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In the United States Court of Appeals For the Federal Circuit

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VIRGINIA MILTON, and, ARNOLD MILTON, on Behalf of Themselves and All Other Similarly Situated Persons, et al.,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

Appeals from the United States Court of Federal Claims in Nos. 1:17-cv-01189-LAS, 1:17-cv-01191, 1:17-cv-01195-LAS, 1:17-cv-01206-LAS, 1:17-cv-01215-LAS, 1:17-cv-01216-LAS, 1:17-cv-01232-LAS, 1:17-cv-01235-LAS, 1:17-cv-01300-LAS, 1:17-cv-01303-LAS, 1:17-cv-01332-LAS, 1:17-cv-01391-LAS, 1:17-cv-01393-LAS, 1:17-cv-01394-LAS, 1:17-cv-01395-LAS, 1:17-cv-01396-LAS, 1:17-cv-01397-LAS, 1:17-cv-

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CERTIFICATE OF INTEREST

Fed. Cir. R. 28(a)(1) requires a Certificate of Interest in principal briefs. Russell S. Post serves as Principal Counsel in 122 of the 171 downstream appeals that have been consolidated into this matter (No. 21-1131; *Milton v. United States*). Mr. Post previously submitted Certificates of Interest for each of the 122 appeals. Because those filings are lengthy, counsel attaches all 122 certificates as Add. A in the Addendum instead of reproducing them here.

For the Court's convenience, the following is the list of appeals associated with the four separate groups of appellants, each with different Principal Counsel:

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	-1316, -1317, -1319, -1322, -1324, -1325, -1336, -1337, -1338, -1339, -1341, -1394, -1398, -1403, -1404, -1405, -1406, -1407, -1427, -1431, -1444, -1455, -1468
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All the foregoing appeals.

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STATEMENT OF RELATED CASES

These consolidated appeals concern claims brought by owners of properties downstream from the Addicks and Barker Reservoirs in the Houston, Texas region that flooded during Tropical Storm Harvey. The underlying cases were filed in the Court of Federal Claims and are collectively known as the "downstream cases." All downstream cases are "related cases" because they will "directly affect or be directly affected by this court's decision in the pending appeal." Fed. Cir. R. 47.5.

Following the creation of an MDL proceeding, the downstream cases were consolidated by the CFC into a Downstream Sub-Master Docket. Appx68-79. Early in the proceedings, the CFC appointed a leadership committee to represent downstream property owners. Appx69-70. Although the CFC later dissolved that structure after issuing its dispositive ruling, Appx5671, most plaintiffs authorized the prior leadership committee and associated counsel to prosecute their appeals. This brief is filed on behalf of that group, comprising 122 of the 171 appeals in this consolidated case.

Separate briefs are being filed on behalf of plaintiffs in the 49 other appeals, which involve other counsel (listed above). All 171 appeals are "related cases."

Additionally, there are two other groups of downstream cases that are also "related cases." Those cases are either still awaiting a final judgment in the CFC or final judgment was recently entered and the cases are not yet before this Court.

In the Downstream Sub-Master Docket, the CFC issued a dispositive ruling granting the Government's motion to dismiss and motion for summary judgment while denying the property owners' motion for summary judgment. Appx1-19. That ruling technically affected only 13 test properties, which had been designated for purposes of litigating the liability issues in the case. Appx1-19, Appx770-771. Therefore, the CFC gave the remaining property owners a chance to show cause that their claims are distinguishable from those controlled by the CFC's ruling. Appx20-21. Most of the downstream properties' owners accepted that their cases are subject to the same analysis, and they are appellants in this appeal.

However, a handful of property owners attempted to show cause that their claims are distinguishable. The CFC has not entered final judgments in these cases so they are still pending below. Appx22-23. These cases are also "related cases."

Finally, a few downstream cases were filed near the end of the litigation—after the CFC's dispositive ruling and its show-cause order. The CFC initially refrained from entering judgment in these cases. Appx22-23, Appx5670-5671. Most are still pending below, but final judgment was recently entered in one case. These cases are also "related cases."

JURISDICTIONAL STATEMENT

The Court of Federal Claims has original jurisdiction over cases alleging a taking of private property without just compensation. 28 U.S.C. §1491(a)(1).

This brief is filed on behalf of the appellants in 122 separate appeals that arose out of the same underlying MDL proceeding. Final judgments were entered in these 122 cases between September 10-14, 2020. SAppx1-2015, SAppx3349-70. Timely notices of appeal were filed in each case. SAppx1-2015, SAppx3349-70.

The Federal Circuit has jurisdiction over appeals from final decisions of the Court of Federal Claims. 28 U.S.C. § 1295(a)(3).

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims erred by concluding that all downstream property owners whose properties were flooded by the Government as a result of an intentional government action in response to Tropical Storm Harvey lacked a property interest to support a takings claim under the Fifth Amendment.

2. Whether the Government took a flowage easement from the affected downstream property owners either (a) permanently and categorically through its Water Control Manual or (b) temporarily through its decision to flood properties downstream of the Addicks and Barker Reservoirs.

STATEMENT OF THE CASE

On August 28, 2017, the United States began releasing massive volumes of water from the Addicks and Barker Reservoirs ("Reservoirs") in Houston, Texas, causing widespread destruction to the homes and businesses located downstream. This government-induced flooding deprived property owners of the normal use and enjoyment of their property for months and inflicted massive financial losses.

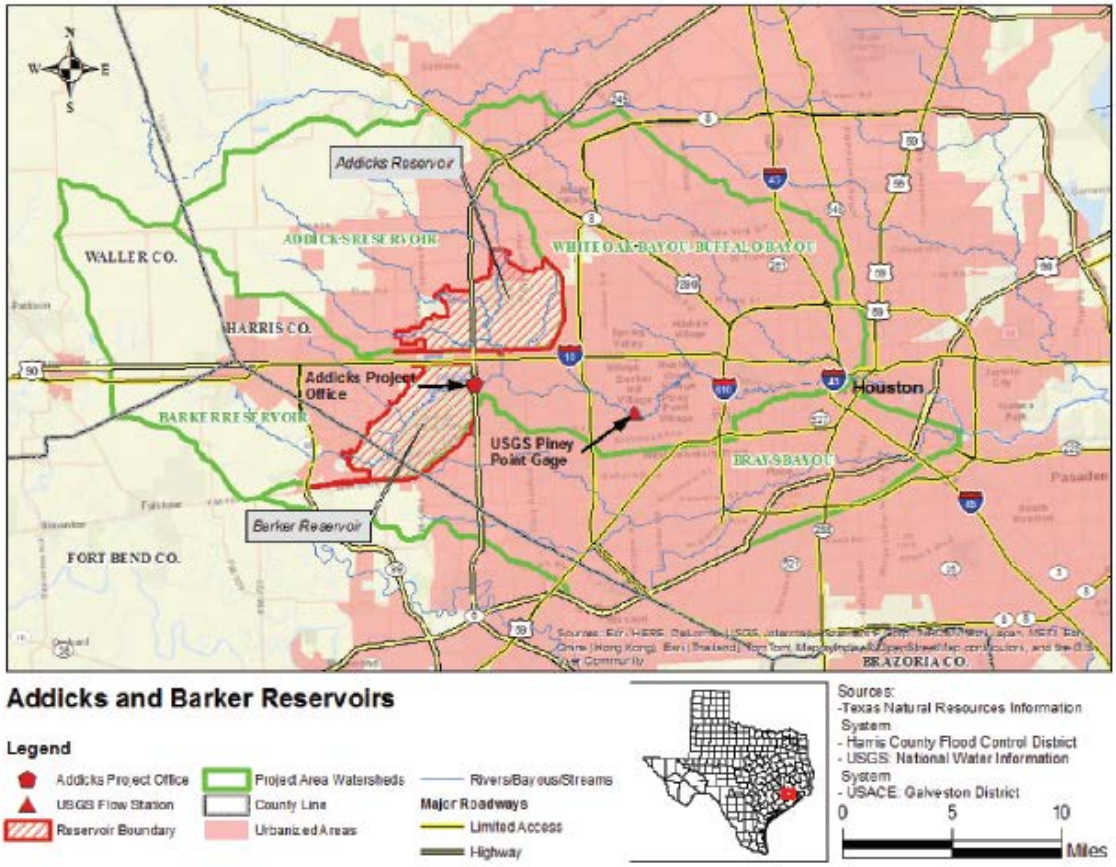
By the Government's admission, the objective of its action was to protect Downtown Houston and the Houston Ship Channel, other neighborhoods, and the integrity of its Reservoirs. The consequence of its action—widespread destruction of private property—was a necessary and foreseen consequence of that decision. From the perspective of the common good, perhaps it was rational to sacrifice the downstream properties to minimize flooding elsewhere, but that is not the question. The question is whether the cost of a government action taken to maximize the common good should be borne by the entire body politic, or just a few citizens.

The Government's decision to release water from the Reservoirs effected a taking of private property, which is compensable under the Fifth Amendment. "The Takings Clause is 'designed to bar 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.'" *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

As Tropical Storm Harvey Approaches,
Thousands of Houstonians Rely on the Barker and Addicks Reservoirs

On August 25, 2017, Hurricane Harvey made landfall along the Texas coast. Appx4144. Within 12 hours of landfall, Harvey weakened into a tropical storm. Appx4144. Eventually, it stalled over the Houston area for four days. Appx4144.

As the tropical storm approached Houston, the Army Corps of Engineers prepared for the deluge. The Corps operates the Addicks and Barker Reservoirs—two earthen dams approximately 11.5 and 13.5 miles in length—on the west side of the greater Houston area:



Appx992-993, Appx1282-1283.

