water flow rates in and out of the Reservoirs (Texas standard). As discussed above, the evidence is quite clear that, had the gates remained closed, Plaintiffs' properties would not have flooded. Of course, like all the factors to be considered in deciding whether a taking has occurred, causation is not something to be resolved in this appeal. Nevertheless, one thing is quite clear -- as to the property interest issue causation is irrelevant, and provides no support for the Trial Court's decision.

ii. The federal cases cited by the Trial Court do not support its conclusion

In its discussion of whether federal law creates a cognizable property interest (once again, not addressed in this Brief), the Trial Court strays into another irrelevant causation discussion (at least as far as this appeal is concerned). It states:

> . . .[T]he government cannot be held liable. . .for property damages caused by events outside of the government's control. . .the Corps cannot be held liable when an Act of God inundates a plaintiff's real property with flood waters that the government could not have conceivably controlled.

[Appx17-18: Opinion]. Citing a number of federal court decisions, the Trial Court states that because Defendant cannot be responsible for events outside of its control, Defendant can have no liability for indirect or consequential damage to Plaintiffs' private property.

Needless to say, the factual premise underlying the Trial Court's conclusion is incorrect. As discussed in detail above, as far as Plaintiffs' (and the other Downstream) properties were concerned, Defendant had the water from Hurricane Harvey under control. The Addicks and Barker gates were closed, and no flooding occurred until Defendant opened those gates.

Furthermore, none of the federal cases cited by the Trial Court support its decision. Some represent outdated law, others are factually distinguishable and (most important) none address the only question before this Court -- whether Plaintiffs possessed a property interest that could be taken.

For example, in *Sanguinetti v United States*, 264 U.S. 264 (1924), the plaintiff contended her land was taken by virtue of flooding arising out of a flood control canal constructed by the United States. The Supreme Court understandably held there was no taking, as 1) the evidence suggested the plaintiff's land would have been flooded even if the canal had not been constructed, 2) the United States had no intent or expectation that the canal might cause a flood to the plaintiff's property, and 3) the flooding was temporary. 264 U.S. at 264-265.

The facts are very different here. As discussed above, Plaintiffs' properties would not have been flooded had Defendant not opened the Reservoirs' gates, and Defendant most certainly knew it would flood Plaintiffs' properties when it opened those gates.

Furthermore, as to *Sanguinetti*'s holding that a temporary taking is not a compensable, the Supreme Court rejected it almost 90 years later in *Arkansas Game and Fish*:

> Because government-induced 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

568 U.S. at 34. Therefore, that part of *Sanguinetti* is no longer good law.

Another case cited by the Trial Court is *United States v Sponenbarger*, 308 U.S. 256 (1939). There, the plaintiff's land (as well as numerous other nearby properties) experienced recurrent flooding from the Mississippi River. To remedy (or at least reduce) this problem, the United States planned to construct flood control project where floodwaters from the Mississippi River could escape only at certain predetermined points. One of those points was near the plaintiff's land. The plaintiff contended this would result in taking of her property. The Supreme Court disagreed:

> Therefore, to hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods. . .[We reject the plaintiff's contention] that her property has been taken because of the bare possibility that some future major flood might cause more water to run over her land at a greater velocity than the 1927 flood which submerged it to a depth of fifteen or twenty feet and swept it clear of buildings.

308 U.S. at 265-266.

Plaintiffs' case is obviously very different. To start, there had never been prior flooding at Plaintiffs' property. Moreover, there would have been no flooding this time either had Defendant not decided to open the gates at the Reservoirs. Finally, there was nothing conjectural about the massive flooding and destruction that actually occurred when Defendant decided to sacrifice Plaintiffs' properties for the "greater good."

Finally, the most recent of the federal cases cited by the Trial Court is *Teegarden v United States*, 42 Fed. Cl. 252 (1998). There, the court found no taking

where, in response to a wildfire, the government directed its firefighting resources to higher priority areas than the plaintiffs' properties. This obviously is quite distinguishable from the instant case. *Teegarden* was a truly uncontrolled natural event situation. Here, with the Reservoir gates closed, the water from Hurricane Harvey was controlled vis-à-vis the Downstream properties (until Defendant chose to destroy them to preserve its Reservoirs and minimize upstream damage). Had the government in *Teegarden* successfully protected plaintiffs properties, but then decided to direct the wildfire on to their properties to "burn the fire out" (thereby preserving other properties), the result would have been quite different.[26]

iii. Defendant's anticipated reliance on *St. Bernard Parish* is misplaced

Because the Trial Court found Plaintiffs had no cognizable property interest that could be taken, it never addressed the second step of the takings test (whether a taking occurred). As such, it never discussed whether, under controlling federal law, Plaintiffs could or did establish causation. It certainly did not discuss, or even cite to, any federal causation decisions, including this Court's decision in *St. Bernard Parish Government v United States*, 887 F.3d 1354 (Fed. Cir. 2018).

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[26] This is especially true since the *Teegarden* court also noted there was no evidence of intent to destroy the plaintiffs' particular properties. 42 Fed. Cl. at 256-257. Once again, that was not the situation here, as Defendant knew exactly which properties would be flooded when it opened the Reservoirs' gates.

Nevertheless, in its Appellee Brief, Defendant may assert there is an "alternate ground to affirm" the dismissal of all Downstream cases. Relying on *St. Bernard Parish*, Defendant may argue there is no causation as, had the Corps never closed the Reservoir gates in the first place (instead leaving them open for the duration of Hurricane Harvey), Plaintiffs' properties still would have flooded.[27]

This argument fails for several reasons. First, *St. Bernard Parish* is quite distinguishable from, and therefore does not apply to, the instant case. In *St. Bernard Parish*, this Court held causation must be connected to the government's affirmative act in question. The sole affirmative governmental act in that case was the construction and operation of the Mississippi River-Gulf Outlet ("MRGO")

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[27] This is based on modeling by Defendant's expert. For two reasons, this modeling does not reliably support Defendant's assertion the flooding would have been no different.

First, this is based on Mr. Nairn's "Gates Open" model, which is identical to his model of what actually occurred during Hurricane Harvey with one exception. In the "Gates Open" model, the gate openings are at maximum. [Appx2371: Nairn Report]. In other words, the "Gates Open" model shows what would have happened if Defendant closed the gates, and then opened the gates to maximum (rather than incrementally as Defendant actually did). Opening the gates to maximum (and leaving them at that level) would unleash an even a greater torrent of water than what actually was the case. As such, this model does not show what would have happened if the gates had never been closed in the first place, leaving water to run down into the Buffalo Bayou at its natural rate.

Second, there was no practice or procedure for Defendant to operate the Reservoirs with gates completely open. As such, a "Gates Open" model is not a valid or relevant hypothetical.

navigation channel. 887 F.3d at 1357, 1362. The plaintiffs did not claim the government released water from the MRGO on to their property. Rather, they asserted the construction and operation of the MRGO over many years -- through erosion, increased salinity, wetlands loss, and a funnel effect -- increased the risk that a storm surge would flood their properties. 887 F.3d at 1358. That risk came to pass during Hurricane Katrina.

This Court held the plaintiffs had not established the construction and operation of the MRGO caused their injury, because they failed to account for a levee system the government also built to reduce the risk of flooding on their properties. 887 F.3d at 1358. Since the plaintiffs claimed a multi-decade course of government conduct increased their risk of flooding, causation could not be established without taking into account governmental flood-reducing actions over that same extended period of time that may have placed them in a better position than if the government had taken no action at all. 887 F.3d at 1363.

Unlike the plaintiffs in *St. Bernard Parish*, Plaintiffs do not allege that the construction of the Reservoirs and Dams, nor their operations over the many decades since, exacerbated the risk of flooding on their properties. Rather, this case involves the deliberate release of water from a governmental flood control project. Defendant's deliberate release of waters from the reservoirs immediately preceded -- and directly caused -- the massive destruction of Plaintiffs' property. This

outcome was foreseen and certain. As such, to prove causation, Plaintiffs need not address risk-reducing actions Defendant may have taken and show there has been a net increase in the risk their property might flood.

Second, even if that case does apply, there is an exception to the *St. Bernard Parish* rule. Vis-à-vis the downstream properties, there was a risk-reducing action (closing the gates) and a subsequent risk-increasing action (opening the gates). In assessing causation, the benefits from the Corps closing the gates may only be considered if, at that time, it was contemplated the gates would subsequently be opened for Induced Surcharges. 887 F.3d at 1367, n. 14. Otherwise, the only question is what would have happened if the gates had remained closed?

There is certainly an issue of fact as to whether, when Defendant closed the Reservoirs' gates in advance of Hurricane Harvey, it contemplated opening them for Induced Surcharges. To start, in the almost 60 years of the Addicks and Barker Reservoirs' existence, the gates had never been opened that way before. [Appx6: Opinion]. Moreover, the Corps' 2009 Operation Assessment of the Reservoirs anticipated keeping the gates closed, even if it might result in the flooding of Upstream Properties. [Appx1154: 2009 Army Corps of Engineers Draft Operational Assessment of the Addicks and Barker Reservoirs]. Finally, even when the gates were closed in response to Hurricane Harvey (and the torrential rain had begun to

fall), the Corps did not expect to have to open the gates and flood Downstream properties. [Appx6: Opinion].

The Subrogated Insurers acknowledge the Manual, and its Induced Surcharge authorization, provide some support for the argument that the opening of the gates may have been contemplated when they were initially closed. However, given the other evidence discussed above, there is unquestionably a genuine issue of material fact regarding causation that should be resolved after a full trial on the merits. Therefore, Defendant's possible argument does not alter the conclusion that, by granting summary judgment, the Trial Court reversibly erred.

b. Act of God

The next legal concept the Trial Court looked to for indirect support concerns losses caused by Act of God. Indeed, this was central to the Trial Court holding that there is no "protected property interest in perfect flood control in the face of an Act of God."[28]

Whether an Act of God, as opposed to governmental action, causes an alleged taking is of course part of a causation determination. Therefore, for the reasons discussed above regarding causation, Act of God cases have no relevance as to

[28] With all due respect to the Trial Court, discussing "perfect flood control" and an "Act of God" is somewhat redundant. Most (if not all) flooding cases involve, to one degree or another, an Act of God (typically torrential rains, unusually high snow packs followed by snow melt, etc.). The question of course is, but for the government's flood control actions, would the Act of God cause the subject loss?

whether a property interest exists that could be taken (nor do any Act of God cases cited by the Trial Court purport to make a property interest determination).

Moreover, even if Texas Act of God rules (rather than federal law) were applied in determining causation, they in no way preclude a subsequent finding that Defendant took Plaintiffs' property. For example, in *McWilliams v Masterson*, 112 S.W.3d 314 (Tex. App. - Amarillo 2003)(cited by the Trial Court), the court held:

> . ..[A]n event may be considered an act of God when it is occasioned exclusively by the violence of nature. And, for one to be insulated from liability, it must be shown that 1) the loss was due directly and exclusively to an act of nature and without human intervention, and 2) no amount of foresight or care which could have been reasonably required of the defendant could have prevented the injury.

112 S.W.3d at 320 (underscoring added, citations omitted). *See also Luther Transfer & Storage, Inc. v Walton*, 296 S.W.2d 750, 753 (Tex. 1956)(another non-taking case cited by Trial Court)("for a defendant to be relieved of liability for an unprecedented flood, there must be no negligence of the defendant concurring with the act of God to cause the damage resulting").

Plaintiffs are not asking to hold Defendant responsible for floods exclusively caused by an "Act of God." For example, if an offshore earthquake causes a massive tsunami that destroys coastal properties, the government should not be held responsible because it constructed allegedly inadequate seawalls or other protective structures. Nothing constructed could withstand such a force of nature, which would truly be the exclusive cause of any losses.

That is not what happened here. In the face of Hurricane Harvey, Defendant closed the gates of the Addicks and Barker Reservoirs. Had it simply kept those gates closed, Plaintiffs' properties would never have flooded. However, Defendant opened those gates, left them open for a few weeks (although the rains from Harvey had long since stopped) and flooded Plaintiffs' properties. The floods were (at least in large part) a result of a human action, not an Act of God. As correctly observed in the Upstream litigation, Harvey's magnitude does not exculpate Defendant from liability for its actions. *In re Upstream Claims II*, 146 Fed. Cl. at 256.

c. Police power

The third Texas legal concept the Trial Court looked to for indirect support concerns police power. It held Plaintiffs' property interests are subservient to the government's exercise of police power to control and mitigate flooding, and this power effectively negates the existence of any cognizable property interest.

