NO. 21-1131

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

v.

UNITED STATES,
Defendant-Appellee

On Appeal From the United States Court of Federal Claims
Sub-Master Docket No. 17-9002L & Case Nos. 1:18-CV-708; 1:18-CV-1652L; 1:19-CV-588; 1:18-CV-707; 1-17-CV-1191LAS

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS IN CONSOLIDATED CASE NOS. 21-1492, 21-1494, 21-1499, 21-1513, & 21-1529

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTEREST

Federal Circuit Rule 28(a)(1) requires a Certificate of Interest be filed with every principal brief. On January 19, 2021, the Plaintiffs-Appellants in Nos. 21-1492, 21-1494, 21-1499, 21-1513, and 21-1529 filed a Certificate of Interest. (Doc. No. 14). Because this filing is 14 pages long, instead of reproducing it here, the aforementioned Certificate of Interest is attached to the Addendum to this Brief at A97-A110.

/s/ Bryant S. Banes
Counsel of Record for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATUTES:

OTHER AUTHORITIES:

RULES:

Constitutional Provisions

STATEMENT OF RELATED CASES UNDER FED. CIR. R. 47.5

Attached to each Certificate of Interest filed by Plaintiffs-Appellants in Nos. 21-1492, 21-1494, 21-1499, and 21-1513 (Doc. Nos. 16–19), and by Plaintiffs-Appellants No. 21-1529 (Doc. No. 20) is a Statement of Related Cases as defined in Fed. Cir. R. 47.5. [Addendum A22-A96]. Plaintiffs-Appellants in Nos. 21-1492, 21-1494, 21-1499, 21-1513, and 21-1529 incorporate the Statement of Related Cases by reference here.

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

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. Appellants move, pursuant to F.R.A.P. Rule 34(a), to place this case on the argument calendar. This case meets the standards in Rule 34(a)(2) for oral argument, in that (a) this appeal is not frivolous, (b) the dispositive issues raised in this appeal have not been recently and authoritatively decided, and (c) as described in the accompanying memorandum, the decisional process would be significantly aided by oral argument.

JURISDICTIONAL STATEMENT

1. **Subject Matter Jurisdiction in the Court of Federal Claims.** The United States Court of Federal Claims ("CFC") had subject matter jurisdiction over Appellants' suit, as the claims are Takings claims, brought pursuant to the Fifth Amendment of the United States Constitution and 28 U.S.C. § 1491. *See* U.S. CONST. amend. V; 28 U.S.C. § 1491. Appx1.

2. **Jurisdiction in the Court of Appeals.** On September 9, 2020, the CFC directed that final judgment be entered in the cases underlying Nos. 21-1492, 21-1494, 21-1499, and 21-1513. Appx22-23. On November 4, 2020, Appellants filed timely Notices of Appeal. SAppx2788; SAppx2802; SAppx2813; SAppx2831; SAppx3346. FED. R. APP. P. 4(a)(1)(B). On December 29, 2020, this Honorable Court consolidated all Downstream appeals under 21-1131, *Milton v. United States*. (No. 21-1131 Doc. 10). This Honorable Court has original appellate jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF ISSUES

1. Whether the trial court committed reversible error as a matter of law in its opinion by supporting its decision with a misstatement of key facts and misinterpretation of relevant law?

2. Whether the trial court committed reversible, prejudicial error in holding that Appellants' damage was not caused by the Government?

3. Whether the trial court committed reversible, prejudicial error by concluding that all downstream property owners whose properties were flooded by the Federal 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?

4. Whether Appellants are entitled to a judgment as a matter of law because the Government took a flowage easement from the affected downstream property owners either (a) permanently and categorially 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

This case arises from a Fifth Amendment Takings case against the United States Government ("Government" or "Appellee"). Appx1. In deciding whether to release the dams, the Government was faced with its own "trolley problem."[1] Rather than asking what *moral* responsibility the Government has, instead, the question becomes: Does the Government have a *constitutional* responsibility to justly compensate individuals and businesses for their private property it sacrificed to protect other neighborhoods? The Fifth Amendment directs that the answer is yes.

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[1] The "trolley problem" is a thought experiment in the field of ethics, particularly moral philosophy. Christopher W. Bauman et al., *Revisiting External Validity: Concerns About Trolley Problems and Other Sacrificial Dilemmas in Moral Psychology*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 536, 538 (2014). According to the problem, the trolley driver sees a group of workers on the track ahead. Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395 (1985) (citation omitted). The driver cannot stop the trolley and the workers cannot get off the track or to safety. *Id.* If the driver does nothing, the driver will kill the group of workers ahead. *Id.* The driver is presented with one alternative—divert the trolley onto the sidetrack, where there is only one worker. *Id.* The problem asks: to what extent is the driver morally responsible for the death of one worker if it decides to divert on to the sidetrack to spare the lives of the group? *Id.*

Here, the Government faced a similar problem. *See* Jeremy Patashnik, *The Trolley Problem of Climate Change: Should Government Face Takings Liability If Adaptive Strategies Cause Property Damage?*, 119 COLUM. L. REV. 1273, 1289 & n.6 (2019) (drawing comparison between the Corps' decision to open floodgates and the trolley problem). If the Government did nothing, the Government feared harm to Downtown Houston, the Houston Ship Channel, and other neighborhoods. Rather than a single worker on the sidetrack like in the problem, the "sidetrack" here contains a group of thousands of unsuspecting individuals and businesses not in imminent danger of massive or permanent damage from Harvey or flooding until the Government released the dams.

This case concerns the intentional and direct Government-induced flooding of properties downstream of the Addicks and Barker Reservoirs ("Reservoirs" or "dams"), in Houston, Texas during Tropical Storm Harvey ("Harvey"). Plaintiffs are 136 individuals and businesses located downstream of the Reservoirs that suffered destruction to their homes and properties after the Government released massive volumes of water from the Reservoirs. SAppx2785-2786; SAppx2795-2796; SAppx2809-2810; SAppx2823-2828; SAppx2883-2894; SAppx2975. The Government-induced flooding deprived homeowners and businesses of the normal use and enjoyment of their property for months and caused massive financial losses.

I. Harvey & Reservoir Release Overview

Harvey made landfall on the Texas Gulf Coast on August 25, 2017 as a Category 4 Hurricane. Appx4144. Within twelve hours after landfall, the storm weakened into a Tropical Storm, stalling over Houston for the next four days. Appx4144.

Thousands had been flooded or damaged by Harvey's downpour. However, by that point, many home and business owners along Buffalo Bayou—downstream of the Reservoirs—did not experience flooding and

were not in a known flood plain. They believed they were safe once the storm had begun to pass. Some experienced minor flooding that had receded, but those home and business owners also believed they would begin the recovery process. Appx896. They were wrong. What Harvey had brought would then be superseded by Government action.

On August 29, 2017, the United States Army Corps of Engineers (herein referred to as "the Corps" and used interchangeably with "Government") announced it had made the "difficult" decision to increase "unexpected controlled releases" from the Reservoirs it had started the day before to full discharge in order to maintain control of the dams. Appx2162. By the Government's admission, the objective of its action was to protect Downtown Houston, the Houston Ship Channel, other neighborhoods, and the integrity of the Reservoirs. Appx1414-1416; Appx2159; Appx4151. The Corps did this even though it had no flowage easement over the property of those downstream. The Corps' decision to take control of the flowage easements over private homes and business properties and make "unexpected controlled releases" was knowing and intentional and, at the time it was made, it was foreseeable that the Corps was sacrificing and condemning hundreds or even thousands of

homes along Buffalo Bayou, including the real property, contents, and future value. Appx2162.

The water released by the Corps fed into Buffalo Bayou at 6,000 cubic feet per second ("cfs") at first and then after about a day, at 13,000 cfs or more. Appx2223; Appx2237. This directly impacted areas around Buffalo Bayou from Highway 6 to Interstate 610 (Texas), raising water levels two feet or more in less than a day and directly causing additional flooding for thousands more homes and businesses, including the Plaintiffs-Appellants in these appeals.

Many of the properties flooded by the Corps' action remained so for days, and for some, weeks, substantially destroying the value of the property or its contents and additionally leaving homes and businesses inaccessible. By the end of the first week of this period, most homes and businesses experiencing any water damage were a total loss due to mold and other causes.

The Corps' decision to release the dams also caused increased sediment and altered the course of Buffalo Bayou in a manner that rendered future flooding more likely to recur in areas not previously subject to flooding.

The decisions made by the Corps or their impacts could not have been anticipated or mitigated by the affected homeowners and businesses, as few were in a flood plain and few had experienced flooding in recent memory. Additionally, many of the homes were without power when the Corps made their decision to release the dams, so Appellants had no idea what was coming or why water was flooding their streets and then homes after the rain had ceased. Appx2735; Appx4193.

II. The Reservoirs & the Corps—History and Responsibility

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; Appx1019-1020; Appx 1091-1093; Appx2165; Appx2129; Appx1141. Together, the Addicks Reservoir and the Barker Reservoir hold 133.5 billion gallons of water. Appx1162-1163.