The Reservoirs protect the City of Houston and the Houston Ship Channel by impounding water behind dams and mitigating flood risks to downstream areas. Appx992, Appx1020, Appx2165, Appx1141, Appx1414. They can hold more than 133.5 billion gallons of water: Addicks holds approximately 200,000 acre-feet and Barker holds approximately 210,000 acre-feet. Appx1162-1163.[1]

In operating the Reservoirs, the Corps follows a Water Control Manual. Section 7-05(a) of the Manual, the "Normal Flood Control Regulation," directs that the floodgates should remain closed during flood events until releases can be made without causing damaging downstream flooding. Appx1022. The Corps' standard practice is to impound stormwater entering the Reservoirs: "The gates on both reservoirs will be closed when 1 inch of rainfall occurs over the watershed below the reservoirs in 24 hours or less, or when flooding is predicted downstream." Appx1022. Section 7-05(a) directs the dam operator to "[k]eep the gates closed and under surveillance as long as necessary ***to prevent flooding below the dams***." Appx1022 (emphasis added).

Prior to Tropical Storm Harvey, the Corps had evaluated downstream and upstream flooding risks and determined that the Reservoirs should be operated to prevent downstream flooding—even at the cost of flooding upstream properties:

[1] *See Water Measurement*, Colorado River Water Conservation District, https://www.coloradoriverdistrict.org/water-measurement/ (last visited February 13, 2021) (noting that one acre-foot is nearly 326,000 gallons).

> The increase in downstream development (and possibly downstream tributary inflow) has contributed to reductions in allowable outflows. ***The dams are operated strictly to prevent downstream flooding; therefore, the gates remain shut even if pool levels increase and flood upstream properties***.

Appx1154 (emphasis added).

This was longstanding federal policy. For decades, the Corps repeatedly had emphasized that it would limit the discharge rate to prevent downstream flooding:

> 1977: "The combined discharge from Addicks and Barker Reservoirs is limited [to non-damaging capacity] less any tributary inflows below the dams." Appx4012.
>
> 1984: "[C]ombined discharges from both reservoirs are limited to this [non-damaging] flow rate less tributary inflows below the dams." Appx3719.
>
> 1992: "The gates will remain closed until downstream conditions permit system releases plus local inflows that remain below the non-damaging capacity." Appx3674. "The current operating plan limits the discharge rate in order to avoid erosion and flood damages to downstream properties." Appx3681.
>
> 1999: "The gates are kept closed and under surveillance as long as needed to prevent flooding below the reservoirs." Appx4127.

Importantly, this policy was publicized to the Houston community. In 2016, following an event in which the Reservoirs were operated normally and flooding resulted in some upstream communities, the Corps explained its policy to the public in the *Houston Chronicle* (the city's most prominent newspaper): "***We will not open the dam to a point where it will cause flooding downstream***." Appx4341-4342.

Given this long history, thousands of Houston residents and business owners relied on the Addicks and Barker Reservoirs to protect their private property against downstream flooding. The record in this case concerns 13 test property plaintiffs who acquired properties between 1976 and 2015. Appx3019-3175, Appx1436-1470. Some properties were residences, while others were commercial. Appx1436-1470.

Of the 13 test properties, three were in the 100-year flood zone, seven were in the 500-year flood zone, and three were not in any flood zone. Appx2015-2126.

Like most Houstonians, most test property owners knew about the Reservoirs, Appx1506-1576, but none was aware at the time of purchase that the Government might deliberately release water from the Reservoirs in a manner that would inundate their homes. Nor were they were aware of any prior flooding of their properties at the time of purchase. Appx1471-1505.[2]

The Government Authorizes "Induced Surcharges" With Full Knowledge of the Consequences for Downstream Properties

No test property owner knew about the Water Control Manual. Consequently, they did not know of Section 7-05(b): "Induced Surcharge Flood Control Regulation." Section 7-05(b) authorizes—indeed, instructs—the Corps to open the floodgates and inundate downstream properties under certain conditions. Appx1023.

[2] For 12 of the 13 test properties, the evidence demonstrates that the owners did not know of any prior flooding at the time of purchase; for one (Welling) there is no contrary evidence.

Specifically, Section 7-05(b) provides that "reservoir releases will be made in accordance with the induced surcharge regulation schedules" in the Manual. Appx1023. Those schedules set trigger points based on two factors: pool elevation and the rate of pool elevation rise. Appx1023, Appx1119-1120, Appx1416.

The Corps knew precisely what such induced surcharges would mean for downstream properties. For decades, the Corps has modeled flow rates in the downstream channel (which is called "Buffalo Bayou"). Appx997-999. By 2014, the Corps had created maps modeling downstream inundation at various flow rates. Appx1299-1304, Appx1425-1430; *see also* Appx1015, Appx1109-1115. Its maps identified with precision the areas that would be inundated at various flow rates. Appx1299-1304; Appx1425-1430.

In 2016, the Corps knew downstream properties along the Buffalo Bayou would suffer flood damage at flow rates greater than 3,000 cfs (cubic feet/second):

> ***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. This data is consistent with complaints of property inundation typically received by the District at discharges of 3,000 cfs and above***. 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 (emphasis added).

At the time of Tropical Storm Harvey, the Corps could use these models to foresee the full extent of the downstream inundation that would likely occur—down to the particular street and block. Appx1425-1430, Appx2162, Appx2811. The Corps knew that induced surcharges would flood properties downstream.

Prior to Tropical Storm Harvey, induced surcharges had never been ordered. Appx1416. There is an Emergency Action Plan, Appx1289-1290, but no emergency has ever been declared. Appx1421, Appx2133. Even during Harvey, the Reservoirs "perform[ed] as expected with no significant problems." Appx2136; Appx1419. They were never structurally compromised or in danger of failing. Appx1419-1421.

Nevertheless, as Tropical Storm Harvey drenched the Reservoirs, the Corps—for the first time ever—invoked the "Induced Surcharge Flood Control Regulation." Appx1416, Appx2164. Around midnight on August 27-28, the trigger points were reached and induced surcharges were required by Section 7-05(b) of the Manual. Appx1416, Appx2131, Appx2156, Appx2164, Appx2167.

Colonel Lars Zetterstrom, the commander responsible for the Reservoirs, Appx2160, ordered the floodgates to be opened just after midnight on August 28. Appx2164, Appx2167, Appx2223. Colonel Zetterstrom "briefed [his] commander" in Washington D.C. regarding "the necessary actions that we were going to take." Appx2164. The Corps' Water Control Manual dictated these "necessary actions." Appx2164; Appx 1416; Appx5362. It has "never been disregarded." Appx2135.

Section 7-05(b) mandates "induced surcharges" to optimize storage capacity and to ensure the structural stability of the dams, assuring that the Reservoirs fulfill their function of protecting Downtown Houston and the Ship Channel. Appx2159; *see also* Appx1414-1416, Appx4151. Induced surcharges are ordinary operations, not emergency actions, because they are triggered ***before*** the dams reach capacity. *Compare* Appx1023 (induced surcharge protocol triggers) *with* Appx1150-1151 (reservoir capacities); *see also* Appx1415 (induced surcharges are meant to utilize "the maximum extent possible for the reservoirs"); Appx4153 (induced surcharges are "necessary to continue operating … while protecting the integrity of the dam").

Adherence to Section 7-05(b) also reduced flooding impacts on communities around the Reservoirs, which otherwise would have suffered much worse flooding. Appx2157-2158, Appx2162, Appx2732, Appx4168, Appx4182-4183.

Importantly, the Corps knew its acts were "making people hurt downstream." Appx2128. Based on its prior modeling, the Corps knew that its decision would inundate the downstream properties. Appx2135. Colonel Zetterstrom and his peers "understood" that "there would potentially be impacts downstream." Appx2160. "[W]e were aware of the potential for inundation of structures downstream due to controlled releases." Appx2162.

Downstream property owners did not receive any warning about the releases. *See* Appx2735, Appx4193. Thus, Appellants had no idea what was coming.

The Induced Surcharges Cause Massive Downstream Flooding

The Corps' implementation of Section 7-05(b) and the induced surcharges created two "flood waves moving downstream through Buffalo Bayou." Appx2223. Its effect on downstream flooding was dramatic. *See* Appx2223-2224; Appx2179-2186.

In the early morning hours on August 28, the releases from the two Reservoirs reached a total combined discharge of 6,000 cfs—well in excess of the Corps' models projecting downstream flood damage. Appx2223, Appx2237; *see also* p. 8, *supra*. The following day, the Corps "ramped up" the releases to a total combined discharge of approximately 13,000 cfs. Appx2223, Appx2237. "During these two periods where release was ramped up, rainfall intensities were relatively low...." Appx 2237.

Downstream properties began to be inundated within a matter of hours after the induced surcharges began. Appx2334-2347.[3] Seven of the 13 test properties eventually suffered flooding to a depth of three feet or more above the first floor—including two exceeding eight feet. Four experienced depths of one to three feet, and two experienced depths of less than one foot. Appx2315, Appx1639-1673, Appx2015-2126.

[3] The time from release to inundation varied for each downstream property depending on its distance from the Reservoirs. Under normal circumstances, it can take several hours for water to travel to various measurement points. *See* Appx1193, Appx2237, Appx2179.

In a harrowing experience shared by countless downstream property owners, people had to be evacuated from at least nine of the test properties—many by boat. Appx1674-1694, Appx4195, Appx4270. Their properties were literally rendered inaccessible by the induced surcharges.

Although some downstream properties had experienced minor flooding prior to the induced surcharges, it paled in comparison to the flooding that resulted from the induced surcharge releases. Appx2334-2347, Appx2804-2811, Appx1946-2104. One commercial property reported just a few inches of flooding prior to the releases, Appx1820, escalating to six feet afterward. Appx1820, Appx2038-2039.

This massive flooding was a rude shock to the downstream property owners. Nine test property owners had remained free of flooding for years or even decades after acquiring their properties. Appx1577-1603, Appx2015-2126. Although four of the test property owners had experienced some minor flooding prior to Harvey, that flooding had been brief and uniformly shallow—nothing like the long-lasting and catastrophic flooding that followed the induced surcharges. Appx1604-1638, Appx2016, Appx2019, Appx2112.

Unsurprisingly, given these facts, the experts on both sides of this case agree that the Government's decision to open the floodgates either directly caused or substantially worsened the inundation of downstream properties.

The Government's own analysis shows that at least eight of the test properties would not have flooded but for the induced surcharges. The Government's expert modeled the actual flooding during Harvey as well as several alternative models, including a "gates closed" model. Appx2309-2310, Appx2569-2570. These models reveal that eight of the 13 test properties would not have flooded at all but for the induced surcharges, and four would have flooded substantially less but for the induced surcharges. *Compare* Appx2315 *with* Appx2726; *see also* Appx2828-2830 (Appellants' expert analyzing Government's model results).