Once again, the Trial Court is trying to force an "is there a taking" square peg into an "is there a cognizable property interest" round hole. Whether or not a governmental entity possesses a police power that is superior to a property interest does not negate the existence of that property interest in the first place. Police power is among the considerations to be weighed in deciding whether there has been a taking (the second step of the taking test). That is governed by federal, not state,

law. Consequently, as with causation and Act of God, police power considerations are irrelevant regarding the existence of a property interest that can be taken.

Furthermore, Texas cases discussing police power do not state that police power trumps property rights. In reality, the opposite is true:

> . . .[The government has] the right under the police power to safeguard the health, comfort, and general welfare [of the public]. . .[This power] is not an arbitrary one; it has its limitations. Thus, it is subject to the limitations imposed by the Constitution upon every power of government, and will not be permitted to invade or impair the fundamental liberties of the citizen. . .[T]he police power is subordinate to the right to acquire and own property, and to deal with it as the owner chooses, so long as the use harms nobody.

Lombardo v City of Dallas, 73 S.W.2d 475, 478-479 (Tex. 1934)(underscoring added)(cited by the Trial Court). As further explained in *Spann*:

> The police power is a grant of authority from the people to their government agents for protection of the health, the safety, the comfort and the welfare of the public. . .[However] it is only a power. It is not a right. . .The fundamental rights of the people are inherent and have not been yielded to government control. They are not the subjects of governmental authority. They are the subjects of individual authority. Constitutional powers can never transcend constitutional rights. . .
>
> The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. . . .It is not a right, therefore, over which the police power is paramount. Like every other fundamental liberty, it is a right to which the police power is subordinate.

235 S.W. at 515 (underscoring added). *See also Brazos River Authority v City of Graham*, 354 S.W.2d 99, 105 (Tex. 1961)(it is "manifestly unjust" to, in the name

of police power, take lands lying above a dam for water storage purposes without paying just compensation).[29]

The question is not whether police power can be exercised -- it unquestionably can. The question is whether a property owner is entitled to compensation when the exercise of that police power effectuates a taking. After all, governmental exercise of police power is precisely what the U.S. Constitution has a takings clause. *Kelo v City of New London*, 545 U.S. 469, 482-483 (2005).

The Subrogated Insurers in no way assert Defendant must be constrained in taking whatever steps it believes are best for the public at large. On occasion, these steps may well include protecting some from floods or damage at the expense of others. However, where the property of others (here Plaintiffs) are sacrificed for the greater good, the United States Constitution requires they be compensated for that sacrifice.

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[29] In the police power context, the Trial Court spends some time discussing *Motl v Boyd*, 286 S.W. 458 (Tex. 1926). This is not even a takings case -- it involved a private dispute over riparian irrigation rights. The court simply concluded riparian rights attach to the normal and ordinary flow of a stream (and not storm waters). 286 S.W. at 471. This case in no way defines (let alone limits) fee simple real or personal property rights in Texas, nor does it give the government the right to intentionally invade property without paying just compensation.

It should also be noted that a little over 35 years later, the Texas Supreme Court noted much of the *Motl* decision is *dicta*, and of no precedential value. *Valmont Plantations v State*, 355 S.W.2d 502, 503 (Tex. 1962).

d. Pre-existing limitations on property

The final place where the Trial Court looked for indirect support for its "no property interest" conclusion is a pair of Texas cases purportedly discussing pre-existing limitations on property. The Trial Court relied on them for the proposition that since Plaintiffs acquired their properties after the Addicks and Barker Reservoirs and Dams were constructed, they possess those properties subject to Defendant's superior right to flood them as necessary (without the need to pay Fifth Amendment compensation).

For several reasons, the Trial Court's reliance on these cases (and a pre-existing property limitation concept) is misplaced. First, to the extent pre-existing limitations actually do exist, they do not negate the existence of a property right that can generally be taken. Rather, pre-existing limitations are to be considered when analyzing whether Plaintiffs had reasonable investment-backed expectations regarding the use of their property. *In re Upstream Claims II*, 146 Fed. Cl. at 248. That is a factor (like causation) to be considered in the second step of the takings test (whether a taking has occurred). It is irrelevant as to the first (is there a property interest capable of being taken).

Second, the two cases cited by the Trial Court are distinguishable, and do not provide support for any sort of broad "pre-existing limitation" doctrine. One is *City of Dallas v Winans*, 262 S.W.2d 256 (Tex. App. - Dallas 1953). In that case, Mr.

Dickey sued his next door neighbor (Mrs. Winans), complaining a concrete abutment she erected in 1952 caused floodwaters to be diverted on to his property. Winans filed a third-party action against the City of Dallas, asserting a culvert under and across Overton Road (on which both Dickey's and Winans' properties are located) changed the natural flow of surface water. This greatly increased the amount of water her property would receive (presumably requiring her constructing the concrete abutment). The culvert was already in existence when Winans purchased her property from a prior owner.

The appellate court held that, since there was no evidence the City of Dallas (including its culvert) changed the natural flow of surface water, Winans' claim against the City of Dallas was baseless. 262 S.W.2d at 258-259. This holding of course has no relevance to the instant case.

This holding disposed of Winans' case against the City of Dallas (no further analysis or discussion was required). However, in what clearly was *dicta*, the court then went further. It is this *dicta* which the Trial Court relied on:

> We believe that a cause of action against the City does not exist under the facts shown here, but if one does exist it is not in favor of appellee. The concrete culvert in question is a public improvement permanent in nature. If its construction injured the land at all, it was a permanent injury which had already occurred when appellee acquired the property, and no right of action accrued to appellee. The claim against the City, if there was any claim, was in favor of the owner of the property at the time the injury occurred - not in favor of a subsequent purchaser.

262 S.W.2d at 259 (citations omitted).

Nowhere in this *Winans dicta* is there any statement (broad or otherwise) that a property owner's rights are circumscribed by pre-existing conditions or limitations. All it says is if property suffers an injury under prior ownership, a subsequent owner cannot sue for the exact same injury. There, the alleged diversion of waters on to Winans' property (the alleged damage) presumably occurred as soon as the culvert was built (when a prior owner owned the property). That is not the case here, as the subject flooding event was the very first time the operation of the Reservoirs took Plaintiffs' property.

The other case is *City of Tyler v Likes*, 962 S.W.2d 489 (Tex. 1997). It does not hold a plaintiff's property rights are negated by the presence of a pre-existing flood control structure, nor does it ever discuss the concept of pre-existing conditions and limitations on property. All the court held was that there could be no recovery for a taking when culverts caused flooding on the plaintiff's property, as the city did not intend that the culverts cause any flooding. 962 S.W.2d at 504-505. Obviously, the instant case is quite different, as, by opening the Reservoirs' gates, Defendant knew it would (and intended to) flood Plaintiffs' property.

Finally, the Trial Court's underlying proposition -- once the Reservoirs and Dams are constructed, all future owners of property are subject (as far as takings liability is concerned) to Defendant's will regarding water releases -- is untenable. It provides Defendant with carte blanche to flood those properties without facing

any exposure, while at the same time diminishing Plaintiffs' important Fifth Amendment rights.

This likely explains why the United States Supreme Court has rejected this proposition:

> Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 627. *See also Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992)("[i]n the case of land, we think the notion. . .that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable us is inconsistent with the historical compact recorded in the Takings Clause"); *In re Upstream Claims I*, 138 Fed. Cl. at 668-669.

VI. CONCLUSION

The U.S. Supreme Court has repeatedly cautioned against governments (or courts for that matter) so narrowly defining or restricting property rights or interests as to render Fifth Amendment protections a nullity:

> . . .[I]f the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification. . ."the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]."

Lucas, 505 U.S. at 1014 (citations omitted). *See also Murr*, 137 S.Ct. at 1944-1945 (there is no "unfettered authority to shape and define property rights. . .[so as to leave] landowners without recourse [for takings]"); *Loretto*, 458 U.S. at 439 ("the government does not have unlimited power to redefine property rights").

With all due respect to the Trial Court, that is what it has done here. It so narrowly defines what property rights can be taken that it has, at least in the context of the governmental operation of flood control projects, eviscerated Plaintiffs' Fifth Amendment rights.

In the end, what this Court is left with is the undeniable fact that Plaintiffs are fee simple owners of their properties, and this is more than sufficient to establish a property interest that can be taken by Defendant. Whether Defendant actually "took" those property interests via its actions is a question for another day.

Nevertheless, on the single issue before this Court -- the existence of a property interest -- there can be no question that the Trial Court reversibly erred.

Accordingly, for the foregoing reasons, the Plaintiff-Appellant Subrogated Insurers respectfully request this Court reverse the United States Court of Federal Claims' February 18, 2020 Opinion and Order in the Downstream Sub-Docket (1:17-cv-09002-LAS), as well as the subsequent dismissal of their case (1:18-cv-00144-LAS) and all other Downstream Addicks/Barker cases, and remand these matters for further proceedings.

Respectfully submitted,

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DATED: March 8, 2021

EXHIBIT A

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-1217

Short Case Caption American Home Assurance v US

Filing Party/Entity All Plaintiffs-Appellants (see Attachment A for full list)

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 11/30/2020

Signature: /s/ Jeffrey R. Learned

Name: Jeffrey R. Learned

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
	Given space limitations	
	in this form, and in	
	the interests of	
	readability, all responses	
	are found in Attachment B	
	Note - No publicly held	
	companies own 10% or	
	more stock in any of the	
	entities.	

☑ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Todd B. Denenberg	Denenberg Tuffley, PLLC 25411 Northwestern Hwy., Suite 600 Southfield, MI 48034	
Paul B. Hines	Denenberg Tuffley, PLLC 25411 Northwestern Hwy., Suite 600 Southfield, MI 48034	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

SEE	ATTACHMENT	C

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

ATTACHMENT A

PLAINTIFFS-APPELLANTS AMERICAN HOME ASSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER B1353DA1600094000; GREAT LAKES INSURANCE SE; LEXINGTON INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B0595N15914; ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, SUBSCRIBING TO POLICY NUMBER UCR 8250556117UP; GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B1263EW0011717AAB; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER B1526PTNAM1700865; TOKIO MARINE AMERICA INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER 3CPO-160089; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER NA-160073, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER AQS-162720, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER HAQS-162720, AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER TR00093911600720; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B1526002788200302; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B0713011836200201; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B0713011864400101; LIBERTY INTERNATIONAL UNDERWRITERS; and INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE.

ATTACHMENT B

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	*Provide the full names of all real parties in interest for the entities. **Do not list the real parties if they are the same as the entities.***	*Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities*
AMERICAN HOME ASSURANCE COMPANY	N/A	American Home is a wholly-owned subsidiary of AIG Property Casualty U.S., Inc., and its ultimate parent corporation is American International Group, Inc.
ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY	N/A	Endurance American is a wholly-owned subsidiary of Endurance American Insurance Company, and its ultimate parent corporation is Sompo Holdings, Inc.
GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA	N/A	General Security is a wholly-owned subsidiary of SCOR U.S. Corporation, which is a wholly-owned subsidiary of SCOR SE.
GREAT LAKES INSURANCE SE	N/A	Great Lakes is a wholly-owned subsidiary of Munich Reinsurance Company.
INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE	N/A	International Insurance is a wholly-owned subsidiary of Hannover Re, and its ultimate parent corporation is HDI Haftpflichtverband der Deutschen Industrie V.a.G.
LEXINGTON INSURANCE COMPANY	N/A	Lexington is a wholly-owned subsidiary of AIG Property Casualty U.S., Inc., and its ultimate parent corporation is American International Group, Inc.