The Corps has the primary responsibility for land management, management and operation of the dams, and the course of water flow. Appx1238. In operating the dams, the Corps follows a Water Control Manual (also referred to as "the Manual"). Section 7-05(a) of the Manual directs that the dam floodgates should remain closed during flood events until releases can be made without causing downstream flooding.

Appx1022. The Corps' standard practice is to impound stormwater entering the Reservoirs, closing the gates on both Reservoirs when "1 inch of rainfall occurs over the watershed below the Reservoirs in 24 hours or less, or when flooding is predicted downstream." Appx1022. The dam operator is instructed to keep the gates closed and under surveillance "as long as necessary to prevent flooding below the dams." Appx1022. Before Harvey, the Corps evaluated upstream and downstream risks and determined that the Reservoirs' operation should be focused on preventing downstream flooding, even at the risk of upstream flooding, stating:

> 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. For decades, the Corps stated that it would limit the discharge rate to prevent flooding downstream. Appx4012; Appx3719; Appx3673-3674; Appx3681; Appx4127.

In 1992, easements were recommended to the Government to be purchased, but they never were. Appx930; Appx3680-3681; Appx3197;

Appx3207; Appx3680-3681. Specifically, in the Corps' "Addicks and Barker Reservoirs Special Report on Flooding," the following recommendation was made: "The Government could purchase flowage easements as a means to avoid damage claims in the event of flooding." Appx3680. In 1948, there was an uncontrolled discharge from the Reservoirs at 7,900 cfs. Appx3672. Due to "damage downstream," two additional gates were added to the Reservoirs in 1963. Appx3672.

In May 1996, the Harris County[2] Flood Control District ("HCFCD") issued a report that predicted the devastation caused by Harvey, stating "it no longer takes an extreme storm. Just a wet period . . . enough to 'ratchet' reservoir levels upward and severely flood private properties." Appx2875. *See also* HCFCD Planning Department, Katy Freeway Corridor Flood Control Study (May 1996) , https://www.documentcloud.org/documents/4328781-Katy-Freeway-Corridor-Flood-Control-Study.html (emphasizing precise flood risks, namely, the Corps' "restrictive gate operations" that would lead to an "inability to drain the [Reservoirs] in an efficient manner.") (herein cited

[2] Harris County, Texas encompasses the city of Houston and over thirty surrounding cities.

as "HCFCD Report"). The report concluded that the "Addicks and Barker reservoirs Buffalo Bayou flood control system has never been constructed to completion, and because of this, Buffalo Bayou lacks adequate overfall capacity to convey unregulated reservoir discharges." Appx2875. *See also* HCFCD Report, at p. 15. The Corps participated in this study and knew about the report and this knowledge did not affect its recommendations. Appx2875.

In 2016, the Corps knew the dams—as they were currently constructed and maintained, and assuming a "wet period" or prolonged storm—would require the release of water of the magnitude experience in August 2017 and did little or nothing to warn anyone. In its October 29, 2014 and March 9, 2016 public presentations on "dam safety," the Corps stated, "Houston is NOT in imminent danger of flooding from Barker and Addicks" and that "[d]am failure is not likely." SAppx2693; SAppx2932-3965. In fact, the dams were not at risk of failure during Harvey. Appx631. In the Government's August 28, 2017 press release issued the day it began releasing the impounded water, the Government stated: "The Corps is confident that the structures continue to perform as they were designed to do." Appx631.

Prior flooding from 2015 forward and maintenance issues for the dams had put the Corps on notice that such statements were suspect at best, but the Corps continued to make these statements in 2016 regardless. In fact, in 2016 after normal dam operations flooded upstream communities, the Corps stated in an article in the *Houston Chronicle*: "We will not open the dam to a point where it will cause flooding downstream."[3] Appx4341-4342. These statements proved false during Harvey.

In 2016, the Corps knew downstream properties along Buffalo Bayou would flood at flow rates greater than 3,000 cfs:

> 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

[3] Importantly, what stands out in the record, is that the Corps had the ability to control the release of the water by controlling the amount of cfs released. Release of water from the Reservoirs was not a "full-blast or nothing" release. The release could have been performed at 4,000 cfs or less or released in such a way so as not to flood Downstream properties. Appx2223; Appx2237; Appx4148; Appx4341-4342.

> reservoirs, measured along the streambed) and Chimney Rock Road (approximately 16 miles downstream of the reservoirs).

Appx1255. During Harvey, the Corps could use these models to foresee the extent of the downstream inundation that would likely occur, down to the intersection and block. Appx1425-1429; Appx2162. Indeed, on September 3, 2017 Michael Kauffman, in Hydrology and Hydraulics at the Corps, wrote in an e-mail to other Corps personnel: "If we go over 4000 cfs in Buffalo Bayou we will have water in people's homes. 4000 cfs puts it in their yards, but living spaces stay dry." Appx4148. When the Corps opened the floodgates, it began its release at 6,000 cfs and then ramped up release to 13,000 cfs and more. Appx2223; Appx2237.

III. The Appellants & The Reservoir Release

Appellants here, Plaintiffs in the case below, are 136 property owners—mostly residential property owners, one residential leaseholder, and a few are commercial property owners. SAppx2785-2786; SAppx2795-2796; SAppx2809-2810; SAppx2823-2828; SAppx2883-2894. Like most Houstonians, Appellants knew about the Reservoirs, but none were aware at the time of the purchase or lease of their properties that the Government would deliberately release water from the Reservoir

such that their properties would be inundated or that they would be deprived of use of their properties for a substantial period of time. Appx1506-1576. Likewise, most Appellants were not aware of prior flooding to their properties at the time of purchase. Appx1471-1505.

No property owner knew about the Manual. None of the property owners knew about Section 7-05(b) of the Manual, which instructs the Corps to open the floodgates and inundate downstream properties under certain conditions, namely, to conduct induced surcharges when pool elevation and rate of pool elevation rise and reach certain points. Appx1023. The Corps, on the other hand, knew what those induced surcharges meant. For decades, the Corps had modeled flow rates in the downstream Buffalo Bayou channel. Appx997-999. From 2011 to 2014, the Corps created flow maps that modeled downstream inundation and different flow rates. Appx1109-1115. The Corps knew its inundated surcharges would flood downstream properties. Appx1425-29; Appx2162.

Even though it is a standard, non-emergency procedure, the Corps had never done an induced surcharge. There is an Emergency Action Plan, but no emergency has ever been declared for the Reservoirs.

Appx1289-1290; Appx1421; Appx2133. Even in Harvey, the Reservoirs "perform[ed] as expected with no significant problems." Appx2136; Appx1419. The dams did not fail, nor were they in danger of breaking. Appx631. In an August 28, 2017 press release (the day the floodgates were opened), the Corps wrote that it was "confident that the structures continue to perform as they were designed to do." Appx631. Corp representative Robert Thomas testified in his deposition that a dam emergency was never declared, nor were the dams in danger of breaking. Appx1420-1421. In its brief to this Court in *St. Bernard Parish*, the Government attempted to distinguish that case from *Arkansas Game & Fish*, stating: "That case arose out of the government's deliberate release of waters from a dam as an integral part of its authorized operations . . . ," which is exactly what occurred here. Appx3049; Appx3051-3052.

By seizing upon the Government's artificial construct of "normal flood operations," as opposed to the Government's prior position of "authorized operations," the Court has created a world where the Government can escape liability by editing its Manual, long after a project was instituted and define any type of induced flooding or taking for a flowage easement on private property as "not normal." The word

"normal" in the context of Takings via induced flooding is then rendered meaningless because such Takings are never considered "normal" and an incorrect, elevated standard is created. Put simply, it allows the Government to use semantics to change a taking into a tort, simply by changing the Constitutional standard of "authorized" and replace it with "normal" in a bald attempt to escape liability.

Nevertheless, as 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 for both Reservoirs, so induced surcharges were required by Section 7-05(b) of the Manual. Appx2131; Appx2155-2156; Appx2164; Appx2167.

Colonel Lars Zetterstrom ("Col. Zetterstrom"), commander of the Galveston District of the Corps (which operates the Reservoirs), gave the order to open the floodgates shortly after midnight on August 28. Appx2160; Appx2164, Appx2223. Col. Zetterstrom "briefed [his] commander" and "made him aware of the necessary actions that we were going to take." Appx2164. The Corps adhered strictly to the Manual, which has "never been disregarded." Appx2135; Appx2164.

Section 7-05(b) mandates "induced surcharges" to optimize storage capacity and ensure the structural stability of the dams, assuring that the Reservoirs fulfill their function of protecting Downtown Houston and the Houston Ship Channel. Appx2159; Appx1414-16; Appx4151. As a representative of the Corps later put it, following Section 7-05(b) was "difficult" but necessary "so that we could achieve a balance that was necessary to continue operating, protect as many homes as we could downstream, while protecting the integrity of the dam." Appx4153.

Adherence to Section 7-05(b) also reduced flooding impacts on communities around the Reservoirs, which otherwise would have suffered much worse flooding. Appx2157-58; Appx2162; Appx2732; Appx4168; Appx4182-83.