Appellants' expert reached a very similar conclusion. *See* Appx2804-2811 (concluding that eight of the 13 test properties would not have flooded but for the induced surcharges and four would have flooded substantially less but for the induced surcharges). Although there is a divergence between the experts concerning (i) which properties would not have flooded and (ii) how much less some properties would have flooded, both agree that the test properties would have benefitted if the gates had remained closed.[4] Appx2804-2811, Appx2315, Appx2726.

In short, but for the induced surcharges, the downstream properties would have suffered no or substantially less flooding. This fact is not disputed.

[4] As to one test property (Stahl), the modeling was either unfeasible or showed no difference. Appx2810, Appx2315, Appx2726. Consequently, following the summary judgment briefing, that plaintiff's claims were voluntarily dismissed. Appx65.

Plaintiffs' Properties Suffer Catastrophic and Enduring Impacts

As the rainfall ceased, the induced surcharges quickly became the primary source of water in the Buffalo Bayou. Appx2238, Appx2181. Uniform flow did not resume until September 5, "at least 6 days after the rain stopped." Appx2238. The water generated from the Reservoir discharges alone was more than sufficient to flood the test properties—many of which were inundated for days. Appx2315. Some owners were unable to gain access to their properties for nearly two weeks. Appx1695-1720, Appx4195, Appx4271; *see also* Appx2315.

Due to the severity and duration of the flooding, the losses were staggering. Many of the test properties suffered hundreds of thousands of dollars in damages—in addition to most or all personal property stored on the first floor of the properties (including vehicles). *See* Appx1721-1861. One commercial property estimated that repairs would cost $17 million. Appx4195.

Downstream property owners remained unable to use or enjoy their property for several months. Many homeowners could not return home until well into 2018; some were ousted from their homes for much longer. Appx1862-1945. Similarly, business owners found themselves unable to reopen their businesses for months. Appx1907-1909, Appx1900. Indeed, nearly a year later, three test property owners (23% of the sample) were still ousted. Appx1868-1869, Appx1905, Appx1915.

The Corps Plans To Use The Induced Surcharge Procedure in the Future

Because Section 7-05(b) of the Water Control Manual remains in effect today, Appx1023, Appx1414, the Government intends to inundate downstream properties yet again when a similar rainfall event occurs. Appx2132; *see also* Appx2733.

This risk is realistic. The Addicks & Barker Emergency Coordination Team met following Harvey to focus on "improved coordination during extreme events," Appx4185, including with respect to "Surcharge Releases." Appx4187. Far from disavowing Section 7-05(b) of the Manual, the Corps is focused on communications. Members of the Corps "have already briefed the white house [sic], of developing a method to push notifications out to everyone." Appx4187.

The Government has long realized that "[t]he downstream properties that are at risk for flood or erosion damage could be purchased and removed." Appx3681. Indeed, even while its induced surcharges were still flooding downstream properties, the Corps was discussing the need for "federal funding to buy all of the property in the A&B reservoirs ***and in the surcharge corridor***." Appx4189 (emphasis added). But the Government has not paid for downstream property or flowage easements.

The Court of Federal Claims Consolidates and Dismisses the Downstream Cases

More than 1000 Houston-area property owners whose properties were located upstream and downstream from the Reservoirs brought constitutional takings claims against the Government in the Court of Federal Claims ("CFC").

Initially, the CFC consolidated these flooding cases into one master docket. Shortly thereafter, the CFC decided to handle the upstream and downstream cases in two distinct sub-dockets. Appx68-79. Test properties were designated to litigate the liability issues. Appx4 n.1, Appx770-771.

After taking the Government's motion to dismiss under advisement and inviting the parties to file summary judgment motions, the CFC granted both the Government's motion to dismiss and its motion for summary judgment on the ground that the plaintiffs lacked a property interest in "perfect flood control." Appx1-19. Eventually, the CFC entered final judgments in all downstream cases except a few that remain pending below. Appx22-23; *see also* pp. xiv-xv, *supra*. Notices of appeal were filed in 171 cases. This Court consolidated these appeals for purposes of briefing and decision.

The Court of Federal Claims Rules in Favor of Upstream Property Owners

Meanwhile, the upstream cases proceeded in their own sub master-docket. There, the CFC found the Government had taken the property of upstream owners—rejecting many of the same defensive arguments asserted in the downstream case and leaving only damages to be determined. *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 146 Fed. Cl. 219 (2019) (Hon. Charles Lettow); Appx5621-5666. Final judgment has not yet been entered in the upstream case.

SUMMARY OF ARGUMENT

In holding that downstream landowners lack a cognizable property interest, the CFC decided a question of Texas law in a way no Texas court has ever done. The ruling conflicts with both basic tenets of Texas property law and Texas cases in which flooded landowners won damages for the taking of a flowage easement. *See*, *e.g.*, *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004); *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99 (Tex. 1961). It also conflicts with the ruling in the upstream cases, where Judge Lettow held that the landowners have a cognizable property interest under Texas law.

Property

To state a claim for a taking, Appellants must show that (1) they possess a property interest, and (2) the United States took the property for a public purpose. The property element presents a question of state law, whereas the takings element presents a question of federal law. The CFC confused the two elements.

The CFC compiled a list of cases where the Texas courts found no ***taking***, but it failed to cite any case where a Texas court held a flooded landowner lacked a ***property interest***. No such case exists; to the contrary, *Gragg* and *City of Graham* could not have upheld state-law takings claims if the CFC's position were sound. Those definitive rulings awarded damages to flooded landowners in exchange for a flowage easement being awarded as the *quid pro quo*.

Flowage easements are familiar in Texas law. They constitute a species of an easement appurtenant in which the dominant estate owner has the right to flood the land of the servient estate owner. Where, as here, a government entity impresses a flowage easement on a tract of land, Texas law recognizes that a stick has been removed from the landowner's bundle and conferred to the government. The CFC erred in mishandling this analysis, so this Court should reverse.

Although the CFC stopped at the property element, this Court should decide the takings element as well in this appeal.

Takings

The record establishes a taking of a flowage easement in two distinct ways. First, the Government took a flowage easement through its Water Control Manual, Section 7-05(b) of which asserts a unilateral right to use downstream properties for flood control purposes. Section 7-05(b) effects a permanent, categorical taking of an easement because it deprives the landowner of the right to exclude others from access to the property. *See United States v. Dickinson*, 331 U.S. 745, 748 (1947); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The right to exclude is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (citation omitted). Therefore, this Court should hold that the Government took a flowage easement as a matter of law.

Second, and independently, the Government effected a temporary taking of a flowage easement by physically flooding the affected properties. This was a taking under authorities as venerable as *Pumpelly v. Green Bay Co*., 80 U.S. 166 (1871), and as recent—and decisive—as *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012). It is frequently said that a temporary takings analysis requires fuller study than a categorical takings analysis, but the key facts are not disputed. Applying the *Arkansas Game* analysis, the Court may hold that the Government took a temporary flowage easement as a matter of law. At the very least, the Court should find fact issues and remand these cases for further development. *See*, *e.g*., *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1349-51 (Fed. Cir. 2020).

None of this means the Government cannot contest damages. It surely can. But damages and liability are distinct. On liability, the record conclusively proves that the landowners' properties were flooded—or their flooding was worsened—because the Government opened the floodgates in accordance with Section 7-05(b) of the Manual. This is not a case about a construction project that caused flooding or flooding that would have occurred in any event; the Government chose to flood these downstream properties as a matter of policy. There may be room for debate about how much this action increased the downstream flooding, but that is an issue of damages—an issue that the downstream property owners should be allowed to pursue on remand just as the upstream property owners are now doing in the CFC.

ARGUMENT

I. Standard of Review.

"Whether a taking has occurred is a question of law based on factual underpinnings." *Caquelin v. United States*, 959 F.3d 1360, 1366 (Fed. Cir. 2020). The CFC decided all the downstream cases on the ground that the property owners lacked a cognizable property interest, granting the Government's motion to dismiss and its motion for summary judgment. Appx2-3, Appx18-19.

With respect to the purely legal question of a cognizable property interest, both rulings are reviewed de novo. *Hardy v. United States*, 965 F.3d 1338, 1344 (Fed. Cir. 2020); *see also Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1349 (Fed. Cir. 2020) (summary judgment); *Piszel v. United States*, 833 F.3d 1366, 1373 (Fed. Cir. 2016) (motion to dismiss). The existence and scope of a property interest is a question of state law. *Hardy*, 965 F.3d at 1344; *Chicago Coating Co. v. United States*, 892 F.3d 1164, 1170 (Fed. Cir. 2018).

With respect to the elements of a taking, many of those elements are either legal conclusions or the relevant facts are not disputed; those issues may be decided in this appeal as a matter of law. To the extent there is any factual dispute, this Court resolves all factual disputes and reasonable inferences in favor of the non-movant. *See*, *e.g.*, *Anaheim Gardens*, 953 F.3d at 1355-57. The elements of a taking are matters of federal law governed by the Fifth Amendment.

II. Appellants Have Cognizable Property Interests.

"To state a claim for a taking, Appellants must establish: (1) that they had a cognizable property interest, and (2) that their property was taken by the United States for a public purpose." *Alimanestianu v. United States*, 888 F.3d 1374, 1380 (Fed. Cir. 2018).

The first element, a cognizable property interest, would seem easy to show. So held Judge Lettow in the case for the upstream landowners:

> Plaintiffs are owners of private properties not subject to flowage easements…. This description, *i.e.*, that plaintiffs are owners of private properties not subject to flowage easements, is in a nutshell a finding respecting the character of the land at issue. In other cases, the character of the land may be more complicated or may factor more heavily in the takings determination. What is most relevant to the takings inquiry here is that defendant had no legal right to cause flood waters to enter the properties.

Appx5648 & n.18. In his view, the upstream property owners "met their burden of establishing a valid property interest." Appx5649.