ATTACHMENT B

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	*Provide the full names of all real parties in interest for the entities.* ***Do not list the real parties if they are the same as the entities.***	*Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities*
LIBERTY INTERNATIONAL UNDERWRITERS	N/A	Liberty International is a Division of Liberty Mutual Insurance Company, and its ultimate parent corporation is Liberty Mutual Holding Company, Inc.
TOKIO MARINE AMERICA INSURANCE COMPANY	N/A	Tokio Marine America is a wholly-owned subsidiary of Tokio Marine Holdings, Inc.
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER B1353DA1600094000	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are Lexington Insurance Co., as well as several London-based insurance syndicates -- 2003 XL Catlin, 1414 Ascot, and 1861 ANV.	This group entity has no parent corporation nor stock.
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B0595N15914	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are the following London-based insurance syndicates -- 2003 XL Catlin, 1200 Argo, 1183 Talbot, 3000 Markel, 5000 Travelers, 5151 Endurance, 1886 QBE, 1969 Apollo, 1686 Axis, 1897 Skuld, 1967 W.R. Berkley.	This group entity has no parent corporation nor stock.

ATTACHMENT B

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	*Provide the full names of all real parties in interest for the entities.* ***Do not list the real parties if they are the same as the entities.***	*Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities*
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, SUBSCRIBING TO POLICY NUMBER UCR 8250556117UP	Erroneously included in Amended Notice of Appeal -- counsel will be taking steps to dismiss this party from this appeal.	Erroneously included in Amended Notice of Appeal -- counsel will be taking steps to dismiss this party from this appeal.
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B1263EW0011717AAB	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are the following London-based insurance syndicates -- 1200 Argo, 2987 Brit, 1969 Apollo, 1967 Brit, 0435 Faraday, 2003 XL Catlin, 2988 Brit, 5151 Endurance, 1886 QBE, 1686 Axis, 3334 Hamilton.	This group entity has no parent corporation nor stock.
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER B1526PTNAM1700865	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are Allied World Insurance Company, AmRisc, Aspen Insurance UK Ltd., Houston Casualty Company, Hudson Insurance Group, Landmark American Insurance Company, Liberty Mutual Insurance Company, Markel, QBE Insurance Corporation, as well as several London-based insurance syndicates -- 1967 W.R. Berkley, 2003 XL Catlin, 1886 QBE and 4444 Canopius.	This group entity has no parent corporation nor stock.

ATTACHMENT B

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	*Provide the full names of all real parties in interest for the entities.* ***Do not list the real parties if they are the same as the entities.***	*Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities*
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER 3CPO-160089	This sole insuring London-based insurance syndicate in this "group" is 1200 Argo.	1200 Argo is a wholly-owned subsidiary of Argo International Holdings, which is a wholly-owned subsidiary of Argo Group International Holdings, Ltd.
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER NA-160073	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are the following London-based insurance syndicates -- 2007 Novae, 2121 Argenta, 318 MSP/Cincinnati, 2014 Acappella, 1897 Skuld, 1980 Pioneer.	This group entity has no parent corporation nor stock.
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER AQS-162720	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are the following London-based insurance syndicates -- 0033 Hiscox, 0510 Tokio Marine, 2003 XL Catlin, 4444 Canopius, 2001 MS Amlin, 1200 Argo, 1886 QBE, 2987 Brit, 4000 Pembroke, 1183 Talbot, 5000 Travelers, 5151 Endurance, 2007 Novae, 1221 Navigators, 1458 Renaissance Re, 0780 Advent, 1861 ANV.	This group entity has no parent corporation nor stock.

ATTACHMENT B

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	*Provide the full names of all real parties in interest for the entities. **Do not list the real parties if they are the same as the entities.***	*Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities*
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER HAQS-162720	The sole insuring company in this particular "group" is International Insurance Company of Hannover SE (listed above).	See above listing for International Insurance Company of Hannover SE.
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER TR00093911600720	The sole insuring company in this particular "group" is General Security Indemnity Company of Arizona (listed above).	See above listing for General Security Indemnity Company of Arizona.
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B1526002788200302	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are Allied World Assurance Company, Chubb North America, Hamilton Re, Ironshore Insurance Company, Lexington Insurance Company, Liberty Mutual Insurance Company, Sompo International, Starr Technical Risks Agency, Inc., Tokio Marine America Insurance Co., XL Catlin, and several London-based insurance syndicates -- 4444 Canopius, 3000 Markel, 0318 MSP, 1886 QBE.	This group entity has no parent corporation nor stock.

ATTACHMENT B

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	*Provide the full names of all real parties in interest for the entities.* ***Do not list the real parties if they are the same as the entities.***	*Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities*
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B0713011836200201	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are the following London-based insurance syndicates -- 3000 Markel, 318 MSP/Beaufort, 2987 Brit, 1183 Talbot, 2003 XL Catlin, 1969 Apollo, 0623 Beazley, 0780 Advent, 1414 Ascot.	This group entity has no parent corporation nor stock.
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER UCR B0713011864400101	This entity is a group of companies or syndicates providing property insurance coverage under the specified policy number. Its members are the following London-based insurance syndicates -- 1886 QBE, 3000 Markel, 1200 Argo, 5151 Endurance, 0435 Faraday, 1183 Talbot, 2003 XL Catlin, 1969 Apollo, 0382 Hardy.	This group entity has no parent corporation nor stock.

ATTACHMENT C

Beginning in September of 2017, numerous property owners and/or their subrogated insurers began filing taking complaints in the U.S. Court of Claims. These arose out of the operation of the Addicks and Barker Flood Control Dams/Reservoirs at the time Hurricane Harvey hit the Houston, Texas area.

These cases were joined under a Master Docket (1:17-cv-03000), and were then bifurcated into an Upstream Sub-Docket (1:17-cv-09001) and a Downstream Sub-Docket (1:17-cv-09002). There are close to 190 cases in the Downstream Sub-Docket. These cases are listed in the attached spreadsheet.

Plaintiffs-Appellants' case (1:18-cv-00144), and this subsequent appeal (2021-1217), is one of the Downstream Docket cases. Many other Downstream Plaintiffs have also filed appeals. All of these appeals challenge the same Opinion and Order (of dismissal) issued in the Downstream Sub-Docket, which was binding on all Downstream cases (although a small number of Downstream cases remain pending in the Court of Claims).

Consequently, every case on the attached spreadsheet constitutes a Related Case per Question 5 in the Certificate of Interest form.

Addicks/Barker Downstream Cases

Court of Claims Docket Number	Federal Circuit Docket Number	Case Name
1:17-cv-01189	Unknown	Y AND J PROPERTIES, LTD. v. USA
1:17-cv-01191	Unknown	BANES et al v.USA
1:17-cv-01194	None - not on appeal	SALO et al v. USA
1:17-cv-01195	2021-1197	BOUZERAND et al v. USA
1:17-cv-01206	2021-1223	ALDRED et al v. USA
1:17-cv-01215	2021-1204	SMITH et al v. USA
1:17-cv-01216	2021-1205	STRICKLAND et al v. USA
1:17-cv-01232	2021-1196	GOMEZ et al v. USA
1:17-cv-01235	2021-1131	MILTON et al v. USA
1:17-cv-01300	2021-1201	HOLLIS, JR. v. USA
1:17-cv-01303	2021-1225	ARRIAGA et al v. USA
1:17-cv-01332	2021-1174	MOUSILLI v. USA
1:17-cv-01390	None - not on appeal	DE LA GARZA et al v. USA
1:17-cv-01391	2021-1237	POLLOCK v. USA
1:17-cv-01393	Unknown	KHOURY v. USA
1:17-cv-01394	2021-1238	AGL, LLC et al v. USA
1:17-cv-01395	Unknown	LUDWIGSEN FAMILY LIVING TRUST et al v. USA
1:17-cv-01396	2021-1239	REYES v. USA
1:17-cv-01397	Unknown	VANCE v. USA
1:17-cv-01398	Unknown	ERWIN v. USA
1:17-cv-01399	Unknown	JAFARNIA v. USA
1:17-cv-01408	2021-1195	BRUZOS et al v. USA
1:17-cv-01423	2021-1224	GOVIA v. USA
1:17-cv-01427	2021-1159	HERING et al v. USA
1:17-cv-01428	2021-1151	LEWIS v. USA
1:17-cv-01430	2021-1188	MURRAY et al v. USA
1:17-cv-01433	2021-1241	VENGHAUS v. USA
1:17-cv-01434	Unknown	RUSSO v. USA
1:17-cv-01435	Unknown	NEAL v. USA
1:17-cv-01436	2021-1242	EFFIMOFF v. USA
1:17-cv-01437	Unknown	THAKER v. USA
1:17-cv-01438	Unknown	THAKER v. USA
1:17-cv-01439	Unknown	GILLIS v. USA
1:17-cv-01450	2021-1251	WOLF et al v. USA
1:17-cv-01451	2021-1173	MEMORIAL SMC INVESTMENT 2013 LP v. USA
1:17-cv-01453	2021-1193	CEBALLOS et al v. USA
1:17-cv-01454	2021-1175	DRONE et al v. USA
1:17-cv-01456	None - not on appeal	WILLIAMSON et al v. USA
1:17-cv-01457	2021-1214	MEADOWS ON MEMORIAL OWNERS ASSOCIATION INC. et al v. USA
1:17-cv-01458	Unknown	BE MEMORIAL REALTY LTD v. USA
1:17-cv-01461	Unknown	TITA et al v. USA
1:17-cv-01512	2021-1167	ABBOTT et al v. USA
1:17-cv-01514	2021-1244	CROKER v. USA
1:17-cv-01515	2021-1268	MURCIA v. USA
1:17-cv-01516	Unknown	KOCHARYAN v. USA
1:17-cv-01517	2021-1269	AGREDA v. USA
1:17-cv-01518	Unknown	REED v. USA
1:17-cv-01519	2021-1270	ALFORD v. USA
1:17-cv-01520	Unknown	RAVAT v. USA
1:17-cv-01521	Unknown	NGUYEN v. USA
1:17-cv-01522	2021-1275	CHEN v. USA
1:17-cv-01523	Unknown	PAGNOTTO v. USA
1:17-cv-01524	2021-1271	MORAN v. USA
1:17-cv-01525	Unknown	RAZNAHAN v. USA
1:17-cv-01545	2021-1192	YOUNG et al v. USA
1:17-cv-01555	None - not on appeal	WILLIAMS et al

Addicks/Barker Downstream Cases

Court of Claims Docket Number	Federal Circuit Docket Number	Case Name
1:17-cv-01564	Unknown	ANGELL et al v. USA
1:17-cv-01565	Unknown	CORTE v. USA
1:17-cv-01566	Unknown	MILLER v. USA
1:17-cv-01567	Unknown	UECKERT et al v. USA
1:17-cv-01577	2021-1165	BAE et al v. USA
1:17-cv-01578	2021-1157	SINDELAR et al v. USA
1:17-cv-01588	2021-1208	BARTLETT et al v. USA
1:17-cv-01625	2021-1199	EGGLESTON et al v. USA
1:17-cv-01645	2021-1136	DEMOPULOS v. USA
1:17-cv-01646	2021-1152	GARDNER et al v. USA
1:17-cv-01647	2021-1163	SWIRES et al v. USA
1:17-cv-01653	2021-1220	KEARNEY et al v. USA
1:17-cv-01679	2021-1161	ALCANTARA et al v. USA
1:17-cv-01680	Unknown	KNUTSEN v. USA
1:17-cv-01681	2021-1272	BAKER v. USA
1:17-cv-01682	Unknown	MARCUS v. USA
1:17-cv-01683	Unknown	HARKNESS v. USA
1:17-cv-01684	2021-1273	AYERS v. USA
1:17-cv-01685	2021-1274	BROWN v. USA
1:17-cv-01686	Unknown	SCOTT v. USA
1:17-cv-01687	None - not on appeal	ROBERTS v. USA
1:17-cv-01688	Unknown	WOOLLEY v. USA
1:17-cv-01689	Unknown	ROTAN v. USA
1:17-cv-01748	2021-1276	SIMONTON v. USA
1:17-cv-01814	2021-1190	WILSON v. USA
1:17-cv-01822	2021-1172	AHMAD et al v. USA
1:17-cv-01828	2021-1231	ABEL et al v. USA
1:17-cv-01833	2021-1164	WASSEF et al v. USA
1:17-cv-01834	2021-1155	HUNT et al v. USA
1:17-cv-01882	2012-1207	ABBAS et al v. USA
1:17-cv-01948	Unknown	ALLENSWORTH et al v. USA
1:17-cv-01949	2021-1277	ANDERSON et al v. USA
1:17-cv-01954	2021-1189	MENDOZA et al v. USA
1:17-cv-01972	2021-1222	AZAR et al v. USA
1:17-cv-02003	2021-1215	JASPER et al v. USA
1:17-cv-16522	Unknown	NGUYEN et al v. USA
1:18-cv-00123	None - not on appeal	BRUCE et al. v. USA
1:18-cv-00142	2021-1187	Carter et al v. USA
1:18-cv-00168	2021-1240	DALAL et al. v. USA
1:18-cv-00169	Unknown	SALIGRAM et al. v. USA
1:18-cv-00230	Unknown	DANIEL v USA
1:18-cv-00243	2021-1146	CASTROPAREDES v USA
1:18-cv-00244	2021-1148	PATOUT v USA
1:18-cv-00308	2021-1171	CUETO v USA
1:18-cv-00318	Unknown	ARRIAGA COMPANIES v USA
1:18-cv-00319	2021-1232	CANNON V USA
1:18-cv-00321	2021-1233	HOUK v USA
1:18-cv-00322	Unknown	OBEROI v USA
1:18-cv-00338	2021-1132	BUSH v USA
1:18-cv-00339	2021-1133	CARPENTER v USA
1:18-cv-00341	2021-1234	RAY v USA
1:18-cv-00344	Unknown	CHEN v USA
1:18-cv-00345	None - not on appeal	KICKERILLO v USA
1:18-cv-00346	2021-1145	FLEMING v USA
1:18-cv-00347	2021-1140	KEMICK v USA
1:18-cv-00348	2021-1142	SCOTT v USA
1:18-cv-00349	2021-1143	SILBERMAN v USA