Importantly, the Corps knew its acts were selecting one class of people to bear the brunt of damage for others by "making people hurt downstream," but the Corps felt it had an obligation "to ensure the integrity of the dam and operate the reservoirs for the entire population." Appx2128. Based on its prior modeling, the Corps was aware that its decision would inundate the downstream properties. Appx2135. Col. 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 meaningful advance warning of the induced surcharges; indeed, even local officials were not given advance notice. Appx2735, Appx4193. Appellants had no idea what was coming.

The Corps' implementation of Section 7-05(b) and the induced surcharges created the first of 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. 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. In a harrowing experience shared by countless downstream property owners, people had to be evacuated from their properties—many by boat. Appx1674-1694; Appx4195. 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 induced surcharge releases, escalating to several feet afterward. Appx2038-2039.

This massive flooding was a shock to the downstream property owners. The record in this case involves test plaintiffs, which are representative of the damage suffered by all downstream plaintiffs. 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 insignificant (a few inches at most)—nothing like the long-lasting and

catastrophic flooding that followed the induced surcharges. Appx1604-1638; Appx1996; Appx2019; Appx2112; Appx2125.

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.

According to the Government's expert, 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 indicating that eight of the 13 test properties would not have flooded but for the induced surcharges. Appx2571-2572; Appx2636; Appx2726; *see also* Appx2828-2830. Appellants' expert agrees. Appx2804-2811.

For three of the other five test properties, the Government's expert concedes that the flooding was substantially worse as a result of the induced surcharges. *Compare* Appx2315 (actual flooding data) *with* Appx2726 ("gates closed" model); *see also* Appx2828-2830; Appx2804-2811 (Appellants' expert). In short, but for the induced surcharges, most downstream properties would have suffered no, or substantially less,

flooding. This fact is not disputed.

As the rainfall ceased, the induced surcharges quickly became the primary source of water in Buffalo Bayou. Appx2181; Appx2238. 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 Appellants' properties. Appx2315.

It soon became apparent that the Government's actions had transformed a terrifying but fleeting rainfall event into a sustained flood of Biblical proportions for the downstream property owners. Downstream properties remained inundated for many days, with some owners completely unable to gain access to their property for nearly two weeks. Appx896; Appx1695-1720, Appx4271; Appx2315.

Due to the severity and duration of the flooding, the losses were staggering. Many of the 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). Appx1721-1861. One commercial property estimated that repairs would cost $17 million. Appx4195.

Downstream property owners and leaseholders 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. Appx1900; Appx1907-1909.

Because Section 7-05(b) of the Water Control Manual remains in effect today, the Government intends to inundate downstream properties yet again when a similar rainfall event occurs. Appx1414; Appx2132; Appx2733. This risk is realistic. An Addicks & Barker Emergency Coordination Team was created to plan for "improved coordination during extreme events," Appx4185, including the subject of "Surcharge Releases." Appx4187. Far from disavowing Section 7-05(b) of the Manual, the Corps is focused on improving 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. But the Government has not paid for downstream property or flowage easements.

More than 1,000 Houston-area property owners and leaseholders whose properties were located upstream and downstream from the Reservoirs brought constitutional takings claims against the Government in the 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.

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. This ruling formally addressed only the 13 test properties, but the CFC recognized that its reasons for decision would "govern all cases covered by the Downstream Sub-Master Docket." Appx20. Before dismissing all the

other cases, the CFC invited non-test property owners to show cause "how their case is legally distinguishable from those already adjudicated." Appx20. Eventually, the CFC entered final judgments in all downstream cases except a handful in which show-cause responses were filed and cases filed after the date of the show-cause order. Appx22-23. Appellants filed a joint a motion for reconsideration, which was denied. Appx5672; Appx5682. Notices of appeal were filed in 171 cases. This Court consolidated these appeals for purposes of briefing and decision.

Meanwhile, the upstream cases proceeded in their own master sub-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); Appx.5621-66. Final judgment has not yet been entered in the upstream case.

This case is not about the inundation of "uncontrolled" water. Instead, this case is based on the Corps' self-described "controlled releases" of water it detained and its diversion of Federal water, either

upstream or downstream, for public purposes, through its authorized operation of the dam in accordance with its own Manual. SAppx2970-2972; SAppx2974-2975; SAppx2977-3009; SAppx3078-3080.

SUMMARY OF THE ARGUMENT

The CFC's order granting the Government's Motion for Summary Judgment and Motion to Dismiss is flawed as a matter of law, as it is based on strawman arguments, misapplication, and misconstruction of Texas law, and analyzes a property interest not asserted by Appellants, and then fails to assert the property interest that was asserted by Appellants—the flowage easement. Thus, the CFC also erred in finding that Appellants did not have a cognizable property interest and thus did not prevail on their Takings claim.

This Court should reverse and render judgment in favor of Appellants because, as a matter of law, Appellants established a Taking in violation of the Fifth Amendment both categorically and physically. Alternatively, this Court should reverse and remand to the CFC for further proceedings. Regardless, this Court should reverse the judgment of the court below because the CFC committed prejudicial, reversible error in its decision.

ARGUMENT

No private property shall "be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause does not protect the Government, but instead, it protects the people it exists to serve. "The Takings clause is 'designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). When the Government physically takes possession of an interest in property for a public purpose, it has a "categorical duty to compensate the former owner." *Id.* (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)). This Court has concluded that to constitute a Taking, "an invasion must [either] appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's rights to enjoy his property for an extended period of time." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003).

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). With respect to questions of law regarding cognizable property interests, the Court of Federal Claims' ("CFC" or "court below") granting the Government's Motion to Dismiss and granting the Government's Motion for Summary Judgment are reviewed de novo. *Hardy v. United States*, 965 F.3d 1338, 1344 (Fed. Cir. 2020) ("We review de novo the existence of a compensable property interest."); *see Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1349 (Fed. Cir. 2020). Appx2–3; Appx18–19. This Court reviews the CFC's legal conclusions de novo and factual findings for clear error. *See Hendler v. United States*, 175 F.3d 174, 1378–79 (Fed. Cir. 1999).

Regarding the elements of a Taking, many of the elements are either legal conclusions or the relevant facts are not disputed; those elements may be decided in this appeal as a matter of law.

II. Takings Claims

No private property shall "be taken for public use, without just compensation." U.S. CONST. amend. V. To state a claim for a Taking, a party must establish (1) they had a cognizable property interest; and (2) 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 trial court erred as a matter of law in its legal analysis of the Takings issue, and this Court should reverse. Appellants established both elements in the Court below and the trial court erred in deciding the case based on an incorrect property interest and a misconstruction of relevant law. This Court should reverse.

A. The CFC erred as a matter of law in its opinion by supporting its decision with a misstatement of key facts and misinterpretation of relevant law.

The court below began its analysis from the incorrect premise that the waters that "actually caused the invasion" came from Harvey and that "[t]hese were flood waters that no entity could entirely control." Appx2. This premise ignores that the water impounded in the Reservoir did not begin to flood downstream properties until the Government directed authorized "controlled releases." Indeed, Appellants' properties either had not flooded at all prior to the Corps' release of the dams or had flooded and the water had receded by the time the dams were released. Further, this premise also ignores the Corps' decision to release the dams and ignores the admissions and statements made to justify the release.

The court below then incorrectly concludes that Appellants did not

allege that the Government "did something wrong" and even if they had, the CFC lacked tort jurisdiction to entertain negligence claims. Appx2. This position entirely ignores and misconstrues the Appellants' cause of action—an unconstitutional Taking. To properly decide Appellants' Takings claims, the court below need not examine whether it had tort jurisdiction or whether Appellants could assert negligence claims against the Government, because neither were alleged by Appellants. Both statements by the court below—that Appellants did not allege wrongdoing of the Government and that the CFC lacks tort jurisdiction—is a strawman argument that cannot support an opinion based on same.

Then, in a clear misconstruction of the allegations below, the CFC states:

> Plaintiffs suggest that the government took an easement against their property by storing of water on their lands. . . . *Put a different way, plaintiffs allege that the government could have done more to ensure perfect flood control efforts, and because the government did not do more, it failed to stop the flooding of their lands*.

Appx2. (emphasis added). Couching its misinterpretation of Appellants' claim as "putting it a different way," the court below indeed puts the allegations a different way—in a way that was never alleged by

Appellants. Again, this strawman is then the basis for the CFC's decision. This, on its face, is error. Additionally, the court below misconstrued and misapplied Texas law. *See* Section II.B.ii, at pp. 38–44 *infra*. These misconstructions and misapplications cannot support the CFC's decision.

As a matter of law, the CFC erred in its Takings analysis. The opinion of the court below was based on false premises and strawman arguments. This Court should reverse the CFC's decision and render judgment in favor of Appellants.

B. The CFC erred in holding Appellants' damage was not caused by the Government, but rather, Harvey—an Act of God.

The court below erred in holding that Appellants' damage was not caused by the Government, but rather, was caused by Harvey as an Act of God. Appx2. The evidence in the record below establishes that the inundation of Appellants' properties occurred only after the Government made the intentional decision to release the Federal waters it held by the Reservoirs. Appx2334-2347; Appx2804-2811; Appx1946-2104.