Those words from the upstream case could have been written just as validly for the downstream plaintiffs. There is no difference between the two groups as to the issue of property. Nevertheless, the CFC in the instant case held otherwise as to the downstream plaintiffs. The opinion for the downstream plaintiffs covered the issue in eight paragraphs, but those paragraphs revolve around the ***takings*** element, not the ***property*** element. Appx11-15. This Court should reverse.

A. Appellants have a cognizable property interest.

Appellants are owners of homes and businesses in the Houston suburbs. They purchased their land in fee simple, not subject to a formal flowage easement. Although Appellants still own the formal title to their lands, they were deprived of the right to exclude others from storing waters on their lands. The Government took one stick from their bundle of sticks: a flowage easement.

1. A flowage easement is a cognizable interest in property.

An easement "is a nonpossessory interest that authorizes its holder to use the property for only particular purposes." *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (citing Restatement (Third) of Property (Servitudes) § 1.2 cmt. d). An easement linked to a specific tract is an easement appurtenant. *Severance v. Patterson*, 370 S.W.3d 705, 721 (Tex. 2012); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203 (Tex. 1962). "It inheres in the land, concerns the premises, and pertains to its enjoyment, and passes with it." *Alley v. Carleton*, 29 Tex. 74, 74, 77 (1867). "Though incorporeal, it is an interest in land...." *Settegast v. Foley Bros. Dry Goods Co.*, 270 S.W. 1014, 1016 (Tex. 1925). Conveyances of such interests must be in writing. *Drye*, 364 S.W.2d at 203.[5]

[5] An easement tied to an individual is an easement in gross. *McWhorter v. City of Jacksonville*, 694 S.W.2d 182, 184 (Tex. App.—Tyler 1985, no writ). Easements in gross are rare in real life and disfavored in Texas law. *See Stuart v. Larrabee*, 14 S.W.2d 316, 319 (Tex. Civ. App.—Beaumont 1929, writ ref'd) ("Easements in gross are not favored...."). They are not at issue.

This appeal involves a particular species of easement appurtenant known as a flowage easement. A flowage easement gives the dominant-estate owner the right to flood a servient estate, such as when land near a dam is flooded to maintain the dam or to control the water level in a reservoir. *See Bennett v. Tarrant Cty. Water Control & Imp. Dist. No. One*, 894 S.W.2d 441, 447 (Tex. App.—Fort Worth 1995, writ denied) (because of its easement, "the Water District is permitted to flood the Landowners' property without incurring liability").

Flowage easements have a venerable pedigree in Texas law. *See*, *e.g.*, *Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447 (Tex. 1976) (ordering new trial in action seeking "to enlarge an existing flowage easement"); *Nat'l Resort Cmtys. v. Cain*, 526 S.W.2d 510, 511 (Tex. 1975) (observing that "the Lower Colorado River Authority had a flowage easement"); *Trinity River Auth. v. Chain*, 437 S.W.2d 887, 888 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (discussing effort to condemn "a flowage easement upon a 5.27 acre strip").

This is a mainstream rule. *See* Restatement (First) of Property § 450 cmt. e (1944) (illustrating an easement with the example of "an easement of flowage," whereby the easement owner builds a dam, "thereby flooding the land subject to" the easement); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 627 (1961) ("It is indisputable, as the Government acknowledges, that a flowage easement is 'property' within the meaning of the Fifth Amendment.").

The United States has purchased flowage easements in Texas. For example, it obtained such an easement relating to property near a lake outside San Antonio. *See Lakecroft, Ltd. v. Adams*, No. 03-14-00428-CV, 2014 WL 7466778, at *1 (Tex. App.—Austin Dec. 18, 2014, pet. denied) ("burdened by a flood-flowage easement that the developer had previously granted to the Corps of Engineers"). And it obtained another near a lake outside Dallas. *See Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 853 (5th Cir. 2014) ("the flowage easement gives the United States the right to flood, overflow, and submerge areas of the property that lie below 537 feet"). Flowage easements are familiar property interests under Texas law.

2. As a property interest, an easement is compensable if taken.

If a landowner already has an easement, the easement constitutes property that must be paid for if the government takes it. *See Magnolia Pipe Line Co. v. City of Tyler*, 348 S.W.2d 537, 540 (Tex. Civ. App.—Texarkana 1961, writ ref'd) ("Magnolia's pipe line easement is property in the constitutional sense.").[6]

[6] Since June 14, 1927, an outright ***refusal*** of review by the Texas Supreme Court means that "[t]he court of appeals' opinion in the case has the same precedential value as an opinion of the Supreme Court." Tex. R. App. P. 56.1(c). Such an outright refusal "carries the imprimatur of Texas Supreme Court precedent." *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 754 n.52 (Tex. 2006); *see also Evanston Ins. Co. v. Legacy of Life*, 645 F.3d 739, 747 n.3 (5th Cir. 2011) ("a decision in which the Texas Supreme Court refuses a writ of error is as binding as a decision of the Supreme Court itself"). No such adoption occurs when review is declined in other ways, whether in the post-1988 form of review being "denied" or the various pre-1988 forms, such as review being "refused no reversible error" (abbreviated "writ ref'd n.r.e."). This idiosyncratic notation practice was comprehensively surveyed in Ted Z. Robertson & James W. Paulsen, *Rethinking the Texas Writ of Error System*, 17 Tex. Tech L. Rev. 1 (1986).

This principle is firmly settled: "An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken." *Id.*; *see also Sinclair Pipe Line Co. v. State*, 322 S.W.2d 58, 60 (Tex. Civ. App.—Fort Worth 1959, no writ) ("Appellant's easement is property in the constitutional sense.").

If the landowner owns the land in fee simple but the government impresses a servitude on it, the resulting easement is real property whose acquisition warrants compensation. *See City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978); *DuPuy v. City of Waco*, 396 S.W.2d 103, 108-09 (Tex. 1965). The applicable rules do not change merely because the property is an easement and not the full fee. *Elliott v. Joseph*, 351 S.W.2d 879, 884 (Tex. 1961); *see also Brazos River Conserv. & Reclamation Dist. v. Adkisson,* 173 S.W.2d 294, 301 (Tex. Civ. App. —Eastland 1943, writ ref'd) ("we do not believe that the rules of law applicable to the condemnation of an easement in a leasehold estate differ in principle from the rules applicable to the condemnation of a fee").

3. Texas courts have recognized a flowage easement as a property interest possessed by a flooded landowner.

For purposes of this appeal, it is hard to find a more authoritative case than *Tarrant Regional Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004). That case upheld a recovery by landowners who alleged that a water district flooded their downstream ranch so seriously as to constitute the taking of a flowage easement.

In *Gragg*, a water district built and operated a reservoir on the Trinity River. *Tarrant Reg'l Water Dist. v. Gragg*, 43 S.W.3d 609 (Tex. App.—Waco 2001). The district conducted its operations "as designed," *id*. at 622, the result of which was the increased flooding of a ranch downstream. The trial court found a taking, granted the district a "'permanent and perpetual flowage easement,'" *id*. at 613, and awarded the landowners more than $10 million in damages. *Id*. at n.6.[7]

The court of appeals affirmed. It recounted findings of fact, *id.* at 621-22, then held that construction and operation of the reservoir "as designed" resulted in "the taking or damaging of [the landowners'] property." *Id.* at 623. It also rejected the district's contention that the landowners had failed to prove "the difference in the market value of the land with and without the easement." *Id.* at 623-24.

The Texas Supreme Court affirmed. After acknowledging that the ranch had sometimes flooded even before the existence of the reservoir, the court recited the findings that the flooding had changed dramatically after the reservoir was built, then upheld the findings. *Gragg*, 151 S.W.3d at 551, 554. The district assailed an instruction "that the District had permanently taken a flood easement." *Id*. at 558. But the court found no error in "instructing the jury that the District was entitled to a permanent right to flood or overflow" the land. *Id*.

[7] Appellants are concurrently filing a motion to take judicial notice of the trial court's judgment. This Court should take judicial notice of official court records. *See*, *e.g.*, Fed. R. Evid. 201; *Function Media, L.L.C. v. Google, Inc.*, 708 F.3d 1310, 1316 n.4 (Fed. Cir. 2013).

Likewise, when the district complained that the landowners' experts failed to use the word "easement" in valuing the land with and without a flowage easement, the court was unmoved. The court focused on the testimony's substance:

> But Gragg presented the testimony of two appraisers regarding the property's value both before and after it experienced the damage that the trial court found the reservoir's construction and operation caused. While the appraisers did not use the word "easement," the District inversely condemned the easement by causing that very damage. That the appraisers did not use the term "easement" does not mean that no evidence supports the compensation the jury awarded.

Id. Thus, *Gragg* confirms that flooded landowners, such as the Appellants here, have a cognizable property interest under Texas law.

For another example, consider *Brazos River Authority v. City of Graham*, 354 S.W.2d 99 (Tex. 1961). There, a city owned properties upstream of a dam built by the river authority. *Id.* at 101-02. Because of the dam's adverse impact on the river's behavior (and thus the city's properties), the trial court's judgment found a taking of three city properties, awarded damages to the city as the owner of those three properties, and granted a flowage easement to the river authority in return.[8] *Id.* at 100-101, 104, 106. That judgment is worth inspecting. It carefully described the three tracts by metes and bounds and ordered that the tracts should:

[8] The Texas Supreme Court maintains the appellate record for *City of Graham* on its website. *See* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=1a5cbe17-983b-4993-ae31-509d49703563&coa=cossup&DT=OTHER&MediaID=1775cf20-a0ac-4f6b-be41-8ed030df4735 Again, Appellants ask the Court to take judicial notice of this judgment. *See* n.7, *supra*.

> be, and said property is hereby, subjected to an easement or servitude in favor of the defendant BRAZOS RIVER AUTHORITY, so that defendant may, without further liability, flood, overflow, inundate or submerge said properties by reason of the construction, maintenance and operation of Possum Kingdom Dam with the crest of the spillway gates at elevation 1000 feet above mean sea level; and that the easement or servitude herein awarded become effective upon and only upon the payment by defendant of the damages herein awarded.

The court of appeals affirmed the judgment. *Brazos River Auth. v. City of Graham*, 335 S.W.2d 247 (Tex. Civ. App.—Fort Worth 1960).