Addicks/Barker Downstream Cases

Court of Claims Docket Number	Federal Circuit Docket Number	Case Name
1:18-cv-00389	2021-1147	CLOONEY v USA
1:18-cv-00463	2021-1206	21ST CENTURY CENTENNIAL INS. V USA
1:18-cv-00518	2021-1138	TEKELL v USA
1:18-cv-00685	2021-1256	JOHN v. USA
1:18-cv-00697	2021-1221	TRAN v USA
1:18-cv-00700	2021-1198	DONALD et al. v. USA
1:18-cv-00707	Unknown	PENA v USA
1:18-cv-00708	Unknown	HORSAK v USA
1:18-cv-00778	2021-1176	MCCLOUD v USA
1:18-cv-00779	2021-1218	D&T NAIL LOUNGE v USA
1:18-cv-00974	Unknown	AHMED v USA
1:18-cv-01068	Unknown	VALLE v USA
1:18-cv-01165	Unknown	ASPARILLA v USA
1:18-cv-01166	Unknown	BADEN v USA
1:18-cv-01167	Unknown	CALVERT v USA
1:18-cv-01168	Unknown	DAVALOS v USA
1:18-cv-01169	Unknown	DAVIS v USA
1:18-cv-01170	Unknown	DOROUGH v USA
1:18-cv-01171	Unknown	DURAN v USA
1:18-cv-01172	Unknown	MARTINEZ v USA
1:18-cv-01173	Unknown	HEARD v USA
1:18-cv-01176	Unknown	JARET v USA
1:18-cv-01178	Unknown	KENNISON v USA
1:18-cv-01179	Unknown	MARIN v USA
1:18-cv-01180	Unknown	OLGUIN v USA
1:18-cv-01181	Unknown	PADILLA v USA
1:18-cv-01183	Unknown	MATO v USA
1:18-cv-01184	Unknown	VALDEZ v USA
1:18-cv-01193	2021-1200	WHEELER v USA
1:18-cv-01263	2021-1250	BLAKE v USA
1:18-cv-01287	Unknown	BERNAL v USA
1:18-cv-01307	Unknown	HARRIS v USA
1:18-cv-01380	2021-1177	LIVE OAK APARTMENTS v USA
1:18-cv-01417	Unknown	CHAWDRY v USA
1:18-cv-01523	2021-1178	YI v USA
1:18-cv-01610	2021-1139	DUNCAN v USA
1:18-cv-01611	2021-1137	MALEY v USA
1:18-cv-01612	2021-1135	PEIRO v USA
1:18-cv-01613	2021-1144	WOODS v USA
1:18-cv-01652	Unknown	CHESS v USA
1:18-cv-01670	2021-1134	BERRY v USA
1:18-cv-01697	None - not on appeal	TRAVELERS EXCESS & SURPLUS LINES v USA
1:18-cv-01714	2021-1279	GRIGSBY v USA
1:18-cv-01856	2021-1184	HANSEN v USA
1:18-cv-01942	2021-1243	DELILLE V USA
1:18-cv-01968	2021-1186	BAMMEL v USA
1:18-cv-02000	None - not on appeal	BEY v USA
1:19-cv-00036	2021-1230	VO v USA
1:19-cv-00127	Unknown	SMITH v USA
1:19-cv-00167	2021-1253	BARLOW v USA
1:19-cv-00423	2021-1162	PHAN v USA
1:19-cv-00465	Unknown	WHILES v USA
1:19-cv-00588	Unknown	LEVINE v USA
1:19-cv-00698	None - not on appeal	ASGHARI v USA
1:19-cv-00782	None - not on appeal	ABED-STEPHEN v USA
1:19-cv-00807	None - not on appeal	ALFORD v USA
1:19-cv-01063	None - not on appeal	DARBY v USA

ADDENDUM A-14

Addicks/Barker Downstream Cases

Court of Claims Docket Number	Federal Circuit Docket Number	Case Name
1:19-cv-01077	Unknown	WRIGHT v USA
1:19-cv-01078	Unknown	KIMMONS v USA
1:19-cv-01082	2021-1254	LEFEVRE v USA
1:19-cv-01180	2021-1255	ROWLAND v USA
1:19-cv-01207	Unknown	AMICA INSURANCE v USA
1:19-cv-01208	2021-1216	PURE UNDERWRITERS v USA
1:19-cv-01215	Unknown	DEVOY v USA
1:19-cv-01266	None - not on appeal	ASHBY v USA
1:19-cv-01278	Unknown	WHITFORD v USA
1:19-cv-01321	Unknown	AHANCHIAN v USA
1:19-cv-01908	2021-1252	CARTMELL v USA
1:19-cv-01924	None - not on appeal	ALLEN v USA
1:20-cv-00115	Unknown	LONGHURST v USA
1:20-cv-00147	Unknown	CROLEY v USA
1:20-cv-00591	None - not on appeal	SHARROCK v USA
1:20-cv-00686	None - not on appeal	RAY v USA
1:20-cv-00696	None - not on appeal	RON v USA
1:20-cv-00701	None - not on appeal	BAKALOVIC v USA
1:20-cv-00704	None - not on appeal	PD LIQUIDATING TRUST v USA

EXHIBIT B

In the United States Court of Federal Claims

No. 17-9002
Filed: February 18, 2020

IN RE DOWNSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS THIS DOCUMENT APPLIES TO: ALL DOWNSTREAM CASES	Fifth Amendment Taking; Motion to Dismiss; RCFC 12(b)(6); Motion for Summary Judgment; Act of God; Perfect Flood Control; Flood Control Act of 1928; 33 U.S.C. § 702c (2018); "Flood Water"; Protected Property Interest; Property Right

Rand P. Nolen, Fleming, Nolen & Jez, L.L.P., *Derek H. Potts*, The Potts Law Firm, LLP, *William S. Consovoy*, Consovoy McCarthy Park, P.L.L.C., *David C. Frederick*, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., *Jack E. McGehee*, McGehee, Change, Barnes, Landgraf, *Richard Warren Mithoff*, Mithoff Law Firm, co-lead counsel for plaintiffs.

Kristine Sears Tardiff and *William James Shapiro*, U.S. Department of Justice, Environment & Natural Resources Division, counsel for defendant.

OPINION AND ORDER

SMITH, *Senior Judge*

This case is brought by residents of Harris County whose homes and properties were flooded by Hurricane Harvey in 2017. These individuals and families suffered both economic loss and the traumatic disruption of their lives, and they seek a remedy from the United States for an alleged taking of their property without just compensation. The Court can only dispense compensation for legal cause when a plaintiff's fundamental property rights have been violated by the United States. In bringing their Fifth Amendment Takings claim, plaintiffs allege that the United States Army Corps of Engineers ("Corps" or "Agency") violated their fundamental property rights. *See* Plaintiffs' Motion for Summary Judgment (hereinafter "Pls.' MSJ") at 1.

Two questions must be asked. First, what property did the government take? Second, how did the government take that property? The answers to these questions go to the heart of the Constitution's taking clause. The waters that actually caused the invasion came from the unprecedented floodwaters from Hurricane Harvey when it stalled over Houston for four days, dumping approximately thirty-five inches of water on Harris County. *See* Plaintiffs' Appendix (hereinafter "Pls.' App.") at A3140; *see also* Defendant's Exhibit (hereinafter "Def.'s Ex.") 12 at 591–92. The federal government erected two dams in the 1940s to mitigate against flood damages in the plaintiffs' area. *See* Pls.' App. at A2214. This storm, which overwhelmed the system's capacity was classified as a once in 2000-year event, Def.'s Ex. 12 at 594–95, which

means the last such event occurred during the life of Jesus! Nevertheless, plaintiffs contend that their property was only inundated when the Corps opened the Addicks and Barker Reservoirs' (the "Reservoirs") gates to prevent additional upstream flooding. Pls.' MSJ") at 1. This leads the Court to the question of whether the government did something wrong? The plaintiffs do not allege that it did, and, even if the plaintiffs had made such an allegation, the Court does not have tort jurisdiction, so it cannot analyze whether the government action was negligent. The answer of what caused the damage is thus inescapable to the Court's eye and mind. The damage was caused by Hurricane Harvey, and such a hurricane is an Act of God, which the government neither caused nor committed.

The remaining question is what were the property rights allegedly taken? Plaintiffs suggest that the government took an easement against their property by storing of water on their lands. Plaintiffs' Opposition to the Government's Motion to Dismiss (hereinafter "Pls.' Resp. to MTD") at 14. Put a different way, plaintiffs allege that the government could have done more to ensure perfect flood control efforts, and because the government did not do more, it failed to stop the flooding of their lands. Of course, the water from the hurricane was not the government's water, unless the storm was also created by the government's wind and air and sun and sky. These were flood waters that no entity could entirely control. The government attempted to mitigate against them, but it could not. Thus, plaintiffs' claims are essentially that they were entitled to perfect flood control, simply because government set up a flood control system to help protect residents in the Houston area. Plaintiffs also claim that the mere presence of the water control structures means that the government owned all waters that passed through them. So, do plaintiffs have the right to be perfectly protected from flooding? The simple answer is no; the right to perfect flood control it is not recognized by either Texas property law or federal law. The purpose of the Constitution's Fifth Amendment protections is to protect legally recognized property rights, but those property rights can only be created by the states or the federal legislative and executive departments. While the Court sympathizes with the plaintiff's loss, the Court's function is to say what the law is, not what the law might become.

This case comes before the Court on defendant's Motion to Dismiss and on the parties' Cross-Motions for Summary Judgment. Plaintiffs allege that the Corps intentionally opened the gates and released massive volumes of water from the Addicks and Barker Reservoirs, causing widespread destruction to the homes and businesses located downstream from the Reservoirs along the Buffalo Bayou. *See* Pls.' MSJ at 1. Plaintiffs seek relief under the Takings Clause of the Fifth Amendment of the United States Constitution and contend that such a release was a temporary categorical physical taking, a temporary non-categorical physical taking, and a permanent non-categorical physical taking. *See Id.* at 23–25. In response, defendant makes the following four arguments: (1) plaintiffs failed to prove a crucial element of causation under the applicable legal standard or in accordance with legal precedent; (2) the alleged infringement was committed pursuant to the government's legitimate use of police powers; (3) the flooding that gives rise to plaintiffs' taking claims resulted from a singular, catastrophic hurricane and, at most, sounds in tort; and (4) under both Texas law and federal law, plaintiffs do not have a cognizable property interest in perfect flood control in the face of a record-setting Act of God such as Hurricane Harvey. *See* United States' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment (hereinafter "Def.'s CMSJ") at 2–3. For the reasons that follow, the Court finds that neither Texas law nor federal law creates a

protected property interest in perfect flood control in the face of an Act of God. As the government cannot take a property interest that plaintiffs do not possess, plaintiffs have failed to state a claim upon which relief can be granted. As such, defendant's Motion to Dismiss is hereby granted, defendant's Cross-Motion for Summary Judgment is granted, and plaintiffs' Motion for Summary Judgment is denied.