The causation standard in a Takings case is: "what would have occurred" if the Government had not acted. *St. Bernard Parish*

Government v. United States, 887 F.3d 1354, 1362 (Fed. Cir. 2018); *United States v. Archer*, 241 U.S. 119, 132 (1916). To establish causation, a plaintiff must show that in the ordinary course of events, absent Government action, the plaintiff would not have suffered the injury. *St. Bernard Parish*, 887 F.3d at 1362.

The CFC determined that Appellants' theory of causation ignores the simple fact that the Reservoir gates were shut for Appellants' benefit, but after mitigation efforts failed because impounded storm waters exceeded the Reservoirs' controllable capacity, and Harvey was the sole and proximate cause of "floodwaters." Appx9. This determination is erroneous because it ignores important facts, namely, that the Government intentionally performed "controlled releases" of the water. Appx2162. By the Government's own admission that it performed "controlled releases" necessarily rebuts any notion that the water breached the Reservoirs of its own accord.

The CFC's determination suggests that the Government performed mitigation efforts in keeping the floodgates closed, but the impounded water breached the Reservoirs and—without any interference—caused Appellants' damages. This is a plain misconstruction of the facts, as it

ignores the Government's statements at the time and admissions during discovery, namely, that it made induced surcharge releases "to protect against flooding in Downtown Houston and the Houston Ship Channel." Appx1414-1416; Appx2159; Appx4151.

There is no question that the Government intentionally released the water impounded in the Reservoirs. The question is whether the Government is liable to Appellants for its intentional and knowing authorized actions. The CFC made this erroneous determination in an effort to distinguish the Upstream case from this case, where no distinguishment can be made, except with respect to where the plaintiffs are located along Buffalo Bayou or where and at which time the Government directed the water, as the damage resulted from the same authorized intentional and knowing Government action. Appx9.

There is no question that where, as here, the Government's intentional release of water from the Reservoirs as a part of its operations constitutes an unconstitutional Taking. In *St. Bernard Parish*, this Court noted that Takings liability arises from authorized activity. *St. Bernard Parish*, 887 F.3d at 1360. Indeed, in its brief to this Court in *St. Bernard Parish*, the Government attempted to distinguish that case from

Arkansas Game & Fish, stating: "That case arose out of the government's deliberate release of waters from a dam as an integral part of its authorized operations . . . ." Appx3049; Appx3051-3052. The Government has changed its word "authorized" for "normal" here in attempt to evade a Taking review, but again, that comports with neither the facts nor the law.

Here, the record is clear: The Government intentionally and knowingly released the waters impounded by the Reservoirs. Appx631; Appx866. The release, directed by the Corps, was an authorized activity. That is no Act of God; it is a Taking by the Corps. Thus, this Court should reverse the judgment below.

C. The CFC erred in holding Appellants did not have a cognizable property interest.

The Constitution "neither creates nor defines the scope of property interests compensable under the Fifth Amendment." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003); *see also Aviation & Gen. Ins. Co. v. United States*, 121 Fed. Cl. 357, 362 (2015). Thus, courts look to state, federal, or common law to determine the requisite property interest to establish a Taking. *Maritrans*, 342 F.3d at 1352; *see also Aviation & Gen. Ins. Co.*, 121 Fed. Cl. at 362. This broad standard has

been held to include intangible rights like leaseholds, liens, contracts, and, as applicable here, flowage easements. *See Aviation & Gen. Ins. Co.*, 121 Fed. Cl. at 362; *see United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (leaseholds); *see Armstrong*, 364 U.S. at 44 (liens); *see Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts); *see 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."); *see Ark. Game & Fish*, 568 U.S. at 38–39 (standard for when government-induced flooding may give rise to claim for taking of flowage easement).

This element should have rendered a straightforward answer, given that flowage easements have been established as property within the meaning of the Fifth Amendment in both Federal jurisprudence and under Texas law. *Ark. Game & Fish*, 568 U.S. at 38–39; *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). Indeed, with respect to the Upstream landowners' Takings lawsuit against the Government, Judge Lettow in the CFC held:

> ***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 a flowage easement, 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 is that defendant had no legal right to cause flood waters to enter the properties.***

Appx5648. & n.18 (emphasis added). The same is true here. Appellants are landowners (and one leaseholder) in the Houston suburbs, with land purchased in fee simple, not subject to flowage easements. *See* Appx181–204; Appx206–211; Appx265–268; Appx276–279; Appx281–283; Appx318–321; Appx336–338; SAppx2785; SAppx2795; SAppx2809; SAppx2823; SAppx2844. The lone difference between "Upstream" Plaintiffs and "Downstream" Plaintiffs is, as the name suggests—Upstream Plaintiffs owned property upstream of the Reservoirs; Downstream Plaintiffs owned property downstream of the Reservoirs. This difference does not change the character of the property, the nature of the Government's actions, or the property interests involved. When Government-induced Federal water breached Appellants' properties, they were deprived of exclusive use and enjoyment of their property and the Government took flowage easement where it had none.

The CFC incorrectly characterized Appellants' property interest as "a property interest in perfect flood control in the wake of an Act of God." Appx11. This is not the property interest at stake, nor is it the property interested claimed by Appellants. Appx80; Appx917. Instead, the analyzed and rejected "perfect flood control" interest was materialized and applied by the CFC, in an apparent effort to reject Appellants' claims against the Government. The CFC also noted that Texas law does not recognize a property interest in "perfect flood control," which ignores the actual interests alleged by Appellants and created an impossible standard by which to judge Appellants' claims (when no Appellant asserted an interest in "perfect flood control") to justify its rejection of Appellants' claims. The CFC based its holding on a blatant misinterpretation of Texas law. Appx1–19. The CFC committed reversible, prejudicial error in examining the property interest as the artificial interest of "perfect flood control in the wake of an Act of God" rather than an interest in a flowage easement. Appx11–18. Moreover, the property interest element of the Takings analysis was satisfied by Appellants below and, as this is a question of law, it was error for the CFC to find otherwise. For these reasons, this Court should reverse.

i. Easements

Easements are nonpossessory interests that authorize the holder to "use the property for only particular purposes." *Marcus Cable Assocs. L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (citations omitted). Conveyances of easements—whether in gross or appurtenant—must be in writing. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203 (Tex. 1962). Easements in gross are easements tied to a specific individual. *McWhorter v. Jacksonville*, 694 S.W.2d 182, 184 (Tex. App.—Tyler 1985, no pet.). Easements appurtenant, relevant here, are easements linked to a specific tract of land. *Severance v. Patterson*, 370 S.W.3d 705, 721 (Tex. 2012).

Flowage easements are a type of easement appurtenant. Flowage easements give the dominant estate owner the right to flood a servient estate. *Bennett v. Tarrant Cty. Water Control & Imp. Dist. No. One*, 894 S.W.2d 441, 447 (Tex. App.—Fort Worth 1995, writ denied). A common example of a flowage easement occurs when landowners near a dam grant a flowage easement to the water authority to permit the land to be flooded to maintain the dam or control water levels in reservoirs.

Flowage easements are recognized and protected under Texas law.

Gleghorn v. City of Wichita Falls, 545 S.W.2d 446, 447 (Tex. 1976) (action for enlargement of flowage easement); *Nat'l Resort Communities v. Cain*, 526 S.W.2d 510, 511 (Tex. 1975) (noting relevant river authority had flowage easement); *Trinity River Auth. v. Chain*, 437 S.W.2d 887, 888 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (concerning condemnation of flowage easement); *see also Thew v. Lower Colorado River Auth.*, 259 S.W.2d 939 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.) (suit to quiet title over flowage easement). In addition to Texas' recognition of flowage easements, the United States Supreme Court has recognized same and this Court has held that it is "well established" that the Government cannot take a flowage easement without just compensation. *See Va. Elec. & Power Co.*, 365 U.S. at 627 ("It is indisputable, as the Government acknowledges, that a flowage easement is 'property' within the meaning of the Fifth Amendment."); *St. Bernard Parish*, 887 F.3d at 1359. Indeed, the United States has purchased flowage easements in Texas. *See, e.g.*, *Lakecroft, Ltd. v. Adams*, No. 03-14-00428-CV, 2014 WL 7466778, at *1 (Tex. App.—Austin Dec. 18, 2014, pet. denied) (regarding flowage easement previously granted to the Corps); *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d

848, 853 (5th Cir. 2014) (discussing United States' flowage easement).