The Texas Supreme Court affirmed in relevant part, upholding the judgment as to one property. *City of Graham*, 354 S.W.2d at 111. The court rebuffed the authority's view that "the dam constructing authority should be allowed to take" the city's property "for water storage purposes under the police power without paying compensation therefor." *Id.* at 105.

The court distinguished a 1926 case which had held that landowners do not own passing ***floodwaters***. *Id.* (citing *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926)). That discussion is significant because the CFC cited *Motl* for the expansive claim that all Texas lands are "owned subject to the pre-existing limits of the State's police power." Appx11. Far from reading *Motl* that way, the supreme court found it distinguishable and upheld the damages for the taking of the flowage easement. *See City of Graham*, 354 S.W.2d at 105 ("nor are we concerned with the rights of riparians in and to flood waters as was the case in *Motl v. Boyd*").

To sum up *City of Graham*, the government impressed a flowage easement on the city's property and the government had to pay for pulling that stick out of the owner's bundle: "A 'taking' under the constitutional provision is involved, and under our constitution the Authority is liable to pay just compensation therefor." *Id.* at 106.

To our knowledge, no Texas court has ever held that flooded landowners should lose for want of a cognizable property interest. That conclusion would require overruling decisions such as *Gragg* and *City of Graham*, which upheld damage awards for the governmental taking of flowage easements.

B. The existence of a property interest is confirmed by all the state court litigation now going on with respect to Harvey flooding.

If the CFC's view of Texas property law is correct, why has no one urged it in a Texas court? Since Tropical Storm Harvey, numerous state-law takings suits have been filed arising out of that event. Several cases have been appealed and some have even progressed to the Texas Supreme Court. Here is just a sample:

- *San Jacinto River Auth. v. Burney*, 570 S.W.3d 820, 832-38 (Tex. App.—Houston [1st Dist.] 2018, pet. granted) (Nos. 19-0400, -0401, -0402 in the Texas Supreme Court) (orally argued Oct. 6, 2020);
- *San Jacinto River Auth. v. Lewis*, 572 S.W.3d 838, 839 (Tex. App.—Houston [14th Dist.] 2019, no pet.);
- *San Jacinto River Auth. v. Bolt*, No. 01-18-00823-CV, 2019 WL 2458987 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. filed) (No. 19-1053 in the Texas Supreme Court);
- *San Jacinto River Auth. v. Beasley*, No. 14-18-00431-CV, 2019 WL 2939887 (Tex. App.—Houston [14th Dist.] July 9, 2019, no pet.).

Many of the Harvey suits in state court involve nuances of takings law under the state constitution, so distinctions can be found. But they prove a basic point: Texas courts are ***not*** dismissing these cases for lack of a protected property interest under Texas law. If the CFC were correct, these cases would not even exist.

C. The CFC's decision misanalyzes the property issue.

The CFC's opinion devotes eight paragraphs to the property interest issue. Those eight paragraphs cannot survive *de novo* review. Consider each in turn.

1. The closest that the CFC came to analyzing the property interest was in its initial framing of the issue. The court set up a strawman property interest, which it knocked down with minimal effort:

> 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. 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.

Appx11 (citations omitted). By framing the issue in this caricatured fashion rather than confronting the property interest alleged by Appellants (a flowage easement), the CFC misstated the real issue. To be clear, Appellants never alleged a right to "perfect flood control."

The CFC's "perfect flood control" construct has no place in the analysis and no pedigree in law. The phrase "perfect flood control" had appeared only once in American jurisprudence until this case. *See Higgins v. Monckton*, 28 Cal. App. 2d 723, 734, 83 P.2d 516, 522 (1938) ("The terms of the contracts plainly disclose that it was not the intention of the parties to impose upon the trustees the duty of maintaining perfect flood control...."). It has never appeared in Texas law.

The CFC's focus on "perfect flood control in the wake of an Act of God" improperly injects the ***takings*** element into the ***property*** element. This Court recognizes that those elements are distinct. *E.g.*, *Alimanestianu*, 888 F.3d at 1380. The former is a matter of federal law; the latter is a matter of state law.

2. Next, the CFC stated that under the Texas constitution, "property is owned subject to the pre-existing limits of the State's police power." Appx11. For support, the CFC cited *Motl* and *Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex. 1934). But those cases do not weaken the property rights that *Gragg* and *City of Graham* recognize. As noted above, *Motl* merely addresses ownership of floodwaters in a river. The owner of riverfront property does not own those surging ***waters***, but that does not limit the owner's property rights in the ***land***. *Lombardo* is even less relevant, as it merely upheld the validity of zoning against an argument that zoning should not be allowed to come to Texas in the wake of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

3. The CFC next said that Texas treats flooding as "a major issue within the state's borders" and the government "must endeavor to control it." Appx12. Relying again on *Motl*, the CFC observed that flooding is bad, and that floodwaters are an enemy to be battled with all the power and might that society can muster. These observations are all very well, but they do not bear on the property element. *Motl* should not be turned inside out to mean that, just because property owners do not own floodwaters, all who live near a waterway must let the government quarter floodwaters in their homes, garages, and office buildings without compensation. Crucially, the Texas Supreme Court does ***not*** read it that way. *See* p. 28, *supra*.

4. The CFC then transitioned into a series of observations about limitations on takings liability under the state constitution. For example, the CFC said that "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." Appx12. The CFC mischaracterized the government action at issue (namely, opening the floodgates), which the Corps concedes was ***not*** an "Act of God." Appx2132. It also changed the subject from whether there is a property interest to whether there is a taking.

5. The CFC prolonged this erroneous detour by observing that Texas courts have failed to find a taking for various reasons. For example: "'Proof of damage alone will not suffice to prove a taking.'" Appx13. Again, however, whether there was a taking under state law is distinct from whether there is a property interest.

The non sequitur reached its illogical conclusion when the CFC stated that these decisions not to find a taking constitute a "limitation on property rights." Appx13. The court added that "the Court does not believe that Texas law provides plaintiffs with a right to be free from flood waters." Appx13. That view cannot coexist with *Gragg* and *City of Graham*, which awarded damages to landowners precisely because floodwaters invaded their lands and took a flowage easement.

6. The CFC next observed that takings liability cannot be based on inaction, citing *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016), and emphasizing that governments are not insurers of private property. Appx13. But *Kerr* made a point of embracing liability for cases such as this one: "This is not a case where the government made a conscious decision to subject particular properties to inundation." *Id*. at 807. "In such cases, of course, the government must compensate owners who lose their land…." *Id*. *Kerr* did not overrule either *Gragg* or *City of Graham*; instead, it cited *Gragg* with approval. *Id*. at 806.

7. The CFC added that *Kerr* might bear on the causation analysis. Appx14. But causation has nothing to do with a property interest. The CFC then miscited a intermediate court case, *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876 (Tex. App.—Beaumont 1998, pet. denied), as one by "the Texas Supreme Court." Appx14. *Wickham* is not good law, *Burney*, 570 S.W.3d at 836, and its holding on "the 'taking' element," Appx14, is inapplicable and irrelevant to the property issue.

8. Last, the CFC returned to the flawed notion of Texas property having "pre-existing" limitations. Appx14. The court reasoned that by buying homes and businesses downstream from the Reservoirs, Appellants had acquired property "subject to the superior right" of the Corps to "operate according to its Manual." Appx15. There is no such *per se* barrier to a takings claim. As we will explain, *see* pp. 47-48, *infra*, the Supreme Court has rejected "the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987). It does not matter that the current owners acquired their properties after Section 7-05(b) took effect. *Id*. Likewise, this Court rejects the suggestion that "the background principles of a state's property law" include federal regulatory action. *Presault v. United States*, 100 F.3d 1525, 1539 (Fed. Cir. 1996). This issue is not a matter of property rights, but of takings analysis—and under federal law, the CFC's notion of a *per se* rule that limits Appellants' property rights is wrong.

This Court should reverse the judgment and remand for further proceedings. Because the CFC's judgment was based solely on the lack of a property interest, this Court may choose to remand without reaching any other issues. But the Court would do well to address the second part of the takings analysis in this appeal, resolving both the property interest and takings elements as a matter of law so only the issue of damages remains for remand.

III. Appellants Are Entitled to Judgment on the Takings Claim.

The Government raised a wide variety of arguments below in an attempt to deny that the conduct in question constituted a taking under the Fifth Amendment. Once the lower court's mistaken ruling on the question of property rights is reversed, none of these arguments provides an alternative basis to affirm. As a matter of law, the conduct in question constituted a taking under the Fifth Amendment.

Determining whether government-induced flooding constitutes a taking is governed by *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012), along with this Court's decision on remand, and *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003). The cases are generally congruent, but to the extent they diverge, *Arkansas Game* provides the most recent and authoritative statement of the controlling legal principles.

A. The elements of a taking are governed by federal law.

Whether a taking occurred is a question of federal law with factual predicates. *Ridge Line*, 346 F.3d at 1352; *see also St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1359 (Fed. Cir. 2018). The CFC did not actually decide this issue, but its discussion of property rights cited Texas cases about the analysis of a taking. Appx11-15. That legal discussion was flawed on its own terms, but more important, it was backwards. The existence of a taking *vel non* is a question of federal law. Here, Appellants have proved a taking on two independent theories.

B. The Manual takes a permanent, categorical flowage easement.

First, the Government took a flowage easement over Appellants' properties through its Water Control Manual, which asserts a unilateral right to use properties downstream from the Addicks and Barker Reservoirs for flood control purposes. *See* pp. 7-8, *supra*. Section 7-05(b) does not just create the possibility of flooding; it establishes a fixed, present policy that deprives the downstream property owners of their right to exclude the Government from using their land. This easement constitutes a permanent, categorical taking that requires just compensation.

Physical seizures of private property are at the heart of the Fifth Amendment, so "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" *Arkansas Game*, 568 U.S. at 31 (citation omitted). The Supreme Court describes such physical invasions as "[t]he paradigmatic taking requiring just compensation," *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 537 (2005), and "the classic taking." *Id*. at 539. Similarly, regulatory action that requires a property owner to suffer a permanent physical invasion of private property is a categorical taking. *Id*. at 538. This rule holds "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). When a categorical taking occurs, there is no need to balance any factors—the government must compensate the property owner. *Id*. at 1015, 1028.