I. Background

A. Construction of the Addicks and Barker Dams and Reservoirs

Between 1854 and 1935, the Houston area experienced six major flood events along the Buffalo Bayou. Pls.' at A3131; Def.'s Ex. 3 at 31. In response to the devastating floods in 1929 and 1935, the Texas Legislature established the Harris County Flood Control District ("HCFCD") in 1937, to implement flood damage reduction projects across Harris County. Def.'s Ex. 2 at 11; Def.'s Ex. 5. As a result of those same floods, Congress directed the Corps to study flood protection along the Buffalo Bayou and, through enactment of the Rivers and Harbors Act of June 20, 1938, authorized construction of the Addicks and Barker Dams and their corresponding Reservoirs as part of the Buffalo Bayou and Tributaries Project ("Project"). Def.'s Ex. 3 at 29, 26–28; Pls.' App. at A22. The sole purpose of the Project was to mitigate against flooding downstream of the Reservoirs—detention basins behind the dams "designed to collect excessive amounts of rainfall which would then be released into Buffalo Bayou at a controlled rate." Def.'s Ex. 7 at 209; Def.'s Ex. 8 at 272–74; Pls.' App. at A19; Pls.' App. at A2215.

Construction of the Barker Dam began in February of 1942 and concluded in February of 1945. Pls.' App. at A2214. Construction of the Addicks Dam began in May of 1946 and concluded in December of 1948. *Id.* Their reservoirs "serve in conjunction with approximately 7.4 miles of Buffalo Bayou channel improvements immediately downstream of the dams to provide flood protection along Buffalo Bayou." Pls.' App. at A20; Def. Ex. 4 at 175. The Reservoirs were originally designed to have four uncontrolled, ungated outlet conduits and one controlled outlet conduit. Pls.' App. at A24; Pls.' App. at A2226. By 1963, the Corps gated all five of the outlet conduits on each Reservoir to provide additional protection to downstream developments. Pls.' App. at A19–A20; Pls.' App. at 2226. Both Reservoirs are "dry dams," which means they generally do not hold any water. Pls.' App. at A19; Pls.' App. at A2210.

The Corps maintains and operates the Reservoirs in accordance with the Water Control Manual ("Manual"), which the Corps first implemented in April 1962 and updated in November 2012. Pls.' App. at A1–A158; Pls.' App. at A193–A280. The Corps generally operates the Reservoirs in accordance with the Manual's "Normal Flood Control Regulation," according to which the gates are closed under what the Corps deems "normal conditions," which exist "when 1 inch of rainfall occurs over the watershed below the reservoirs in 24 hours or less, or when flooding is predicted downstream." Pls.' App. at A49. More specifically, normal conditions exist "when the reservoir pools are not in the range of [the] induced surcharge schedule." Pls.' App. at A49. Under normal conditions, the Manual directs the operator of the Reservoirs to "[k]eep the gates closed and under surveillance as long as necessary to prevent flooding below

the dams." *Id.* The Manual also contains instructions for "Induced Surcharge Flood Control Regulation," according to which the Corps will open the gates under the following conditions:

> Induced Surcharge Flood Control Regulation. At any time the reservoir pool equals or exceeds 101 feet [North American Vertical Datum of 1988 ("NAVD 1988")] in Addicks Reservoir and 95.7 feet NAVD 1988 in Barker Reservoir[,] monitoring of pool elevation should immediately ensue to determine if inflow is causing pool elevation to continue to rise. If inflow and pool elevation conditions dictate, reservoir releases will be made in accordance with the induced surcharge regulation schedules shown on plates 7-03 and 7-04. The gates should remain at the maximum opening attained from the induced surcharge regulation schedules until reservoir levels fall to elevation 101 feet NAVD in Addicks and 94.9 NAVD 1988 feet in Barker. Then, if the outflow from both reservoirs when combined with the uncontrolled runoff downstream is greater than channel capacity, adjust the gates until the total discharges do not exceed channel capacity and follow the normal operating procedures.

Pls.' App. at A50. Accordingly, the Induced Surcharge Flood Control Regulation is triggered when the Reservoir pools reach specified elevations, and, once conditions allow for the return to normal flood control operations, the Corps releases floodwaters from the Reservoirs at a lesser rate until the Reservoirs are empty. Pls.' App. at A19–A20; Pls.' App. at A49–A50.

In or around 2007, the Corps formed the Addicks-Barker Multi-Agency Emergency Coordination Team ("ABECT"), which designated points of contact for federal, state, and local agencies and developed lines of communication for storm and flood events involving the Addicks and Barker Dams and Reservoirs. Def.'s Ex. 2 at 12–15. The ABECT routinely conducts emergency exercises and developed Emergency Action Response Charts for each reservoir that define the scope of responsibilities of each agency during flooding or emergency events when the water in the Reservoirs surpasses certain elevation levels. *See* Def.'s Ex. 2 at 12–15, 16–19; Def.'s Ex. 4 at 174; Def.'s Ex. 20 at 982–94.

B. Plaintiffs' Acquisition of their Properties[1]

Between 1976 and 2015, plaintiffs acquired their respective properties. *See* Pls.' App. at A458–A492. The houses and structures on those properties were built between 1962 and 2016, either while under the ownership of plaintiffs or their predecessors. *See generally* Def.'s Ex. 35. All of the test properties are located in Harris County, Texas, along the Buffalo Bayou, and downstream of the Reservoirs. Pls.' App. at A1776. Additionally, all of the properties fall within the Buffalo Bayou watershed. Def.'s Ex. 4 at 76. Three of the properties are located within the 100-year flood zone, eight are located within the 500-year flood zone, and two fall

[1] For the purposes of this sub-section, and this sub-section alone, "properties" refers to the thirteen test properties designated in the Court's Order Regarding Test Property Selection. *See generally* Order Regarding Test Property Selection, No. 17-9002, ECF No 81. Additionally, "plaintiffs" in this sub-section refers exclusively to the individuals and entities that own those test properties. *See generally id.*

outside the 500-year floodplain.[2] *See generally* Pls.' App. at A1036–1147. Nine of the plaintiffs remained free from flooding during the period between the acquisition of their properties and Harvey. *See* Pls.' App. at A599–A625; *see also* Pls.' App. at A1036–1147. Four of the plaintiffs experienced some flooding between the acquisition of their properties and Harvey, but they did not experience flooding to the same degree as what they experienced as a result of Harvey. Pls.' App. at A626–A660.

C. Hurricane Harvey and the Induced Surcharge Release

On August 25, 2017, Hurricane Harvey made landfall along the Texas coast as a Category 4 hurricane. Pls.' App. at A3134. Within twelve hours of making landfall, as Harvey moved towards Harris County, it weakened into a tropical storm but stalled over the Houston area for four days before moving into Louisiana on August 30, 2017. *Id.* Harvey maintained tropical storm intensity the entire time it was stalled inland over southeast Texas. *Id.*; Def.'s Ex. 12 at 589. During the storm, the Reservoir watersheds received an estimated 32-35 inches of rain, and the average rainfall across Harris County was 33.7 inches. Pls.' App. at A3140; Def.'s Ex. 12 at 591–92. After the storm passed and the extent of the devastation was established, the HCFCD analyzed the return frequency of the four-day rainfall totals and determined that Harvey fell within the range of a 2000-year to a greater than 5000-year flood event at all of the relevant storm gage locations. Def.'s Ex. 12 at 594–95.

On August 23, 2017, prior to Hurricane Harvey's landfall, the Governor of Texas issued a disaster proclamation, warning residents that Harvey posed a threat of imminent danger to sixty counties, including Harris County. *See* Def.'s Ex. 16 at 930. That disaster proclamation was extended throughout the months that followed. *Id.* On August 25, 2017, the President of the United States, through the Federal Emergency Management Agency ("FEMA"), issued a federal disaster declaration for those same areas, including Harris County. Def.'s Ex. 17 at 933. In addition to the two disaster proclamations, the Corps activated the ABECT in advance of Harvey, and the group held its first call to discuss the impending storm on August 23, 2017. Def.'s Ex. 20 at 976–79, 980–81. Prior to and during the storm, the ABECT utilized the Corps modeling results and daily Corps Water Management System ("CWMS") Forecasts to monitor existing and forecasted conditions in the Reservoirs. Def.'s Ex. 20 at 980–81; Def.'s Ex. 21 at 990–95.

According to Corps records and the CWMS Forecasts, both Reservoirs were empty, and the flood gates were set to their normal settings prior to Harvey's landfall on August 25, 2017,

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[2] "Five Hundred Year Floodplain (the 500-year floodplain or 0.2 percent change floodplain) means that area, including the base floodplain, which is subject to inundation from a flood having a 0.2 percent chance of being equalled [sic] or exceeded in any given year." 44 C.F.R. § 9.4 (2009). In colloquial terms, this means that properties located within the 500-year floodplain have a 1-in-500 chance of flooding in a given year. 500-year floods are storms with a return frequency of 500 years or more—or storms that occur once about every 500 years. Properties within the 100-year floodplain have a 1-in-100 chance of flooding in a given year and are expected to flood once every 100 years or more. Properties located outside the 500-year floodplain are expected to flood less than once every 500 years.

which allowed the daily reservoir inflows to pass through the gates. Def.'s Ex. 8 at 280–91; Def.'s Ex. 22 at 997, 999. That night, in anticipation of flooding from Harvey, the Corps closed the gates on both the Addicks and Barker dams. Def.'s Ex. 8 at 291; Def.'s Ex. 21; Def.'s Ex. 24 at 1010. On August 26, 2017, the Corps noted that "[w]ith rainfall continuing over the next 5+ days, the reservoirs are expected to exceed record pools." Def.'s Ex. 23 at 1004–05. At that time, however, the Corps did not expect to "make mandatory releases for surcharge operations." *Id.* On August 27, 2017, the CWMS Forecast indicated that conditions had changed, and noted the following:

> The Addicks and Barker watersheds have received 10-18 inches across the watersheds in the last 48 hours. Gates are currently closed. Forecasted rainfall amounts are in flux. The 7-day accumulation assumed for this forecast is approximately 30-inches as received from the River Forecasting Center.
>
> At this time, mandatory releases are expected to be necessary for surcharge operations at Addicks later tonight and at Barker on Wednesday.

Def.'s Ex. 25 at 1018–19; Pls.' App. at A3141. On August 27, 2017, peak inflows into the Addicks Reservoir were approximately 70,000 cubic feet per second ("cfs"), and peak inflows into Barker were approximately 77,000 cfs. Pls.' App. at A3157–A3158. As a result, a Stage 2 Extended Watch alert was triggered, and the Corps began 24/7 monitoring of the Reservoirs in accordance with the Emergency Action Plan for Addicks and Barker Dams. Pls.' App. at A1158. On August 27, 2017, the pool of floodwater behind the Barker Reservoir exceeded the government-owned land, and on August 28, 2017, the pool of water behind the Addicks Reservoir exceeded the government-owned land. Def.'s Ex. 26 at 1028.

At approximately midnight on August 28, 2017, for the first time since the Reservoirs' construction, and in accordance with the Manual's Induced Surcharge Flood Control Regulation, the Corps began releasing water from both Reservoirs. Pls.' Appx at A1158; Def.'s Ex. 27 at 1034–35; Def.'s Ex. 8 at 287. Despite these releases, the reservoir pools behind the dams continued to rise. *See* Def.'s Ex 26; Def.'s Ex 28. On August 30, 2017, even as the Reservoirs were releasing water, both Reservoirs experienced record-level pool elevations, with water in the Addicks Reservoir reaching an elevation of 109.1 feet and Barker Reservoir reaching a pool elevation of 101.6 feet. Pls.' App. at A1158; Pls.' App. at A3157–A3158; Def.'s Ex. 24 at 1014; Def.'s Ex. 29. The CWMS Forecast issued that same day reported that the Addicks and Barker Reservoirs had received between 32-35 inches of rain since the beginning of Harvey; that the Addicks Dam was releasing approximately 7,500 cfs downstream; that the Barker Dam was releasing approximately 6,300 cfs downstream; and that the total combined discharge was approximately 13,800 cfs. *See* Def.'s Ex. 28 at 1041–42.