Courts have recognized that a landowner's easement constitutes property compensable under the Constitution if taken by the Government. *See Magnolia Pipe Line Co. v. City of Tyler*, 348 S.W.2d 537, 540 (Tex. Civ. App.—Texarkana 1961, writ ref'd) (finding easement was property "in the constitutional sense"); *Sinclair Pipe Line Co. v. State*, 322 S.W.2d 58, 60 (Tex. Civ. App.—Fort Worth 1959, no writ) (same); *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); *Brazos River Conserv. & Reclamation Dist. v. Adiksson*, 173 S.W.2d 294, 301 (Tex. Civ. App.—Eastland 1943, writ ref'd) ("we do not believe 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").

ii. Texas law

"[W]here the government made a conscious decision to subject particular properties to inundation so that other properties would be spared, as happens when a government builds a flood-control dam knowing that certain properties will be flooded by the resulting reservoir[,] . . . of course the government must compensate the owners

who lose their land to the reservoir." *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 807 (Tex. 2016) (Willett, J.).

The court below erred by using an incorrect interpretation of Texas law to support its conclusion, and one that has been rejected in every Texas court with precedential power over Houston since Harvey, to support its conclusion.

First, the court below cites *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876, 883 (Tex. App.—Beaumont 1998, pet. denied), from a court that is not the appellate authority for Houston, as controlling Texas Supreme Court precedent. Appx14. Citing Texas cases, as governed by the Texas Rules of Appellate Procedure and set forth clearly in *The Greenbook*: *Texas Rules of Form*, requires the notation of the petition history with each appellate court citation. *See, e.g.*, TEX. R. APP. P. 56.1; *see also* THE GREENBOOK: TEXAS RULES OF FORM (Texas Law Review Ass'n et al. eds.,14th ed. 2018).

The distinction between a *refused* petition and a *denied* petition requires engaging in a bit of semantics.[4] Under Texas law, when a

[4] Appellate decisions *after* September 1, 1997 are required to have "**petition** history" notations. Appellate decisions *before* September 1, 1997 are required to have "**writ** history" notations, as prior to September 1, 1997, applications to the Texas Supreme Court for review were referred to as "applications for writ of error." Another

petition for review is *refused* ("pet. ref'd"), the appellate court's opinion has the force and effect of Texas Supreme Court precedent, because the Texas Supreme Court has determined that the judgment of the court of appeals is correct and the legal principles announced in the opinion are likewise correct. TEX. R. APP. P. 56.1(c). Where, as in *Wickham*, the petition for review is *denied* ("pet. denied"), the Texas Supreme Court is *not* satisfied that the opinion of the court of appeal has correctly declared the law in all respects but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the State as to require correction. TEX. R. APP. P. 56.1(b)(1). Given this, *Wickham* is not controlling Texas Supreme Court precedent. This error was not harmless because the court below rejected the notion by Appellants that the intentional and knowing release of Federal water overrides the issue of whether more water is entering the dam than the

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noteworthy distinction lies within the designations "writ ref'd" and "writ ref'd n.r.e." As with "pet. ref'd," the designation "writ ref'd" means the Texas Supreme Court was satisfied that the opinion correctly declared the law and it has equal precedential value as a Texas Supreme Court opinion. THE GREENBOOK: TEXAS RULES OF FORM 132 (Texas Law Review Ass'n et al. eds.,14th ed. 2018). The designation "writ ref'd n.r.e." means "writ refused, no reversible error," which indicates the Texas Supreme Court was not satisfied that the appellate opinion was correctly declared in all respects but is of the opinion that application for writ of error presented no reversible error. *Id.* at 131. The designation "writ ref'd n.r.e." does not give an appellate opinion the same weight as Texas Supreme Court precedent. *Id.* Notably, there is no "pet. ref'd n.r.e." designation.

Government is releasing, as it did in *Gragg*, 151 S.W.3d at 546. Appx13-15.

Additionally, because *Wickham* is a decision from the Beaumont court of appeals, it is not binding in Houston. Binding appellate decisions in Houston are handed down from either of Houston's two appellate courts, the First Court of Appeals or the Fourteenth Court of Appeals. *See, e.g.*, TEX. GOV'T CODE ANN. § 22.201(b),(o) (establishing First and Fourteenth appellate districts covering the counties of Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington).

Second, the court below misconstrued and misapplied Texas law. The court below stated that under the Texas Constitution, "property is owned subject to the pre-existing limits of the State's police power," citing both *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926), and *Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex. 1934). Appx11. Despite the CFC's determination to the contrary, neither of these cases suggest that the ownership of property subject to the State's police power weakens applicable property rights here, as established and recognized in *Gragg* and *City of Graham*. *Motl* is irrelevant to this Takings analysis, as it

determines that the owner of a riverfront property does not own the surging waters, but that does not limit the owner's property rights in the land. *Motl*, 286 S.W. at 458. Similarly irrelevant is *Lombardo*, which upholds the validity of zoning in Texas. 73 S.W.2d at 475.

In *City of Graham*, the Texas Supreme Court recognized a dam's adverse impact on a river's behavior and, consequently, city-owned properties, and found a Taking, awarding damages to the city as the owner and granting the river authority a flowage easement. 354 S.W.2d at 99. Specifically, the Supreme Court held that the dam construction authority should not be allowed to take the city's property for "***water storage purposes under the police power without paying compensation therefor***." *Id.* at 105 (emphasis added). This decision emphasizes that the State's police power does not override the Fifth Amendment as the court below seemed to suggest, but it also reiterates a landowner's interest in a flowage easement.

Third, the court below determined that it did not "believe that Texas law provides plaintiffs with a right to be free from flood waters." Appx13. This determination stands in contrast to Texas case law, particularly, *Gragg*. In *Gragg*, the Texas Supreme Court upheld recovery

from a landowner that alleged a water district flooded their downstream ranch so severely as to constitute the taking of a flowage easement. 151 S.W.3d at 559. In that case, the water district built a reservoir on a river and conducted its operations "as designed." *Tarrant Regional Water Dist. v. Gragg*, 43 S.W.3d 609, 622 (Tex. App.—Waco 2001), *aff'd* 151 S.W.3d 546 (Tex. 2004). Ultimately, the Texas Supreme Court held that though the ranch downstream of the reservoir had flooded previously, the flooding changed dramatically after the reservoir was built, and affirmed the decision that the water district had taken a flowage easement and owed the landowner damages. 151 S.W.3d at 559. This decision clearly establishes that Texas landowners indeed have a right to be free from Government-controlled waters in circumstances like these, but also that Texas landowners have a property interest in a flowage easement, as Appellants alleged before the court below.

Texas law favors Appellants' position and the court below erred in its misapplication and misconstruction of Texas law. Moreover, as Federal courts look to state law for determining the interest at stake in Fifth Amendment claims, the flowage easement interest should have been analyzed in the court below and decided in favor of Appellants.

D. Appellants are entitled to a judgment in their favor.

Both elements of a Taking claim were established in the record below. Further, in the court below, Appellants established that the Government took a flowage easement both permanently and categorically, as stated in the Corps' Manual, and temporarily, when it intentionally released the Federal waters. This Court should reverse and render judgment in favor of Appellants.

The CFC took pains to distinguish the Downstream case from the Upstream case, determining that Downstream allegations hinged on damage resulting from the Government's intentional actions of opening the floodgates, whereas Upstream allegations hinged on damage resulting from normal dam operations. Appx9. The CFC additionally erred in failing to recognize that both of these things can be true. The Water Control Manual provided that the floodgates were to remain closed, except in certain emergency circumstances. Thus, by following the Manual and intentionally opening the floodgates (using emergency procedures when there was no declared emergency by the Corps), Appellants' damage occurred from both intentional acts (temporary Taking) *and* authorized dam operations in accordance with the Manual

(categorical, permanent Taking).

i. Appellants established the second element of a Takings claim—that their property was taken by the United States for a public purpose.

In addition to establishing that they had a cognizable property interest, thus satisfying the first Takings element, Appellants also established the second element—showing that their property was taken by the United States for a public purpose. *Alimanestianu*, 888 F. 3d at 1380. "Public purpose" is interpreted broadly. *See Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

Here, the public purpose was established in the record by the admissions of the Government and the testimony of Government representatives. The Government intentionally released water onto Appellants' properties for at least three public purposes: (1) to protect Downtown Houston and the Houston Ship Channel; (2) to protect other neighborhoods from flooding; and (3) to mitigate risk to Government structures (though undisputed facts showed that the structures were not actually at any risk). Appx1414-1416; Appx2159; Appx4151.

The following evidence in support of these public purposes was established in the record below:

- The Corps acknowledged that it made induced surcharge releases to protect against flooding in Downtown Houston and the Houston Ship Channel. Appx1414-1416; Appx2159; Appx4151.

- Col. Zetterstrom and his peers understood that "there would potentially be impacts downstream" and they "were aware of the potential for inundation of structures downstream due to controlled releases." Appx2160; Appx2162.

- Col. Zetterstrom testified that the releases were intended to "mitigate against damage flood stages for Downtown Houston and the Port of Houston." Appx2165.

- The Reservoirs were designed to protect Downtown Houston and the Houston Ship Channel. Appx2159.

- Richard Long, the Corps' Natural Resource Management Specialist confirmed that "the operation of the [Reservoirs] were designed for the overall good of the City of Houston . . . [t]o provide flood risk management to the City of Houston" by "help[ing] [to] limit the impacts of flooding that may occur from a storm event." Appx2129.