It is settled that government appropriation of an easement falls within this test. *See Lingle*, 544 U.S. at 546-47; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan*, 483 U.S. at 831-32. As Justice Scalia put it, "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 831 (cleaned up). A permanent physical occupation occurs when the government declares a "permanent and continuous right" of access to private property—even if that right is not continuously exercised. *Id*. at 832.

Accordingly, this Court recognizes it is "well established that the government may not take an easement without just compensation," *Ridge Line*, 346 F.3d at 1352 (citing *United States v. Dickinson*, 331 U.S. 745, 748 (1947)), and by extension, "government actions may not impose upon a private landowner a flowage easement without just compensation." *Id*. at 1353 (citing *Dickinson*); *see also id.* at 1354 (citing *Nollan*); *St. Bernard Parish*, 887 F.3d at 1359 (citing *Ridge Line*). Last year, this Court reaffirmed the "categorical treatment of a coerced easement that impairs the landowner's right to exclude." *Caquelin v. United States*, 959 F.3d 1360, 1367 (Fed. Cir. 2020) (citing cases).

In many cases, the taking of a flowage easement is evident only after the fact, when physical events show that government action has imposed a public right to use private property by inundating it with water. This Court's decision in *Ridge Line* dealt with such a claim. But here, the Government put its easement in writing.

The Water Control Manual takes a permanent flowage easement by declaring a unilateral right of the Government to use downstream properties for flood control. Section 7-05(b), the provision for an "Induced Surcharge Flood Control Regulation," specifies that under certain conditions the floodgates will be opened and water will inundate downstream properties. *See* pp. 7-8, *supra*. The flooding in this case resulted from the Government's invocation of this regulation; it was not an accident. *See* pp. 9-10, *supra*. Indeed, the Government has confirmed that it intends to invoke the regulation again under similar circumstances in the future. *See* pp. 14-15, *supra*. Section 7-05(b) states that, when specified flood conditions exist, "reservoir releases will be made in accordance with the induced surcharge regulation schedules." Appx1023. It is substantively identical to the permanent flowage easements awarded in *Gragg* and *City of Graham*, which required the government to pay for the right to "flood," "overflow," and "inundate" private properties.

This regulation "requires an owner to suffer a permanent physical invasion of her property," *Lingle*, 544 U.S. at 538, by taking a "permanent and continuous right" of access to the downstream properties. *Nollan*, 483 U.S. at 832; *see also Ridge Line*, 346 F.3d at 1352 (citing *Nollan*). Such categorical takings are "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. Because the Manual effects a permanent categorical taking, there is no need for further analysis. The only remaining question is damages.

C. Independently, the intentional government-induced flooding was a temporary taking of a flowage easement.

Independently, the Court should hold that the Government temporarily took a flowage easement through the physical act of inundating Appellants' properties. This temporary taking theory turns on a series of factors. There is no real dispute about the underlying facts, so the Court can decide this theory as a matter of law. At the very least, however, this theory warrants a remand for full development.

For nearly 150 years, it has been settled that government-induced flooding may constitute a taking of private property. *See Arkansas Game*, 568 U.S. at 32 (citing *Pumpelly v. Green Bay Co*., 80 U.S. 166 (1871)). First, *Pumpelly* held that "where real estate is actually invaded by superinduced additions of water ... so as to effectually destroy or impair its usefulness, it is a taking, with the meaning of the Constitution." *Pumpelly*, 80 U.S. at 181. Subsequent cases extended the rule to recurring flooding, *Arkansas Game*, 568 U.S. at 32 (citing *United States v. Cress*, 243 U.S. 316 (1917)), as well as intermittent flooding. *United States v. Dickinson*, 331 U.S. 745, 747-51 (1947). This line of authority culminated in *Arkansas Game*, where the Supreme Court held that even a temporary flood could constitute a taking under certain circumstances: "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." 568 U.S. at 34.

Aside from the short list of categorical takings, "most takings claims turn on situation-specific factual inquiries," *id*. at 32, and flooding cases are no exception. *Id*. at 35-36. They turn on the "'particular circumstances of each case.'" *Id*. at 37 (citations omitted). Temporary takings may occur when the government takes "temporary possession" of private property or when "government action occurring outside the property [gives] rise to 'a direct and immediate interference with the enjoyment and use of the land.'" *Id*. at 33 (citations omitted).

In *Arkansas Game*, the Supreme Court outlined several factors that determine "the existence *vel non* of a compensable taking" in a temporary flood case. *Id.* at 38; *cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (temporary invasion cases "are subject to a more complex balancing process to determine whether they are a taking"). They include:

- time/duration of the property invasion;
- intentional or foreseeable result of authorized government action;
- character of the land and reasonable investment-backed expectations;
- severity of the interference.

Arkansas Game, 568 U.S. at 38-39; *compare Ridge Line*, 346 F.3d at 1355-57 (considering similar factors). On remand, this Court found a taking. *See Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1369-75 (Fed. Cir. 2013) ("*Arkansas Game II*"). Under that analysis, a temporary taking occurred here.

1. Time and duration.

First, when deciding whether a temporary taking occurred in a flooding case, "time is indeed a factor." *Arkansas Game*, 568 U.S. at 38. For the same reason a "temporary, unplanned occupation" of a building for less than a day is not a taking, *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 87-88, 93 (1969) (quoted in *Arkansas Game*), a very brief flooding event might not rise to the level of a taking. On the other hand, it is not necessary to demonstrate that the impacts of the flooding were as prolonged as in *Arkansas Game*, *see Arkansas Game II*, 736 F.3d at 1370, since the "'temptation to adopt what amount to *per se* rules in either direction must be resisted.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (citation omitted) (cited in *Arkansas Game*).

In this case, the government-induced flooding was not just a fleeting episode but lasted for several days—and in some cases, for two weeks. *See* p. 14, *supra*. Moreover, its consequences deprived the property owners of the use and enjoyment of their property for months. *Id*. Residential property owners were displaced from their homes for several months, and some were still unable to return nearly a year later. *Id*. Commercial property owners were unable to reopen their businesses or resume their normal operations for months. *Id*. Thus, this government-authorized flooding event "is properly viewed as having lasted" for the entire duration of these impacts. *Arkansas Game II*, 736 F.3d at 1370.

2. Severity.

Closely related to the duration of a flooding event is the question of severity. *See Arkansas Game*, 568 U.S. at 39 ("Severity of the interference figures in the calculus as well."). Severity is an important consideration; the imprecise boundary between a mere tort and a compensable taking is closely linked to whether an owner suffered a mere financial injury or "'a direct and immediate interference with the enjoyment and use of the land.'" *Id*. at 33 (citation omitted); *see also Ridge Line*, 346 F.3d at 1355-56 (courts must consider whether "the government's actions were sufficiently substantial to justify a takings remedy," an inquiry that turns in part on "the nature and magnitude of the government action" and whether those actions "preempt the owner's right to enjoy his property for an extended period of time").

In this case, the government-induced flooding caused severe interference with the property rights of the Appellants. Many properties suffered catastrophic damage, making them completely unusable for the purposes for which they were purchased. *See* p. 14, *supra*. In the harrowing hours after the government discharges began, many of the property owners had to be evacuated from their homes—several by boat. *Id.* at 12. Many residences suffered hundreds of thousands of dollars in damages—not to mention the loss of personal property. *Id*. at 14. One commercial owner estimates that repairing the flood damage will cost $17 million. *Id*. By any measure, this catastrophic interference with Appellants' property rights was severe.

In *Arkansas Game*, this Court found a "severe burden" based on findings that government-induced flooding "'so profoundly disrupted'" the property in question that its owner "'could no longer use those regions for their intended purposes.'" *Arkansas Game II*, 736 F.3d at 1370. Even with respect to areas that had a history of minor flooding, after the government acted "the flooding lasted for significantly longer periods of time and had much more serious consequences." *Id*. at 1374. Here, as in that case, the interference exceeded "a range that the property owner could have reasonably expected to experience in the natural course of things." *Id*. at 1375.

Indeed, during the period when Appellants' properties remained flooded (nearly two weeks for some properties) the property owners were completely ousted. *See* p. 14, *supra*. They were not just unable to use the land for its intended purpose, but were unable to access the land altogether during this period. There is no doubt that complete ouster is a taking. *Lingle*, 544 U.S. at 539.

Even after the waters receded, Appellants could not use their properties for their intended purposes (as homes and businesses) for months. *See* p. 14, *supra*. Just as the interference was severe in *Arkansas Game* because the property owner "had been deprived of the customary use" of its flooded property, *Arkansas Game*, 568 U.S. at 39, the devastation of Appellants' personal residences and businesses deprived them of the "customary use" of those properties. These facts are severe enough to effect a taking.

3. Intent and foreseeability.

Third, the Supreme Court instructs courts to consider "the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Arkansas Game*, 568 U.S. at 39. Previously, this Court had described this inquiry as an effort to distinguish a "predictable result" or "'direct, natural or probable result'" of authorized government action from a mere "'incidental or consequential injury.'" *Ridge Line*, 346 F.3d at 1355-56 (citation omitted). On remand in *Arkansas Game*, this Court found a taking because the government "could have foreseen" that its acts "would lead to substantial increased flooding" of the property. *Arkansas Game II*, 736 F.3d at 1373. The evidence in this case is infinitely stronger.

The government-induced flooding in this case was authorized and intentional. The Government made an intentional choice to open the floodgates as authorized by the Water Control Manual, and knew that it would flood the downstream properties. *See* pp. 8-10, *supra*. The Government had prepared "flow maps" that indicated—with a startling degree of precision—the properties that would be flooded if the floodgates were opened at various flow rates. *See* pp. 8-9, *supra*. During Harvey, the Government ordered an "induced surcharge" in accordance with its Manual and the authorization of its command hierarchy. *See* p. 9, *supra*. The officer who gave the fateful order to open the floodgates "understood" that by opening the gates, "there would potentially be impacts downstream." *See* p. 10, *supra*.