On August 31, 2017, the CWMS Forecast reported that uncontrolled water was flowing around the north end of the Addicks Dam, but that such uncontrolled flows were only expected to continue until September 2, 2017. Def.'s Ex 29 at 1048–50. As of that announcement date, "[e]levated discharges [were] expected to continue for at least 10+ days, before resuming normal rates of less than 4000 cfs combined total discharge." *Id.* In reality, however, surcharge releases of floodwaters remained necessary until September 16, 2017, at which point normal operations

resumed. Def.'s Ex. 24 at 1016. The Reservoirs did not return to their normal, fully drained state until mid-October 2017. Def.'s Ex. 12 at 604. Despite the Corps' attempt to mitigate against flooding from Harvey's record-setting storm, plaintiffs' properties downstream of the Reservoirs sustained significant flood damage. In an attempt to ameliorate the effects of the damage caused by that record-setting natural disaster, FEMA has obligated over $1.6 billion in approved grants through the individual and households program and over $2 billion in obligated public assistant grants for disaster relief efforts. FED. EMERGENCY MGMT. AGENCY, https://www.fema.gov/disaster/4332 (last visited Jan. 22, 2020).

II. Procedural History

A. *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*

Beginning in September of 2017, property owners in the Houston area began filing complaints with this Court, alleging that the flooding that occurred during or immediately following Hurricane Harvey constituted an unconstitutional taking of their property. All related cases were joined under a Master Docket (No. 17-3000), and then bifurcated into an Upstream Sub-Docket (No. 17-9001) and a Downstream Sub-Docket (No. 17-9002). *See* Order Severing Claims into Two Separate Dockets, No. 17-3000, ECF No. 102. To streamline litigation, the Court designated a group of test properties and administratively stayed all other claims. Order Regarding Test Property Selection, No. 17-9002, ECF No 81; Case Management Order No. 5, No. 17-9002, ECF No. 27.

On February 20, 2018, in the Downstream Sub-Docket, defendant filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"). *See* United States' Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted (hereinafter "Def.'s MTD"). In that Motion, defendant argued that, under both state and federal law, plaintiffs lack the property interest purportedly taken, and that, to the extent a cause of action could arise out of the circumstances at issue, such a claim sounds exclusively in tort. *See generally id.* On March 20, 2018, plaintiffs filed their Response to the government's Motion to Dismiss, arguing that they sufficiently pleaded their cause of action demonstrating that the Corps' actions gave rise to a taking and that their ownership of property in fee simple—as defined by the Texas Tax Code—necessarily affords them the right to be "free from the Federal Government storing water on their property." *See* Pls.' Resp. to MTD at 14. The government filed its Reply in Support of its Motion to Dismiss on April 11, 2018, reiterating its original arguments for dismissal. *See generally* United States' Reply in Support of its Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted (hereinafter "Def.'s Reply to MTD").

On April 19, 2018, Judge Susan G. Braden deferred ruling on defendant's Motion to Dismiss until trial and set a pre-trial and discovery schedule. Memorandum Opinion and Scheduling Order, ECF No. 92. On January 7, 2019, the Downstream Sub-Docket was reassigned to Senior Judge Loren A. Smith. *See* Order of Reassignment, ECF No. 152. Due to a lapse in government appropriations and upon finding that the current pre-trial and trial schedule

was "infeasible and inoperable," the Court vacated the schedule and stayed the case pending the restoration of government funding. Order, ECF No. 154. After the restoration of funding, the Court determined that jurisdiction was a threshold issue that should be decided in advance of trial and held a hearing in Houston, Texas on March 13, 2019, regarding defendant's Motion to Dismiss.

On April 1, 2019, the Court deferred its ruling on the Motion to Dismiss in order to concurrently rule on both dismissal and on cross-motions for summary judgment. *See*, ECF No. 169. The Court also ordered briefing on Cross-Motions for Summary Judgment, and each party was allotted an additional ten pages in which to further address the following two questions:

1. Whether a protected property interest exists under Texas law when flooding has occurred as a direct result of mitigating flood control efforts in the face of an Act of God; and

2. The general applicability of the Flood Control Act of 1928, its successor acts, and the definition of "floods or flood waters."

Id. at 1. Plaintiffs filed their Motion for Summary Judgment on June 14, 2019. *See* Motion for Summary Judgment and Memorandum in Support (hereinafter "Pls.' MSJ"). Defendant filed its Cross-Motion for Summary Judgment on August 3, 2019, and its Corrected Cross-Motion for Summary Judgment on August 5, 2019. *See generally* United States' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment; *see also generally* United States' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment (Corrected) (hereinafter "Def.'s CMSJ"). Plaintiffs filed their Reply and Response on September 16, 2019. *See generally* Plaintiffs' Reply in Support of Motion for Summary Judgment and Response to United States' Cross-Motion for Summary Judgment (hereinafter "Pls.' MSJ Resp."). On October 15, 2019, the government filed its Reply in Support of its Cross-Motion for Summary Judgment. *See generally* United States' Reply to Plaintiffs' Response to the United States' Cross-Motion for Summary Judgment (hereinafter "Def.'s CMSJ Reply."). Oral Argument on the parties Cross-Motions for Summary Judgment was held in Houston, Texas on December 11, 2019. At oral argument, the Court encouraged the parties to pursue settlement, but on February 13, 2020, the parties informed the Court that settlement was unsuccessful. This case is fully briefed and ripe for review.

B. *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*

During the pendency of the Downstream Sub-Docket proceedings, the parties in the Upstream Sub-Docket proceeded to a trial on liability. On December 17, 2019, Senior Judge Charles F. Lettow issued an opinion on liability, holding that the upstream flooding "constituted a taking of a flowage easement under the Fifth Amendment." *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, No. 17-9001, 2019 U.S. Claims LEXIS 1976, at *120 (Fed. Cl. Dec. 17, 2019) (hereinafter "Upstream Opinion"). In that case, the plaintiffs' theory of causation involved the inundation of water on their upstream properties "resulting from the Corps' construction, modification, maintenance, and operation of the Addicks and Barker Dams." *Id.* at *89.

In that opinion, Senior Judge Lettow determined that the taking of upstream property occurred as a result of the general operation of the Addicks and Barker Dams and Reservoirs, as a direct result of the Corps' decision to close the flood gates in order to protect properties downstream at the expense of the upstream properties located within the maximum pool size for the Reservoirs. *See generally id.* In contrast, the Downstream plaintiffs do not allege that the general operation of the Reservoirs caused the flooding of their property. *See generally* Complaint; *see also* Pls.' MSJ. Rather, plaintiffs downstream advance a takings theory predicated on the Corps' decision to open the flood gates and begin Induced Surcharge releases. Pls.' MSJ at 32 ("The Government caused the flooding of Plaintiffs' properties by opening the gates and releasing water from the Reservoirs."). As more fully explained below, the downstream plaintiffs' theory of causation ignores the simple fact that the gates were initially closed for the sole purpose of protecting *their* properties from floodwaters, that such mitigation failed because the impounded storm waters exceeded the Reservoirs' controllable capacity, and that the Harvey was the sole and proximate cause of the floodwaters.

With those legal differences between the Upstream and Downstream causes of action in mind, the Court concludes that the legal analysis in the Upstream Opinion is not relevant to the Court's evaluation of the downstream cause of action. Additionally, due to the significant factual differences between the Upstream and Downstream cases, the Court does not believe the findings in the Upstream Opinion are relevant to its downstream findings.

III. Discussion

The Court will dismiss a case under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Spectre Corp. v. United States*, 132 Fed. Cl. 626, 628 (2017) (quoting *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002)). In reviewing a motion to dismiss for failure to state a claim, the Court "must accept as true all the factual allegations in the complaint . . . and [] must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). The Court need not, however, accept legal conclusions "cast in the form of factual allegations," and will grant a motion to dismiss when faced with conclusory allegations that lack supporting facts, as "a formulaic recitation of the elements of a cause of action" alone will not withstand a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The Takings Clause of the Fifth Amendment of the Constitution provides "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. When analyzing a takings claim, the Court will implement a two-step process. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002). The Court's first step is to determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a stick in the bundle of property rights." *Id.* at 1343 (citing *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (citations omitted)). Once the Court has determined that the plaintiff possesses the requisite property right, the Court then decides "whether the governmental action at issue constituted a taking of that stick." *Id.*

On August 25, 2017, Hurricane Harvey made landfall along the Texas coast as a Category 4 hurricane. Pls.' App. at A3134. In anticipation of high volumes of rain, the Corps closed the flood gates on both the Addicks and Barker dams to mitigate against downstream flooding. *See* Def.'s Ex. 8; Def.'s Ex. 21; Def.'s Ex. 24 at 1010. For four days Harvey was stalled over Houston, and in the early hours of August 28, 2017, the volume of water in the Reservoirs exceeded the capacity of the government-owned land, began to spill onto adjacent non-government-owned properties, and the Corps was forced to release water from both Reservoirs in accordance with the Induced Surcharge Flood Control Regulation provided in its Manual. Pls.' Appx at A1158; Def.'s Ex. 27 at 1034–35; Def.'s Ex. 8 at 287. Despite the Corps' attempt to save the downstream properties from Harvey's floodwaters, plaintiffs' properties were inundated with water. These approximately 170 downstream cases ensued, and they turn on the following singular question:

> Do plaintiffs have a protected property interest in perfect flood control, under either federal or state law, when a government-owned water control structure erected for the sole purpose of flood control fails to completely mitigate against flooding created by an Act of God?

Upon careful consideration, and with all due sympathy to the plaintiffs' plight, the Court finds that, under both federal and state law, plaintiffs lack the requisite property interest in perfect flood control in the face of an Act of God, and thus cannot succeed on their takings claims.

A. Property Rights

The courts have long held that "[f]or a takings claim to succeed under the Fifth Amendment, under either a physical invasion or regulatory takings theory, a claimant must first establish a compensable property interest." *Avenal v. United States*, 33 Fed. Cl. 778, 785 (1995) (citing *Lucas v. S.C. Costal Council*, 505 U.S. 1003, 1026–27 (1992)). Moreover, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945); *see also Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993) ("As part of a takings case, the plaintiff must show a legally-cognizable property interest.").

The Supreme Court has repeatedly held that "state law defines property interests." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010); *see also Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'"); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352–53 (Fed. Cir. 2003) ("Property rights are set by state law and federal common law but are not created by the constitution.");

Bartz v. United States, 224 Ct. Cl. 583, 592 (1980) ("[T]he issue of what constitutes a 'taking' is a 'federal question' governed entirely by federal law, but that the meaning of 'property' as used by the Fifth Amendment will normally obtain its content by reference to state law."). The laws of a given state identify what rights and property interests are constitutionally protected. *See id.*

In *Stop the Beach*, the Supreme Court explained that "[t]he Takings clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." 560 U.S. at 732. As a result, the Court *must* look to state law in determining whether a plaintiff possesses the property rights purported to have been taken. *See id.* As such, the Court turns both to the laws of the State of Texas and to federal law to determine whether plaintiffs have a protected property interest in perfect flood control in the wake of an Act of God.

B. Perfect Flood Control

1. State Law

As property rights are defined by state law, the Court must look to Texas law to determine whether plaintiffs have a protected property interest in perfect flood control in the wake of an Act of God. After careful review of over 150 years of Texas flood-related decisions, the Court finds that the State of Texas has never recognized such a property right, and, in fact, that the laws of Texas have specifically excluded the right to perfect flood control from the "bundle of sticks" afforded property owners downstream of water control structures. *See, e.g., Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (Tex. 2016); *Sabine River Auth. of Tex. v. Hughes*, 92 S.W.3d 640 (Tex. App.—Beaumont 2002). Based on the Court's understanding of Texas jurisprudence, and for the reasons set forth below, the Court concludes that Texas does not recognize a right to perfect flood control in the wake of an Act of God.[3]

Article 17 of the Texas State Constitution provides that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. art. I, § 17. Nevertheless, the Texas State Constitution also specifically enumerates that the police power is an exception to takings liability and that compensation is not required for "an incidental use, by (A) the State, a political subdivision of the State, or the public at large; or (B) an entity granted the power of eminent domain under law." TEX. CONST. art. I, § 17(a)(1)(A)–(B). Texas courts have routinely interpreted this clause to mean that property is owned subject to the pre-existing limits of the State's police power. *See generally Motl v. Boyd*, 286 S.W. 458 (Tex. 1926); *see also Lombardo v. Dallas*, 124 Tex. 1, 10 (Tex. 1934) ("All property is held subject to the valid exercise of the

[3] In analyzing whether Texas law recognizes the right to perfect flood control in the wake of an Act of God, the Court has looked to both takings and tort cases to reach the conclusion that Texas has never recognized such a right. Additionally, the Court finds it significant that, even when Texas courts have applied the less stringent standards for establishing tort liability, those courts have never found that a right to be free from flooding is absolute or a legally protected interest. *See, e.g., Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (Tex. 2016); *McWilliams v. Masterson*, 112 S.W.3d 314, 321 (Tex. App.—Amarillo 2003).

police power."); *Cummins v. Travis County Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 48 (Tex. App.—Austin 2005) ("[A]ny such rights an owner may have can only be exercised in a reasonable fashion and are subject to the State's police powers"). Texas courts have also consistently recognized efforts by the State to mitigate against flooding as a legitimate use of the police power. *See generally Motl*, 286 S.W. 458.