- The Government asserted that releasing water was consistent with the design of the Reservoirs and their stated purpose. Appx2159.

- An August 28, 2017 Press Release from the Corps asserted that the Reservoirs "continue to perform as they were designed to do, which is to protect against flooding in Downtown Houston and the Houston Ship Channel." Appx631.

- Col. Zetterstrom admitted that the releases were to prevent "uncontrolled water" having "a greater impact on . . . communities around the northern end of the dam" and that, had the gates remained closed, "water would have spilled out

around the ends of the dam and gone into different neighborhoods." Appx2157.

- Col. Zetterstrom testified that the Government-induced "[s]urcharge [was] justified for two reasons: optimizing storage capacity and ensuring the structural stability of the dams." Appx2157.

- Col. Zetterstrom testified that protecting the integrity of the structures "allows additional safety to the public." Appx2159.

- Mr. Long testified that the Corps knew its actions were "making people hurt downstream" but found that harm justified by the public benefit of "ensur[ing] the integrity of the dam and operat[ing] the reservoirs for the entire population." Appx2128.

- Corps representative Robert Thomas testified in his deposition that a dam emergency was never declared, nor were the dams in danger of breaking. Appx1420-1421.

These Government admissions leave no room to question whether the Government's actions in releasing the Federal water was for a public purpose. It is clear the dams did not fail, nor did the Corps anticipate their failure. Appx631. In an August 28, 2017 press release (the day the floodgates were opened), the Corps wrote that it was "confident that the structures continue to perform as they were designed to do." Appx631.

This element (property taken for a public purpose) was established in the record below and it was error for the Court to ignore this element in its analysis. The court below additionally erred in granting dismissal

in favor of Appellees and granting Appellee's Motion for Summary Judgment when Appellants' had established both elements of a Taking. Appx1–19.

ii. The Government's Water Control Manual establishes a permanent, categorical Taking of a flowage easement where it has none.

Physical Takings are a "classic" Taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Categorical Takings, on the other hand, are regulatory actions that require a property owner to suffer permanent physical invasions of their private property. *Id.* at 538. The Corps' Water Control Manual took a categorical flowage easement over Appellants' properties where it had none and where no emergency was declared. Appx631; Appx1022-1023; Appx1123; Appx1154; Appx1258-1259; Appx1397-1399. Specifically, the Manual directs that the dam floodgates should remain closed during flood events until releases can be made without causing downstream flooding. Appx1022. The Corps' standard practice is to impound stormwater entering the Reservoirs, closing the gates on both Reservoirs when "1 inch of rainfall occurs over the watershed below the Reservoirs in 24 hours or less, or when flooding is predicted downstream." Appx1022. The dam operator is instructed to

keep the gates closed and under surveillance "as long as necessary to prevent flooding below the dams." Appx1022. Section 7-05(b) of the Manual, which instructs the Corps to open the floodgates and inundate downstream properties under certain conditions, namely, to conduct induced surcharges when pool elevation and rate of pool elevation rise reach certain points. Appx1023.

Under Texas law, conveyances of easements, including easements appurtenant like flowage easements, must be in writing. *Drye*, 364 S.W.2d at 203. The Government's unilateral determination that it has a right to use downstream properties for flood control purposes is the Taking of an easement where it has none in writing and where it has not provided just compensation. As a matter of law, the Corps' Water Control Manual establishes a permanent, unconstitutional Taking has occurred and the Government must justly compensate Appellants. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1028 (1992) (when a permanent, categorial Taking occurs, no balance of factors is required; the Government must compensate the property owners). This Court should reverse the CFC's decision and render judgment that the Government's Water Control Manual established a permanent,

categorial Taking that mandates the Government justly compensate Appellants.

iii. The Government's intentional flooding was a temporary Taking of a flowage easement where it has none.

Additionally, this Court should reverse the CFC's decision and render judgment that the Government's intentional flooding was a temporary Taking of a flowage easement where it had none.

Had the CFC properly recognized Appellants' cognizable property interests, namely, a flowage easement, the CFC should have engaged in the multi-factor inquiry established in *Arkansas Game & Fish*: (1) the degree to which the invasion is intended or is the foreseeable result of the authorized Government action; (2) the severity of the interference; (3) time and duration of the flooding; (4) the character of the land at issue; and (5) interference with the owner's reasonable investment-backed expectations regarding the land's use. *Ark. Game & Fish*, 568 U.S. at 38–39.

1. Foreseeable result

In Takings cases, courts must consider the degree to which the Government's intrusion was intended or was the foreseeable result of authorized Government action. *Ark. Game & Fish*, 568 U.S. at 39. In

proving a temporary taking, the plaintiff must establish that Government action caused the injury to their property and that the invasion was a direct, natural, or probable result of an authorized activity. *St. Bernard Parish*, 887 F.3d at 1359–60. In its brief to this Court in *St. Bernard Parish*, the Government attempted to distinguish that case from *Arkansas Game & Fish*, stating: "[*Arkansas Game*] arose out of the government's deliberate release of waters from a dam as an integral part of its authorized operations . . . ." Appx3049; Appx3051-3052.

The flooding at issue here was intentional and authorized by the Government. Government personnel made numerous admissions establishing the intentional, knowing, and authorized nature of the release of the Federal waters. *See* Section II.C.i, *supra*, at pp. 46–47. 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. Appx1416; Appx2164; Appx2155-2156; Appx2128; Appx2167. 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.

Appx1425-1429; Appx2162. During Harvey, the Government ordered an "induced surcharge" in accordance with its Manual and the authorization of its command hierarchy. Appx1416; Appx2164; Appx2155-2156; Appx2167. The officer who gave the order to open the floodgates "understood" that by opening the gates, "there would potentially be impacts downstream." Appx2160; Appx2162. This factor is satisfied. The evidence in the record establishes that when the Government released the water from the Reservoirs, it did so intentionally, knowing the properties downstream would flood.

2. Severity

Severity analysis is important in a Takings case. The severity factor draws the line between tort and Taking. *Ark. Game & Fish*, 568 U.S. at 39. The determination is made by examining whether the property owners suffered mere financial injury or if there was a "direct and immediate interference" with their use and enjoyment of land. *Id.* at 33.

Here, the Government's interference was severe. Following the Government-induced release of Federal waters, homes were flooded for days, and some weeks. Appx1862-1945; Appx1900; Appx1907-1909. This

alone is a substantial interference with the use and enjoyment of their properties. Beyond the sitting Federal water in Appellants' homes, the aftermath of same rendered the properties uninhabitable or unusable for months, and it took some years to be able to move back into their homes. Appx1862-1945; Appx1900; Appx1907-1909.

The Government's extended intrusion on Appellants' use and enjoyment of their properties is coupled with repair estimates in the thousands on the low end and loss of nearly all personal property. The damages alone were not merely economic—the loss and enjoyment of the property was coupled with extreme economic losses.

3. Time and duration

This Court has recognized a temporal aspect to whether a temporary Taking has occurred. *Ark. Game & Fish*, 568 U.S. at 38. The Supreme Court has held that temporary, unplanned occupation of a building for less than a day was not a Taking. *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 87–88, 93 (1996). Similarly, brief flooding might not be a Taking. *Ark. Game & Fish Comm'n v. United States (Arkansas Game & Fish II)*, 736 F.3d 1364, 1370 (Fed. Cir. 2013). However, the Government's actions here resulted in a Taking that was

not brief. Appx1862-1945; Appx1900; Appx1907-1909. On the shorter end, for some, the flooding lasted several days. Appx1862-1945; Appx1900; Appx1907-1909. On the longer end, Federal waters remained in the properties for up to two weeks. Appx896; Appx1695-1720; Appx1862-1945; Appx1900; Appx1907-1909; Appx2315; Appx4271. In both temporal circumstances, Appellants were deprived of the use and enjoyment of their properties for months, some years. Appx1862-1945; Appx1900; Appx1907-1909.

4. Character of land

The character of the land at issue is largely residential and few commercial. Prior to the Government's intentional flooding of Appellants' properties, many of the properties had never flooded. Appx896. Others had previously flooded, but not during Harvey and not until Federal waters breached their properties. Appx1506-1576; Appx1577-1639. Others had flooded at some point during Harvey, while Harvey sat over Houston, but had receded before the Government's release of the dams on August 27-28, 2017. Appx1577-1639.

5. Interference with investment-backed expectations regarding use

In *Arkansas Game & Fish*, this Court found it significant that the

land at issue had not been "exposed to flooding comparable" to the event at issue "in any other time span." *Ark. Game & Fish*, 568 U.S. at 38. The same is true here. Prior to the Government's intentional flooding of Appellants' properties, many of the properties had never flooded. Appx1506-1576; Appx1577-1639. Others had previously flooded, but not during Harvey. Appx1577-1639. Others had flooded in Harvey, but the flooding had receded before the Government's release of the dams. *See* Appx1640; Appx1656.

Appellants acquired their property in reliance 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. For decades, the Government reiterated this 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. 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***." Appx4341-42 (emphasis in original).