This knowledge was not abstract and generalized, but highly particularized. The Government had prepared detailed maps identifying the particular areas that would be flooded—and the extent of the flooding—by induced surcharge releases. *See* pp. 8-9, *supra*. Indeed, the Government could tell, based on those models, which properties would flood when the gates were opened at particular flow rates. *Id*. Accordingly, the flooding of Appellants' properties was not only foreseeable—it was foreseen, and it occurred exactly as predicted by the Government's models. *See* pp. 11-13, *supra*.

Accordingly, this is not a case requiring a nuanced analysis of foreseeability, in which the Court must distinguish "predictable" or "probable" results from mere "incidental and consequential" injuries. When it released water from the reservoirs, the Government made a deliberate, calculated choice to flood Appellants' properties. This invasion of private property was both "intended" and "the foreseeable result of authorized government action." *Arkansas Game*, 568 U.S. at 39.

4. Character of land and investment-backed expectations.

Finally, the Supreme Court instructs courts to consider "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use." *Arkansas Game*, 568 U.S. at 39 (citation omitted). In this respect, the Court found it significant in *Arkansas Game* that the land "had not been exposed to flooding comparable to [this event] in any other time span." *Id*.

Here, the "character of the land at issue" is largely comprised of residences, along with a number of commercial properties. The test property owners acquired their properties between 1976 and 2015, and none was aware of any prior flooding at the time of purchase. *See* p. 7, *supra*. Of 13 test properties, three were located in a 100-year flood zone, seven were located in a 500-year flood zone, and three were not located in any flood zone. *Id*. None had ever experienced prior flooding "comparable" to this event. *Arkansas Game*, 568 U.S. at 39; *see* pp. 7, 12, *supra*.

Appellants all acquired their property in reliance—explicitly or implicitly—on the justifiable expectation that the Government would not flood their properties. The "Normal Flood Control Regulation" for the Reservoirs provides that the gates will be closed during flood events "to prevent flooding below the dams." Appx1022; *see also* pp. 5-6, *supra*. For decades, the Government reiterated this core policy. *Id*. In 2009, the Government assessed the risk of upstream and downstream flooding in light of increased development in the area and stated that "[t]he dams are operated strictly to prevent downstream flooding; ***therefore, the gates remain shut even if pool levels increase and flood upstream properties***." Appx1154 (emphasis added). Indeed, in 2016—just one year before these events—the Government published unequivocal reassurance to citizens in the most widely-read newspaper in Houston: "***We will not open the dam to a point where it will cause flooding downstream***." Appx4342 (emphasis in original); *see also* p. 6, *supra*.

True, the Manual included an "Induced Surcharge Flood Control Regulation." But the Government did not publicize its intention to flood downstream properties under certain circumstances, and it had never used that procedure before this event. *See* pp. 7, 9, *supra*. Unsurprisingly, none of the test property plaintiffs testified to being aware of the Manual or the possibility that the Government might deliberately flood their properties by releasing water from the reservoirs. *See* p. 7, *supra*.

Furthermore, while reasonable investment-backed expectations must be based on the time the property was acquired—when none of the test property owners was aware of any prior flooding—subsequent events only reinforced the reasonableness of the owners' expectations. Prior to this event, nine of the test properties had never experienced any flooding, while four had experienced only minor flooding in the years after their properties were acquired, and it paled in comparison to the flooding caused by the induced surcharges. *See* p. 12, *supra*.

All of these property owners had reasonable, investment-backed expectations that their properties would not be flooded. Most of the properties had never flooded, and all of them "had not been exposed to flooding comparable" to this severe event. *Arkansas Game*, 568 U.S. at 39. This case fits neatly in the ambit of *Arkansas Game*, as a matter of law. At the very least, the reasonableness of the property owners' expectations under the record of this case is an evidentiary question for trial. *See*, *e.g.*, *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1349-51 (Fed. Cir. 2020).

In this respect, the fact that Appellants purchased property after the Reservoirs had been constructed and after the Manual had declared the Government's intention to flood downstream properties under certain circumstances does not bar the claim. The Supreme Court has squarely declared that owners' rights are not extinguished "because they acquired the land well after the [Government] had begun to implement its policy." *Nollan*, 483 U.S. at 833 n.2. That rule has been reaffirmed. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001). The Takings Clause forecloses "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe." *Id*. at 628. "A valid takings claim will not evaporate just because a purchaser took title after the law was enacted." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

To be sure, there are cases in which it is an "undisputed material fact" that a particular purchaser "was a sophisticated investor that purchased its property with knowledge about the effects" of prior laws. *Anaheim Gardens*, 953 F.3d at 1351. But this is not such a case. Appellants reasonably expected that the Government would not flood their land—and at the very least, there is a factual dispute for trial.[9]

[9] To reiterate a point made above, to the extent the Government has effected a categorical taking via the Manual, there is no need even to consider reasonable, investment-backed expectations. *See*, *e.g.*, *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (holding that in categorical takings cases, "'reasonable investment-backed expectations' are not a proper part of the analysis" of whether a taking occurred, but they may be relevant to damages); *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) ("The Government's attempt to read the concept of 'reasonable expectations' as used in regulatory takings law into the analysis of a physical occupation case ... is rejected categorically.").

D. None of the Government's arguments defeats the taking claim.

In the CFC, the Government raised a variety of collateral arguments in an attempt to avoid a constitutional taking. These arguments shared a common theme: they all originated from decisions involving materially different factual allegations, not cases in which the Government deliberately chose to flood private properties.

1. The recurrence test is no longer valid after *Arkansas Game.*

This Court's 2003 decision in *Ridge Line* arose from a construction project that caused massive increases in storm drainage. *Ridge Line*, 346 F.3d at 1350-51. In holding that a complaint about government-induced flooding could establish the taking of a flowage easement, this Court laid down a two-part test drawn from a line of decisions by the Court of Claims. *Id*. at 1355-57. As a strict matter of precedent, the Supreme Court's 2012 decision in *Arkansas Game* superseded that two-part test. Still, *Ridge Line* is largely consistent with *Arkansas Game*—with one exception.

With respect to the severity of the invasion (which this Court classed as the "nature and magnitude" of the event), *Ridge Line* said courts must consider whether the interference "was substantial and frequent enough to rise to the level of a taking" and cited cases for the proposition that "one or two" flooding events are insufficient. *Id*. at 1357. Under this test, only "repeated invasions" that are "inevitably recurring" would constitute a taking. *Id*. In the CFC, the Government relied on this passage. But it is no longer good law after *Arkansas Game.*

This Court reached that conclusion itself on remand in *Arkansas Game*, noting that it had relied on language in prior cases implying that a temporary flood "was not an 'inevitably recurring' event that would give rise to a takings remedy." *Arkansas Game II*, 736 F.3d at 1369. Rejecting such a bright-line recurrence rule, "[t]he Supreme Court reversed this court, holding that government-induced flooding can constitute a taking even it if is temporary in duration." *Id*.; *see also Quebedeaux v. United States*, 112 Fed. Cl. 317, 323-25 (2013) (recognizing that a single flood may constitute a taking under modern takings jurisprudence).

The Government cannot resurrect its discredited "one free flood" argument, which was just the sort of "blanket exemption" and "blanket exclusionary rule" that the Supreme Court has repudiated. *Arkansas Game*, 568 U.S. at 37.

2. The Government cannot recast the government act at issue, which is neither inaction nor construction of the Reservoirs but the affirmative act of "induced surcharges."

Takings liability arises only from affirmative government acts, not inaction, so the elements of a takings claim must be measured against the government action that is the subject of litigation. *See St. Bernard Parish*, 887 F.3d at 1360-62. Here, Appellants claim that the Government ***directly*** took private property through its "induced surcharges." This claim is very different from the familiar category of flooding cases alleging that the construction of a particular federal project had the ***indirect effect*** of taking private property.

Appreciating this distinction is vital to a fair evaluation of Appellants' claims (and to a frank assessment of the fallacies of the Government's defensive theories). Many flooding cases involve claims about the consequences of a government project that allegedly resulted in government-induced flooding—not a deliberate decision to flood specific properties, as in this case. The two types of claims are very different.

For example, *St. Bernard Parish* concerned the construction and operation of the Mississippi River-Gulf Outlet channel near New Orleans—with a particular focus on the failure to maintain or modify it. *Id*. at 1357-59. This Court held that the claims regarding failure to maintain or modify the channel involved government ***inaction***—not government ***action***—so they failed to state a viable takings claim. *Id*. at 1360-62. The lone theory of government action involved the construction and routine operation of the MRGO channel. *Id*. at 1362. That theory required a fact-specific analysis of "'what would have occurred' if the government had not acted." *Id*. (citation omitted). Citing similar cases dealing with the construction of flood-control projects, this Court considered what would have happened if the flood-control project had not been built. *Id*. at 1362-68. In this case, by contrast, "the Downstream plaintiffs do not allege that the general operation of the Reservoirs caused the flooding of their property .... Rather, plaintiffs downstream advance a takings theory predicated on the Corps' decision to open the flood gates and begin Induced Surcharge releases." Appx9. Thus, the "government action" at issue is the authorization of induced surcharges.

As another example, *United States v. Sponenbarger*, 308 U.S. 256 (1939), involved a flood-control project along the Mississippi River. The plaintiff feared that plans for the project would increase the intensity of flooding on her property—despite its long history of substantial flooding. *Id*. at 261-63. Rejecting that claim, the Court explained that "[t]he Government has not subjected respondent's land to any additional flooding, above what would occur if the Government had not acted." *Id*. at 266. Further, flood-control projects that confer greater benefits than burdens "take nothing from the landowner." *Id*. at 266-267.[10] The Court's analysis focused on the particular government action in question: the planned flood-control project.

Cases like *St. Bernard Parish* and *Sponenbarger* are inapposite to this case, which involves a deliberate governmental decision to inundate private property. Takings claims based on the design and construction of a flood-control project may require a comparison to conditions that would have existed without the project or may require a weighing of risks and benefits associated with the project as a whole, but that is not this case. Appellants acquired their properties after the Reservoirs were constructed and do not complain about the construction of the Reservoirs. This case concerns the "affirmative government act" of flooding private properties, *St. Bernard Parish*, 887 F.3d at 1361, so the takings analysis should be conducted with reference to that challenged government action.