The Texas Supreme Court has long recognized that flooding is a major issue within the state's borders and that the government must endeavor to control it. *See, e.g., Motl*, 286 S.W. 458. In 1926, the Supreme Court of Texas explained that "[o]ver 30,000,000 acre-feet of water annually passes unutilized from the streams of Texas to the Gulf of Mexico, much of it in floods that cause great destruction. Good business sense demands that the floods of Texas be controlled." *Id.* at 469. In highlighting the importance of flood mitigation, the *Motl* Court noted that "flood waters are to be treated as a common enemy, the control and suppression of which is a public right and duty." 286 S.W. at 470. This decision demonstrates that the right to protect the public from flooding is not something new, but rather "of ancient origin, universal in its extent." *Id.* In fact, flood mitigation is not only a right but a duty, and

> [t]o deny that the State of Texas has [the] power and authority to ameliorate [destructive flooding], and to cause the storing of these floods waters, both for the protection of the people and for the reclamation and development of its lands by irrigation, is to deny to the State one of the ancient rights of the police power.

Id. at 471. The Court interprets such precedent to stand for the conclusion that Texas law clearly recognizes the state's authority to mitigate against flooding to be a legitimate use of the police power. Additionally, Texas jurisprudence illuminates precisely how the state's police power is superior to the rights of property owners, and waters are "subject to regulation and control by the State, regardless of the riparian's land which may border upon the stream." *Id.* at 474; *see also Cummins*, 175 S.W.3d at 49 ("[O]wnership of waterfront property is subject to regulation under the State's police powers and, hence, their rights must yield to the regulations that serve the public's interest."). As such, the plaintiffs in this case own their land subject to the legitimate exercise of the police power to control and mitigate against flooding.

In addition to holding that efforts expended to mitigate against flooding constitute a legitimate use of the police power, Texas courts have rejected the theory that failure to perfectly mitigate against Acts of God can rise to the level of a taking under Texas law. The court in *McWilliams v. Masterson* held that "[i]t has long been the rule that one is not responsible for injury or loss caused by an act of God." 112 S.W.3d 314, 321 (Tex. App.—Amarillo 2003) (citations omitted); *see also Luther Transfer & Storage, Inc. v. Walton*, 296 S.W.2d 750, 753 (Tex. 1956) ("Damages resulting from an act of God are not ordinarily chargeable to anyone."); *Benavides v. Gonzalez*, 396 S.W.2d 512, 514 (Tex. App.—San Antonio 1965) (holding that "[u]nprecedented rainfall or Act of God is uniformly recognized as a good defense" to diversions of water.). Under Texas law, to determine whether an occurrence was an Act of God, a court need only ask whether it was "so unusual that it could not have been reasonably expected or provided against." *Gulf, C. & S. F.R. Co. v. Texas Star Flour Mills*, 143 S.W. 1179, 1182 (Tex. Civ. App. 1912). As Harvey was a 2000-year storm, the likes of which the Houston area had

never seen, the storm was of a kind that "could not have been reasonably expected or provided against." *Id.* As such, the Court concludes that Harvey was most assuredly an Act of God.[4]

When determining whether a party is liable for flood-related damage to another's property, Texas courts have routinely held that "it must be shown that [an] unlawful act caused damages to the owner which would not have resulted but for such act." *Benavides v. Gonzalez*, 396 S.W.2d 512, 514 (Tex. App.—San Antonio 1965). "Proof of damage alone will not suffice to prove a taking." *Bennett v. Tarrant County Water Control and Imp. Dist. No One*, 894 S.W.2d 441 (Tex. App—Fort Worth 1995) (citing *Loesch v. United States*, 227 Ct. Cl. 34, 44, 645 F.2d 905, 914, *cert. denied*, 454 U.S. 1099 (1981)). Texas law has specifically limited liability in both a takings and a tort context where the operator of a water control structure fails to perfectly mitigate against flooding caused by an Act of God. *See Kerr*, 499 S.W.3d 793. This limitation on property rights exists both when the operator fails to do more to protect downstream properties from flooding, and when the operator induces the release of water, so long as the water is released at a lesser rate than it is impounded. *See id.*; *see also Sabine River Auth.*, 92 S.W.3d 640. Regardless of the intentionality of the waters' release, the Court does not believe that Texas law provides plaintiffs with a right to be free from flood waters.

In one case where property owners alleged that a water control structure "could have done more" to ensure their properties were free from flooding, the Texas Supreme Court held that "[governments] cannot be expected to insure against every misfortune occurring within their geographical boundaries, on the theory that they could have done more. No government could afford such obligations." *Kerr*, 499 S.W.3d at 804 (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 37, (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.")). In analyzing whether the county was liable for the flooding beyond its control, the court highlighted that "because inaction cannot give rise to a taking, we cannot consider any alleged failure to take further steps to control flooding." *Kerr*, 499 S.W.3d at 805; *see also Cameron Cty. Reg'l Mobility Auth. v. Garza*, No. 13-18-00544, 2019 Tex. App. LEXIS 8968, at *9 (Tex. App.—Corpus Christi 2019) ("A governmental entity cannot be liable for a taking if it committed no intentional acts."). In finding for the defendant, the *Kerr* Court "decline[d] to extend takings liability . . . in a manner that makes the government an insurer for all manner of natural disasters," because to find otherwise would "encourage governments to do nothing to prevent flooding, instead of studying and addressing the problem." *Id.* at 810; *see also Texas Highway Dep't v. Weber*, 219 S.W.2d 70 (Tex. 1949) ("If the state were suable and liable for every tortious act of its agents, servants, and employees committed in the performance of their official duties, there would result a serious impairment of the public service and the necessary

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[4] Of note, this Court's finding that plaintiffs' flood-related damage is the result of an Act of God is consistent with the findings of the United States District Court for the Southern District of Texas, which, in a negligence proceeding, determined that "the storm surge from Harvey" was an "Act of God" that contributed to plaintiff's property damage. *Landgraf v. Nat Res. Conservation Serv.*, No. 6:18-CV-0061, 2019 U.S. Dist. LEXIS 61198, at *4 (S.D. Tex. Apr. 9, 2019).

administrative functions of government [sic] would be hampered"). Interpreted collectively, it is the Court's understanding that Texas does not recognize the right to be free from unintentional flooding resulting from an Act of God.

In addition to finding that uncontrollable flooding cannot result in a taking, the Court in *Kerr* also highlighted that intent alone is not enough to establish causation in a takings context, and explained that "[b]ecause a taking cannot be premised on negligent conduct, we must limit our consideration to affirmative conduct the County was substantially certain would cause flooding to the homeowners' properties and ***that would not have taken place otherwise***." *Kerr*, 499 S.W.3d at 805 (emphasis added). Under Texas law, even when a release of water is intentional, a taking does not occur where "the [water control structure] never released more water than was entering the reservoir via rainfall." *Sabine River Auth.*, 92 S.W.3d at 642 (citing *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876, 880 (Tex. App.—Beaumont 1998)). This is particularly true where the water is not released directly onto a plaintiff's property, but rather is released into a river that consequently floods properties downstream. In *Wickham v. San Jacinto River Authority*, the Texas Supreme Court specifically determined the following:

> In addition to the fact that appellee never released more water than was entering the San Jacinto River, Adams' deposition testimony makes it clear that the water being released from Lake Conroe was flowing directly into the San Jacinto River, not directly onto appellants' property. From the point of release, the water flowed into the River and went downstream and mixed into other tributaries which apparently overflowed their banks[,] resulting in flooding. Standing alone, this would be sufficient summary judgment evidence to negate the "taking" element in appellants' inverse condemnation claim.

979 S.W.2d at 883. Under Texas law, even an intentional release of water does not give rise to a takings claim unless the flood control structure releases more water than is entering the reservoir.[5] *See Sabine River Auth.*, 92 S.W.3d 640; *see also Wickham*, 979 S.W.2d 876. As such, under Texas law, the "bundle of sticks" afforded property owners does not include to right to be free from all flooding, regardless of the intentionality behind the water's release.

Finally, Texas law also indicates that, when an individual purchases real property, the individual acquires that property subject to the property's pre-existing conditions and limitations. *See generally City of Dallas v. Winans*, 262 S.W.2d 256 (Tex. Civ. App.—Dallas 1953); *see also City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997). A cause of action can only occur when the injury arises, and a subsequent property owner cannot inherit that cause of action. *See, e.g.*, *Winans*, 262 S.W.2d at 259 ("The concrete culvert in question is a public improvement permanent in nature. If its construction injured the land at all, it was a permanent injury which had already occurred when appellee acquired the property, and no right of action accrued to

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[5] The Court notes that, in the wake of Harvey, water flowed into Addicks at 70,000 cfs and into Barker into 77,000 cfs. Pls.' App. at A3157–A3158. Despite the high inflow of water, the outflow from Addicks was only approximately 7,500 cfs, the outflow from Barker was only approximately 6,300 cfs, and the totally combined discharge was approximately 13,800 cfs at its peak. Def.'s Ex 28. Texas law would not have recognized a taking under such circumstances.

appellee."); *see also Likes*, 962 S.W.2d 489 (finding no taking where the culvert system was completed more than ten years before plaintiff's home was built, and where the City had not made improvements since its construction to increase the amount of water in the watershed.). As each of the plaintiffs in this case acquired their property *after* the construction of the Addicks and Barker Dams and Reservoirs, plaintiffs acquired their properties subject to the superior right of the Corps to engage in flood mitigation and to operate according to its Manual.

Before the Court can analyze whether a Fifth Amendment Taking has occurred, the Court first must look to what property interest was allegedly taken. Federal law dictates that "the issue of what constitutes a 'taking' is a 'federal question' governed entirely by federal law, but that the meaning of 'property' as used by the Fifth Amendment will normally obtain its content by reference to state law." *Bartz*, 224 Ct. Cl. at 592. While none of the aforementioned Texas jurisprudence is persuasive on our analysis of whether a Fifth Amendment Taking has occurred under federal law, the storied history of Texas law makes it clear that the State of Texas never intended to create a protected property interest in perfect flood control in the wake of an Act of God. As the State of Texas does not recognize such a right, the Court now looks to whether federal law provides plaintiffs with the right to perfect flood control in the wake of an Act of God.

2. Federal Law

While "state law defines property interests," *Stop the Beach*, 560 U.S. at 707, federal common law may also identify which property rights are protected under the Constitution. *See Maritrans*, 342 F.3d at 1352–53 ("Property rights are set by state law and federal common law but are not created by the constitution"). As Texas law does not recognize a protectable property interest in perfect flood control in the face of an Act of God, the Court now looks to whether federal common law provides plaintiffs with such a protected property interest. Also, federal statutes can create specific property interests for particular individuals, but this is rare. *See generally Grav v. United States*, 14 Cl. Ct. 390 (1988) (holding that a statutory offer that invited performance as the method of acceptance creates an implied-in-fact contract for which a plaintiff must be compensated), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989). After careful review of related legal precedent, statutes, the Court finds that such a "property right" does not exist under federal law either.