Furthermore, while reasonable investment-backed expectations must be based on the time the property was acquired—when none of the test property owners were aware of any prior flooding—subsequent events only reinforced the reasonableness of the owners' expectations. Prior to this event, many of the properties had never experienced flooding, while few had experienced minor flooding (a few inches at most) in the years they had owned their properties, which paled in comparison to the Federal waters released by the Government and the extensive duration of inundation by same.

iv. The Government's arguments fail

In its Motion for Summary Judgment below, the Government made the following arguments: (1) Appellants failed to establish causation; (2) the Government's use of police power did not violate the Constitution; (3) flooding from a single hurricane is not a Taking; and (4) relative benefits, all of which fail. Appx5379-5448.

1. Causation

In Fifth Amendment Takings cases, causation requires a showing of "what would have occurred" if the Government had not acted. *St. Bernard Parish*, 887 F.3d at 1362; *United States v. Archer*, 241 U.S. 119, 132 (1916). To establish causation, a plaintiff must show that in the ordinary course of events, absent Government action, the plaintiff would not have suffered the injury. *St. Bernard Parish*, 887 F.3d at 1362.

The Government argued below that the standard for establishing causation was: Appellants must prove their properties experienced more flooding during Harvey than their properties would have experienced had the Corps never built the Reservoirs. Appx4351. Thus, the Government concluded that Appellants failed to establish causation. Appx4351.

The Government's causation analysis focuses on the wrong Government action. The challenged Government action in this case is not the building of the Reservoirs. Instead, Appellants challenged the Government's intentional release of Federal water downstream. As such, the causation standard centers around whether Appellants would have suffered the injuries claimed had the Government not released the Federal water from the Reservoirs. "[T]he 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 Corp's decision to open the flood gates and begin Induced Surcharge releases." Appx9.

The experts agreed that eight of 13 test properties would not have flooded but for the Government-induced surcharges and three others suffered substantially worse flooding because of it. Appx1604-1673; Appx1946-2014. Regarding the two remaining properties, there was a factual dispute as to the *magnitude* of the flooding. Appx2345; Appx2347; Appx2809-11. Nevertheless, even the Government's own expert agreed that each test property would have been better off with the flood gates closed. Appx 2315; Appx2726; Appx2828-2830. The experts' disagreement lies in the extent of damages, which does not affect the causation determination. Appx2804-2811.

Appellants easily satisfy the causation element when the correct causation standard (whether Appellants would have suffered the injuries claimed had the Government not released the Federal water from the Reservoirs) is applied.

2. Police Power

The Government alleged that its use of the police power usurped Takings Clause requirements and the CFC below appeared to agree. Appx11-12.

The Takings Clause directs that no private property shall "be taken for public use, without just compensation." U.S. CONST. amend. V. "The Takings clause is 'designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Ark. Game & Fish*, 568 U.S. at 31 (quoting *Armstrong*, 364 U.S. at 49). When the Government physically takes possession of an interest in property for a public purpose, it has a "categorical duty to compensate the former owner." *Id.* (quoting *Tahoe-Sierra Preservation Council*, 535 U.S. at 322). This Court has concluded that to constitute a Taking, "an invasion must [either] appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's rights to enjoy his property for an extended period of time." *Ridge Line*, 346 F.3d at 1356. These constitutional requirements cannot be circumvented by the Government's ex post facto declaration of exercise of police powers: "Such 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 v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177–78 (1871).

Agreeing with the Government's purported exercise of police power to avoid Takings liability renders the Takings Clause meaningless and transforms the Constitution into "an instrument of oppression" rather than an instrument giving "protection to individual rights." *Id.* at 179. The Government's position is simply not the law and cannot support a judgment in its favor.

3. Flooding from a single hurricane is not a Taking

The Government argued that flooding from a single hurricane is not a Taking. Appx4387. The Government relied on *Ridge Line* in its argument that the interference was not substantial or frequent enough to rise to the level of a Taking, which is no longer good law following *Arkansas Game & Fish*. Appx4387. *Ridge Line* directed that courts must consider whether an interference was substantial or frequent enough to rise to the level of a Taking and one or two flooding events would not be

enough. *Ridge Line*, 346 F.3d at 1357. In *Arkansas Game & Fish II*, this Court rejected this recurrence rule, holding that "[G]overnment-induced flooding can constitute a taking even if it is temporary in direction." 736 F.3d at 1369. As such, the Government's argument that a single hurricane is not enough to establish a Taking must fail.

4. Relative Benefits Doctrine Does Not Apply

The relative benefits test determines whether the burden on a plaintiff's property is outweighed by the benefit conferred on that property. *Alford v. United States*, 961 F.3d 1380, 1385–86 (Fed. Cir. 2020); *United States v. Sponenbarger*, 308 U.S. 256 (1939). "The benefit to the community at large has nothing to do with the relative benefits comparison." *Id.* at 1386.

If the Government is found to have taken a flowage easement, such is an uncompensated burden to the property that cannot be outweighed by any benefit that could possibly be conferred to Appellants. Indeed, the Government did not argue this below, urging instead that the Downstream Properties should be glad to bear the burden for the intentional flooding meant to save the further Upstream Flooding, the Houston Ship Channel or Downtown Houston. Appx631. *Alford* makes

clear this is not the law. Moreover, the Government incorrect argument was designed to swallow the rule and render any Taking noncompensable, as it would give the Government the ability to inundate the properties with water, carte blanche. As what happened here, this renders the properties inaccessible, unusable, and drives the value of the properties downward, as the permanent flowage easement would be forcibly passed to the new owner, should any of the Appellants sell their property. This is a burden on the property that cannot be outweighed by any benefit.

v. Appellants have not received just compensation

Lastly, Appellants have not received just compensation for the Government's unconstitutional Taking of their private property for public use. "Just compensation" means "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). "The guiding principle of just compensation is reimbursement to the owner for the property interest taken," whether the fair market value of the land or the difference in value of the property based on the Government's easement." *Alford v. United States*, 141 Fed. Cl. 421, 426 (2019) (quoting *Va. Elec. & Power Co.*, 365 U.S. at 633).

Mortgage or foreclosure relief or other forms of relief do not qualify as just compensation. *Id.* ("The Takings Clause of the Fifth Amendment provides just compensation as the exclusive remedy.").

As established herein, the Government stored water on Appellants' properties for the public purpose of benefitting the City of Houston and other neighborhoods and the Government did not pay for such use. Some Appellants have sought to repair and restore their properties to their condition prior to the Government's interference; however, the prospect of reclamation does not disqualify a landowner from receiving just compensation for the Government's Taking. *Ark. Game & Fish*, 568 U.S. at 40 n.2. By involuntarily holding the Government's water on their properties, Appellants have borne a public burden, and justice requires the burden "be spread among taxpayers through the payment of compensation." *Lingle*, 544 U.S. at 543. The order of the court below should be reversed, and judgment rendered in favor of the Appellants.

CONCLUSION

For the foregoing reasons, the decision of the CFC should be reversed, and judgment rendered in favor of Appellants, or alternatively, the decision of the CFC reversed and remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **April 29, 2021**, I electronically filed the foregoing Corrected ***Brief of Appellants in Consolidated Case Nos. 21-1492, 21-1494, 21-1499, 21-1513, & 21-1529*** with the clerk of the court for the Federal Circuit Court of Appeals, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Docket Activity" to the following attorneys of record who have consented in writing to accept this notice as service of this document by electronic means:

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/s/ Bryant S. Banes
BRYANT S. BANES

Attorney for Appellants
Dated: **04/29/2021**

ADDENDUM

ADDENDUM TABLE OF CONTENTS

In the United States Court of Federal Claims

No. 17-9002
Filed: February 18, 2020

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

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

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

OPINION AND ORDER

SMITH, *Senior Judge*

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

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

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

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

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

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

I. Background

A. Construction of the Addicks and Barker Dams and Reservoirs

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

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

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

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

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

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

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

B. Plaintiffs' Acquisition of their Properties[1]

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

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

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

C. Hurricane Harvey and the Induced Surcharge Release

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

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

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

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

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

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

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

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

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

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

II. Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Discussion

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

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

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

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

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

A. Property Rights

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

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

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

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

B. Perfect Flood Control

1. State Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Federal Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

IT IS SO ORDERED.

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

In the United States Court of Federal Claims

No. 17-9002
Filed: September 9, 2020

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

ORDER DIRECTING THE ENTRY OF JUDGMENT IN DOWNSTREAM CASES

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

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

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

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

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

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

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

IT IS SO ORDERED.

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

FORM 26. Docketing Statement

Form 26 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DOCKETING STATEMENT

Case Number: 2021-1131

Short Case Caption: Milton v. US

Filing Party/Entity: Appellants under no. 21-1513

Instructions: Complete each section or check the box if a section is intentionally blank or not applicable. Attach additional pages as needed. Refer to the court's Mediation Guidelines for filing requirements. An amended docketing statement is required for each new appeal or cross-appeal consolidated after first filing.