[10] In addition, the objectionable parts of the planned project had been abandoned. *Id*. at 267-68.

This distinction has particular significance for the analysis of causation. Because "[c]ausation requires a showing of 'what would have occurred' if the government had not acted," *id.* at 1362 (citation omitted), the question in a case about induced surcharges is "what would have occurred" but for those surcharges. "In order to establish causation" in such a case, "a plaintiff must show that in the ordinary course of events, absent government action [*i.e.*, the induced surcharges], plaintiffs would not have suffered the injury." *Id*.

By this straightforward measure, causation is established as a matter of law. All the experts agree that eight of the 13 test properties would not have flooded but for the surcharges, and four others would have suffered substantially less flooding. *See* pp. 11-13, *supra*. There is some factual dispute about ***which*** properties would not have flooded at all and ***how much*** less certain properties would have flooded, but even the Government's expert's data reveals that all the test properties would have been better off with the gates closed. *Compare* Appx2315 *with* Appx2726; *see also* Appx2828-2830, Appx2804-2811.

In sum, the experts differed in their analysis of how much better off some of the properties would have been. But that is an issue of damages, not causation. Thus, under the correct causation framework, Appellants established causation as a matter of law. The Government is free to contest damages or raise other defenses, but causation should not be open to serious dispute.

The Government cannot avoid this direct causal connection by comparing the flooding caused by its induced surcharges to a but-for world without the floodgates. As explained, such analysis may be sound for cases in which the government action in question is the construction of a particular project. *See*, *e.g.*, *St. Bernard Parish*, 887 F.3d at 1362-68. Many of the flooding cases fit within this paradigm. *See*, *e.g.*, *Sponenbarger*, 308 U.S. at 265-66 (comparing flood-control project to preexisting flood protection); *Sanguinetti v. United States*, 264 U.S. 146, 147 (1924) (comparing effects of canal to flooding prior to the canal); *United States v. Archer*, 241 U.S. 119, 132 (1916) (comparing effects of dike to "what would have occurred if the dike had not been constructed"). But this case is completely different.

The Government can hardly pretend otherwise. In *St. Bernard Parish* itself, the Government argued that the case "bears no resemblance" to a case where the alleged taking resulted from "the government's deliberate release of waters from a dam as an integral part of its authorized operations." Principal Br. of United States, *St. Bernard Parish Gov't v. United States*, 2016 WL 7321489 at *2-3 (Dec. 9, 2016). "The government obviously did not intend to flood plaintiffs' properties, and the inundation cannot plausibly be regarded as part of the authorized and intended plan" for the government action in question. *Id*. at *2. Here, by contrast, the Government ***did*** deliberately release waters, ***did*** act pursuant to an authorized and intended plan, and ***did*** intend to flood downstream properties. These differences cannot be ignored.

Because of the nature of this government action, this is not a case involving both an action "that creates a risk of flooding and subsequent government action designed to mitigate that risk." *St. Bernard Parish*, 887 F.3d at 1367. After ordering the induced surcharges, the Government took no actions that "mitigate[d] the type of adverse impact that is alleged to be a taking" (*i.e.*, the induced surcharges). *Id*. Because downstream property owners did not contemplate that the Government would open the floodgates and inundate their properties, *see* pp. 5-7, 46-48, *supra*, the Government's prior risk-reducing activities are irrelevant to but-for causation. *St. Bernard Parish*, 887 F.3d at 1367 n.14; *John B. Hardwicke Co. v. United States*, 467 F.2d 488, 490-91 (Ct. Cl. 1972); *see also Ideker Farms, Inc. v. United States*, 142 Fed. Cl. 222, 231-33 (2019); *Ideker Farms, Inc. v. United States*, 146 Fed. Cl. 413, 420-23 (2020). Denying but-for causation in this case would be cruel joke.

3. There is no "police power" exception to the Takings Clause.

It is a cardinal rule that the Takings Clause is "'designed to bar 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.'" *Arkansas Game*, 568 U.S. at 31 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Flooding cases are subject to the same underlying principles as all takings cases. *See id.* at 35-37. Thus, the Government "may well be right that it is a good idea" to flood Appellants' land, "but if it wants an easement . . . it must pay for it." *Nollan*, 483 U.S. at 841-42.

This self-evident proposition is important because, in the proceedings below, the Government claimed that it could defeat a taking by invoking its police powers. The CFC seemingly agreed. Appx11-12. But by definition, "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Lingle*, 544 U.S. at 543. By its terms, the Fifth Amendment applies to property "taken for public use," requiring compensation "'in the event of *otherwise proper interference* amounting to a taking.'" *Id*. (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987)).

Thus, the Government cannot avoid its duty to compensate property owners by arguing that it was "right" to take their private property. The Supreme Court rejected such a "curious and unsatisfactory result" in its earliest flood takings case, stating that "[s]uch a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good." *Pumpelly*, 80 U.S. at 177-78. This result, the Court held, would transform the Constitution into "an instrument of oppression rather than protection to individual rights." *Id*. at 179.

In fact, the Government's "police powers" argument requires differentiation between the two types of takings at issue. It is immaterial to one theory and it is an anachronistic approach to the other.

First, insofar as the Government has taken a permanent, categorical easement, it must pay for it "no matter how weighty the asserted 'public interests' involved." *Lucas*, 505 U.S. at 1028; *see also Loretto*, 458 U.S. at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."). Because an easement is one form of "permanent physical occupation," a flowage easement is subject to this *per se* rule. *Lingle*, 544 U.S. at 546-47; *Nollan*, 483 U.S. at 831-32; *see also* pp. 36-38, *supra*.

Second, the Government's "police powers" argument is an anachronism. Grounded in ancient cases (primarily nineteenth-century cases dealing with fires), the argument traces back to early attempts to deal with the subject that we now call "regulatory takings." Until *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (quoted citations omitted); *see also Lingle*, 544 U.S. at 537 (same). In *Mahon*, Justice Holmes recognized that allowing unlimited regulation of property "under the police power" would evade the Takings Clause. *Lucas*, 505 U.S. at 1014. From that basic insight, the Court embarked on a century of "regulatory takings" jurisprudence that is defined by "'essentially ad hoc, factual inquiries.'" *Id*. at 1015 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

The old cases that animate the Government's "police powers" argument were "the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power." *Id.* at 1022-23; *see also id*. at 1026 (same). The Court now evaluates exercises of the police power with its regulatory takings factors—not *per se* rules. *See Lingle*, 544 U.S. at 537-40. And it is no accident that the regulatory takings factors overlap substantially with the four factors outlined in *Arkansas Game* for claims involving temporary flooding. *Compare id. with Arkansas Game*, 568 U.S. at 38-39.

In short, to the extent the Court finds it proper to analyze this case under *Arkansas Game* (as opposed to finding a permanent, categorical flowage easement based on the Manual), arguments about the validity of the Government's decision to exercise its police powers are not freestanding barriers to the finding of a taking; they are simply considerations to be weighed among the *Arkansas Game* factors. There is no "police powers" exception to the Takings Clause.[11]

[11] Further, the Government's "police powers" cases are largely rooted in the necessity defense, which applies "only when there is an imminent danger and an actual emergency giving rise to actual necessity." *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1378 (Fed. Cir. 2013). Here, the induced surcharges were planned operations to maximize the Reservoirs' storage capacity and protect their integrity, not unplanned reactions to "imminent danger" or "actual emergency." The dams were never at risk and no emergency was declared. *See* p. 9, *supra*; Appx1419-1421.

4. Neither the burden of financial responsibility nor the benefit of governmental aid is material to the Takings Clause.

In the CFC, the Government warned that a judgment for the property owners would force the Government to incur a significant financial liability, and took solace in the notion that the property owners had been compensated through disaster relief, federal loans, etc. None of these arguments is legally material.

First, it is no defense to the constitutional right to receive "just compensation" for the Government to complain that it would be expensive to honor the Constitution. The whole point of the Takings Clause is "'to bar 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.'" *Arkansas Game*, 568 U.S. at 31 (citation omitted). Indeed, the financial loss is fixed—the only question is whether that burden should fall solely on Appellants or "be spread among taxpayers." *Lingle*, 544 U.S. at 543. *Arkansas Game* dismissed a similarly exaggerated warning about financial liability for flood control projects, reasoning that adherence to a case-specific takings inquiry "augurs no deluge of takings liability." 568 U.S. at 36-37. This case is no different.

Second, it makes no difference whether the property owners reclaimed their land or received federal flood relief; just compensation is owed for "'the period during which the taking was effective.'" *Id*. at 33 (citation omitted); *see also id*. at 40 n.2 (citing *United States v. Dickinson*, 331 U.S. 745, 751 (1947)) (same); *Ridge Line*, 346 F.3d at 1353-54 (same). The Fifth Amendment offers no discounts.

5. The Flood Control Act does not trump the Takings Clause.

Finally, the CFC's opinion included a brief discussion of Section 702c of the Flood Control Act of 1928 ("FCA"), which 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; Appx16-17. That reference cannot fairly be understood as a separate basis for decision. In an abundance of caution, however, Appellants emphasize that the FCA is no barrier to a takings claim.

Obviously, Congress is powerless to exempt any category of takings claims from the Fifth Amendment. This proposition is settled and self-evident:

> Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.

Scranton v. Wheeler, 179 U.S. 141, 153 (1900).

The FCA is not an exemption for constitutional takings. In *Arkansas Game*, Justice Scalia dismissed such a suggestion at oral argument in withering terms, pointing out that Congress "can't overrule the Takings Clause."[12] The argument has not improved. If Appellants have a valid takings claim, the FCA is neither a barrier to the claim nor a background principle that limits their property rights.

[12] https://www.oyez.org/cases/2012/11-597 (40:47-41:30) (last visited February 20, 2021).

CONCLUSION

The Court should reverse the judgment of the CFC, enter judgment for the Appellants on their takings claim, and remand for further proceedings on damages. Alternatively, the Court should reverse and remand for further proceedings.

Respectfully submitted,

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