Plaintiffs repeatedly argue that, because their properties had never flooded before (or at the very least because such flooding was minimal), they had a "reasonable, investment-backed expectation" that they would remain free from flooding. Pls.' MSJ at 32. Additionally, plaintiffs seemingly contend that, even though the Reservoirs were dry prior to Harvey's landfall, the simple fact that the water passed through the Reservoirs before inundating plaintiffs' properties means that all of the water was Corps' water, as opposed to "flood water." *See* Pls.' MSJ at 32; *see also* Pls.' Resp. to MTD at 23. In response, defendant argues that plaintiff's takings claim fails because plaintiffs have failed to prove causation, and, in the alternative, that plaintiffs lack the property interest purportedly taken. *See generally* Def.'s CMSJ. The Court rejects both of plaintiff's assertions.

The Court believes plaintiffs mischaracterized the events that preceded the flooding of their properties. As an initial matter, the government's construction of the Reservoirs and the resulting benefit of flood control does not, by its nature, affirmatively create a cognizable property interest in perfect flood control. In *Avenal v. United States*, this Court addressed whether a plaintiff could have a vested property interest in a benefit conferred upon them by a federal government project, and, if they could acquire such a right, whether cessation of that benefit could give rise to a Fifth Amendment Taking. 33 Fed. Cl. 778, 787 (1995). In finding for the government, that Court ultimately determined that an unintended benefit could not create a vested property interest, and that "[i]n certain limited circumstances, the Federal Government can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment." *Id.* at 790. While the facts in *Avenal* are not directly analogous to those in the case at bar, the Court agrees with the overall holding—that even if a plaintiff benefits from a federal project, such a benefit does not in itself create a property interest that is subject to Fifth Amendment compensation when the government later ceases to provide such benefit. *See generally id.*

There is a fundamental difference between property rights and the benefits a government provides to its citizens. To ignore this would be to discard the last several hundred years of Anglo-American legal history. That difference is based upon the relationship between the source of the property and the new owner of the property right. The property right is created by the conveyor and arises out of the conveyor's relationship with the recipient. That relationship most commonly takes the form of a contractual obligation. Furthermore, a property interests can occasionally be created as a gift—for example, an inheritance, an award, or a personal gift. These then become the recipient's property. However, when a government creates programs that benefit its citizens, those programs rarely provide members of the public with property interests. *Cf. Grav*, 14 Ct. Cl. 390. This is because the justification and intention behind the program—be it flood control, the construction of a highway, or some other benefit—is for the general good of the community. It is almost never a benefit intentionally awarded for a specific group of individuals.

Additionally, despite the fact that the Corps has routinely erected water control structures to benefit property owners by mitigating against downstream flooding, the federal government never intended to provide plaintiffs downstream of a water control structure with a vested right in perfect mitigation against "flood waters." To the contrary, Section 702c of the Flood Control Act of 1928 ("FCA") provides that "[n]o 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." 33 U.S.C. § 702c (2018). Since the FCA's enactment, the Supreme Court has attempted to distinguish between what is and is not flood water. In *Central Green Co. v. United States*, the Supreme Court held that "the text of the [FCA] directs us to determine the scope of the immunity conferred, not by the character of the federal project or the purpose it serves, but by the character of the waters that caused the relevant damage and the purpose behind their release." 531 U.S. 425, 434 (2001). The Court further outlined when the character of the water is clearly definable and when an ambiguity exists as follows:

> It is relatively easy to determine that a particular release of water that has reached flood stage is "flood water" . . . or that a release directed by a power company for

> the commercial purpose of generating electricity is not . . . . It is, however, not such a simple matter when damage may have been caused over a period of time in part by flood waters and in part by the routine use of the canal when it contained little more than a trickle.

Id. at 436 (citations omitted). Interpreting this precedent, the Court concludes that the character of the release at issue in this case is clearly "a release of water that has reached flood stage." *See id.* Accordingly, the Court determines that, contrary to plaintiffs' assertion that the Corps affirmatively decided to store its water on their properties, the waters released from the Reservoirs—waters only impounded behind the dams because of the occurrence of a natural disaster—were "flood waters" in excess of what the Corps could reasonably control. As such, the Court now must look to whether the existence of a dam erected for the sole purpose of protecting downstream properties from "flood waters" affords plaintiffs a vested property interest in perfect flood control when storm waters exceed a volume over which the government can successfully control.

When interpreting the FCA, courts have continuously held that simply owning property that benefits from flood control structures does not by itself confer upon those owners a vested right in perfect flood control. In fact, the Supreme Court in *United States v. Sponenbarger* categorically rejected the proposition that a Fifth Amendment Taking can arise as a result of flooding that the government did not cause and over which the government had no control. 308 U.S. 256 (1939). The Court specifically held the following:

> An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect.

Id. at 265. Essentially, when the government undertakes efforts to mitigate against flooding, but fails to provide perfect flood control, it does not then become liable for a compensable taking because its mitigative efforts failed. *See id.* Indeed, "[i]f major floods may sometime in the future overrun the river's banks despite—*not because of*—the Government's best efforts, the Government has not taken [plaintiff's] property." *Id.* at 266 (emphasis added). In its decision, the Supreme Court extended that same holding to cases in which other properties benefited from the project, as "the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all." *Id.* To find otherwise "would far exceed even the 'extremest' [sic] conception of a 'taking' by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private property owner for flood damages which it in no way caused." *Id.* at 265.

In the years following, this Court has routinely upheld the Supreme Court's ruling in *Sponenbarger*—that the government cannot be held liable under the Fifth Amendment for property damages caused by events outside of the government's control. For example, in *Teegarden v. United States*, this Court held that "[i]n the context of a claim for inverse

condemnation, damages resulting from 'a random event induced more by an extraordinary natural phenomenon than by Government interference' cannot rise to the level of a compensable taking, 'even if there is permanent damage to property partially attributable to Government activity.'" 42 Fed. Cl. 252, 257 (1998) (citing *Berenholz v. United States*, 1 Cl. Ct. 620, 626 (1982) (quoting *Wilfong v. United States*, 202 Ct. Cl. 616, 622 (1973))). In *Hartwig v. United States*, this Court held that "the United States is not liable for all of the damages caused by a flooding unless directly attributable to governmental action. Indirect or consequential damages are not compensable." 202 Ct. Cl. 801, 809 (1973); *see also Danforth v. United States*, 308 U.S. 271 (1939) (holding that "an incidental consequence" of a levee's construction cannot give rise to a taking); *Sanguinetti v. United States*, 264 U.S. 146 (1924) ("[T]he injury was in its nature indirect and consequential, for which no implied obligation on the part of the Government can arise."); *John Horstmann Co. v. United States*, 257 U.S. 138 (1921) ("[W]hat is done may be in the exercise of a right and the consequences only incidental, incurring no liability."); *R. J. Widen Co. v. United States*, 357 F.2d 988 (Ct. Cl. 1966) ("[C]ompensation under the Fifth Amendment may be recovered only for property taken and not for incidental or consequential losses, the rationale being that the sovereign need only pay for what it actually takes rather than for all that the owner has lost."); *B Amusement Co. v. United States*, 180 F. Supp. 386 (Ct. Cl. 1960) ("It is well settled that consequential damages form no basis for such a recovery [under the Takings Clause of the Fifth Amendment]."). Thus, federal precedent clearly supports the Court's finding that a "natural phenomenon"—or Act of God—cannot trigger takings liability, particularly as plaintiffs do not possess a protected property interest in perfect flood control during and after a natural disaster.

In sum, there exists no cognizable property interest in perfect flood control against waters resulting from an Act of God, and "the Fifth Amendment does not make the Government an insurer" against flooding on a plaintiff's real property when the government fails to completely protect against waters outside of its control. *Sponenbarger*, 308 U.S. at 265. The mere fact that plaintiffs' properties had not sustained this level of flooding prior to Harvey's landfall does not create the right to or provide plaintiffs with a legitimate, investment-backed expectation in perfect flood control. Furthermore, the Court must categorically reject plaintiffs' arguments that the water on their properties was Corps' water. The Reservoirs are dry reservoirs and they contained no water until Harvey made landfall. Def.'s Ex. 22 at 997, 999; Def.'s Ex. 8 at 280–91. The closing and later opening of the gates under the Corps' induced Surcharge operation does nothing to make the water "government water," as opposed to "flood waters" as articulated in *Central Green*. 531 U.S. 425.

IV. Conclusion

Based on the above analysis of both state and federal law, it seems clear to this Court that neither Texas law nor federal law provides plaintiffs with a cognizable property interest in perfect flood control in the wake of an Act of God. As the government cannot take a property interest that does not exist, and as the Corps cannot be held liable when an Act of God inundates a plaintiff's real property with flood waters that the government could not conceivably have controlled, plaintiffs have failed to state a claim upon which relief can be granted. *See* RCFC 12(b)(6).

Though the Court is sympathetic to the losses plaintiffs suffered as a result of Hurricane Harvey, the Court cannot find the government liable or find it responsible for imperfect flood control of waters created by an Act of God. For the reasons set forth above, defendant's MOTION to Dismiss is hereby **GRANTED** pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief could be granted. Defendant's CROSS-MOTION for Summary Judgment is **GRANTED**. Plaintiffs' CROSS-MOTION for Summary Judgment is **DENIED**. A telephonic status conference will be held on Wednesday, February 26, 2020 at 3:00 p.m. (EDT), regarding this Opinion.

IT IS SO ORDERED.

s/ *Loren A. Smith*

Loren A. Smith,
Senior Judge

EXHIBIT C

In the United States Court of Federal Claims

No. 17-9002
Filed: September 9, 2020

IN RE DOWNSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS	)
THIS DOCUMENT APPLIES TO:	)
ALL CURRENTLY PENDING DOWNSTREAM CASES	)

ORDER DIRECTING THE ENTRY OF JUDGMENT IN DOWNSTREAM CASES

Consistent with the Court's February 18, 2020 Opinion and Order granting both defendant's Motion to Dismiss and defendant's Cross-Motion for Summary Judgment (ECF No. 203), the Court hereby **ORDERS** the following:

1. The Clerk of Court **SHALL** enter judgment dismissing each of the individual downstream cases **EXCEPT** for the following cases:

   a. any case filed after March 13, 2020, the date upon which the Court issued its Order to Show Cause (ECF No. 208); and

   b. the cases identified below, as the plaintiff(s) in each of these cases filed a response to the Court's Order to Show Cause:

   Banes, et al. v. United States, No. 17-1191
   Williams, et al. v. United States, No. 17-1555
   Olsen, et al. v. United States, No. 18-123
   Kickerillo, et al. v. United States, No. 18-345
   Travelers Excess and Surplus Lines, et al. v. United States, No. 18-1697
   Asghari, et al. v. United States, No. 19-698
   Abed-Stephen, et al. v. United States, No. 19-782
   Alford, et al. v. United States, No. 19-807
   Ashby, et al. v. United States, No. 19-1266
   Darby, et al. v. United States, No. 19-1063
   Allen, et al. v. United States, No. 19-1924

2. The Clerk of Court **SHALL** close Sub-Master Docket No. 17-9002. Any appeal of the Court's February 18, 2020 Opinion and Order **SHALL** be filed in the individual dockets in which a party files an appeal.

3. Any future filings related to the cases identified above shall be made in the individual case dockets.

IT IS SO ORDERED.

s/ *Loren A. Smith*
Loren A. Smith,
Senior Judge

EXHIBIT D

In the United States Court of Federal Claims

No. 18-144 L
Filed: September 11, 2020

AMERICAN HOME ASSURANCE COMPANY, et al.

v.

JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed February 18, 2020 in Case No. 17-9002L, granting defendant's motion to dismiss and cross-motion for summary judgment and denying plaintiffs' cross-motion for summary judgment, and Order, filed September 9, 2020 in Case No. 17-9002L, directing the entry of judgment in Downstream Cases,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the case is dismissed.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. 32(g) and Fed. Cir. R. 32(b)(3). It was prepared using Microsoft Word 2016, and, according to that program's word-count function, it contains 13,959 words.

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Respectfully submitted,

DENENBERG TUFFLEY, PLLC

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Counsel for all Plaintiffs-Appellants in Consolidated Case No. 21-1217 (American Home Assurance, et. al. v United States)

DATED: March 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, a copy of the foregoing document was filed electronically with the Clerk of the Court using the Court's CM/ECF System. By operation of the Court's electronic filing system, this filing was electronically served this same date on Brian C. Toth (United States Department of Justice), principal counsel for Defendant-Appellee, and on principal counsel for all other Plaintiffs-Appellants in these consolidated cases.

Respectfully submitted,

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