Case Origin	Originating Number	Type of Case
U.S. Court of Federal Claims	1:18-cv-707	Takings

Relief sought on appeal: ☐ None/Not Applicable

Reversal and remand.

Relief awarded below (if damages, specify): ☐ None/Not Applicable

Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment was granted, and Plaintiffs' Cross-Motion for Summary Judgment was denied.

Briefly describe the judgment/order appealed from:

(1) Judgment, No. 18-707, ECF No. 9, based on (2) Opinion and Order, No. 17-9002L, ECF No. 203, and (3) Order Directing Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237

Nature of judgment (select one): Date of judgment: 9/10/20

- ☑ Final Judgment, 28 USC § 1295
- ☐ Rule 54(b)
- ☐ Interlocutory Order (specify type) _____
- ☐ Other (explain) _____

Name and docket number of any related cases pending before this court, and the name of the writing judge if an opinion was issued. ☐ None/Not Applicable

This appeal relates to several appeals originating from the same Downstream Sub-Master Docket (17-9002L); Hon. Loren A. Smith; Explanation of related cases on additional pages

Issues to be raised on appeal: ☐ None/Not Applicable

As a matter of de novo review, the lower court erred in ruling that appellants failed to state a cognizable claim for a "taking" of private property by the U.S. Army Corps of Engineers.

Have there been discussions with other parties relating to settlement of this case?

☑ Yes ☐ No

If "yes," when were the last such discussions?

- ☐ Before the case was filed below
- ☑ During the pendency of the case below
- ☐ Following the judgment/order appealed from

If "yes," were the settlement discussions mediated? ☐ Yes ☑ No

If they were mediated, by whom?

N/A

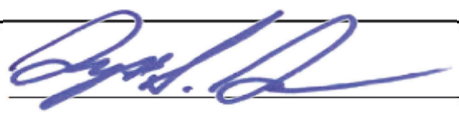
Do you believe that this case may be amenable to mediation? ☐ Yes ☑ No

Explain.

The question before the Federal Circuit is a matter of law that Appellants under no. 21-1513 do not believe is amenable to mediation at this time. Moreover, repeated settlement discussions occurred during the pendency of the case and no meaningful progress occurred. Given this, settlement at mediation on appeal would likely be unsuccessful.

Provide any other information relevant to the inclusion of this case in the court's mediation program.

N/A

Date: 2/3/21 Signature: 

Name: Bryant S. Banes

Save for Filing

Statement of Related Cases Under Fed. Cir. R. 47.5

This case (Appellants under No. 21-1513) is one (1) of approximately 190 cases brought by owners of properties in the Houston, Texas region that flooded downstream from the Addicks and Barker Reservoirs following Hurricane Harvey. These cases were filed in the Court of Federal Claims and are collectively known as the "Downstream" cases. All the 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.

The Downstream cases were consolidated by the Court of Federal Claims into a Downstream Sub-Master Docket. See No. 1:17-cv-9002L, In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs v. United States (Fed. Cl.); see also Management Order No. 3 (Order Establishing Sub-Master Docket for Downstream Claims), No. 17-9002L, ECF No. 2.

All substantive and legal briefing occurred in the Downstream Sub-Master Docket (No. 17-9002L). Ultimately, the court issued an "Opinion and Order" granting Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment. See Opinion and Order, No. 17-9002L, ECF No. 203. In a subsequent order, the court directed that the Downstream Sub-Master Docket (No. 17-9002L) be closed, and the final judgments be entered in the individual Downstream cases. See Order Directing the Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237.

The court exempted from this directive two (2) categories of Downstream cases: (1) cases in which property owners have attempted to show cause that their claims

are distinguishable from those controlled by the court's summary judgment ruling;[1] and (2) cases filed after the date of the show-cause order.[2] Otherwise, the court ordered that judgment be entered and appeals be filed in each individual docket. *Id.*

Starting on December 10, 2020, final judgments were entered in all the individual Downstream cases (except for the two (2) categories of cases in which the court reserved a ruling). Notices of appeal were filed in most of the cases and the cases have been docketed with this Court. All the appeals emanating from the Downstream Sub-Master Docket (No. 17-9002L) are "related cases."

The attorneys filing this Notice and Docketing Statement have been engaged to represent 136 of Downstream Appellants. At this time, counsel believes a complete list of the "related cases" is as follows:

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[1] Those cases are (1) *Banes et al. v United States*, No. 17-1191L; (2) *Salo et al. v. United States*, No. 17-1194L; (3) *Williamson et al. v. United States*, No. 17-1456L; (4) *Williams et al. v. United States*, No. 17-1555L; (5) *Olsen et al. v. United States*, No. 18-0123L; (6) *Kickerillo et al. v. United States*, No. 18-0345L; (7) *Travelers Excess and Surplus Lines v. United States*, No. 18-1697L; (8) *Asghari et al. v. United States*, No. 19-0698L; (9) *Abed-Stephen et al. v. United States*, No. 19-0782L; (10) *Alford et al. v. United States*, No. 19-0807L; (11) *Ashby et al. v. United States*, No. 19-1266L; (12) *Darby et al. v. United States*, No. 19-1063L; and (13) *Allen et al. v. United States*, No. 19-1924L. Moreover, in Daniel et al. v. United States, No. 18-0230L, one of the plaintiffs (Gregory Pudney) filed a show cause response while the other plaintiff did not (D.R. Daniel).

[2] Those cases are (1) *Sharrock et al. v. United States*, No. 20-0591L; (2) *Ray et al. v. United States*, No. 20-0686L; (3) *Ron et al. v. United States*, No. 20-0696L; (4) *Bakalovic et al. v. United States*, No. 20-0701L; and (5) *PD Liquidating Trust v. United States*, No. 20-0704L.

#	Trial Docket No.	Caption (v. United States)	Appeal Docket No.
1	1:17-cv-01189-LAS	Y AND J PROPERTIES, LTD.	2021-1286
2	1:17-cv-01191-LAS	BANES et al.	2021-1529
3	1:17-cv-01194-LAS	SOLA et al.	
4	1:17-cv-01195-LAS	BOUZERAND et al.	2021-1197
5	1:17-cv-01206-LAS	ALDRED et al.	2021-1223
6	1:17-cv-01215-LAS	SMITH et al.	2021-1204
7	1:17-cv-01216-LAS	STRICKLAND et al.	2021-1205
8	1 17-cv-01232-LAS	GOMEZ et al.	2021-1196
9	1:17-cv-01235-LAS	MILTON et al.	2021-1131
10	1:17-cv-01300-LAS	HOLLIS, JR. et al.	2021-1201
11	1:17-cv-01303-LAS	ARRIAGA et al.	2021-1225
12	1:17-cv-01332-LAS	MOUSILLI	2021-1174
13	1:17-cv-01390-LAS	DE LA GARZA et al.	
14	1:17-cv-01391-LAS	POLLOCK	2021-1237
15	1:17-cv-01394-LAS	AGL, LLC et al.	2021-1238
16	1:17-cv-01395-LAS	LUDWIGSEN FAMILY LIVING TRUST et al.	2021-1303
17	1:17-cv-01396-LAS	REYES	2021-1239
18	1:17-cv-01393-LAS	KHOURY	2021-1467

19	1:17-cv-01397-LAS	VANCE	2021-1302
20	1:17-cv-01398-LAS	ERWIN	2021-1429
21	1:17-cv-01399-LAS	JAFARNIA	2021-1305
22	1:17-cv-01408-LAS	BRUZOS et al.	2021-1195
23	1:17-cv-01423-LAS	GOVIA	2021-1224
24	1:17-cv-01427-LAS	HERING et al.	2021-1159
25	1:17-cv-01428-LAS	LEWIS	2021-1151
26	1:17-cv-01430-LAS	MURRAY et al.	2021-1188
27	1:17-cv-01433-LAS	VENGHAUS	2021-1241
28	1:17-cv-01436-LAS	EFFIMOFF	2021-1242
29	1:17-cv-01434-LAS	RUSSO	2021-1465
30	1:17-cv-01437-LAS	THAKER	2021-1307
31	1:17-cv-01435-LAS	NEAL	2021-1306
32	1:17-cv-01438-LAS	THAKER	2021-1308
33	1:17-cv-01439-LAS	GILLIS	2021-1464
34	1:17-cv-01450-LAS	WOLF et al.	2021-1251
35	1:17-cv-01451-LAS	MEMORIAL SMC INVESTMENT 2013 LP	2021-1173
36	1:17-cv-01454-LAS	DRONE et al.	2021-1175
37	1:17-cv-01456-LAS	WILLIAMSON et al.	

38	1:17-cv-01457-LAS	MEADOWS ON MEMORIAL OWNERS ASSOCIATION INC. et al.	2021-1214
39	1:17-cv-01458-LAS	BE MEMORIAL REALTY LTD	2021-1444
40	1:17-cv-01453-LAS	CEBALLOS et al.	2021-1193
41	1:17-cv-01461-LAS	TITA et al.	2021-1294
42	1:17-cv-01512-LAS	ABBOTT et al.	2021-1167
43	1:17-cv-01514-LAS	CROKER	2021-1244
44	1:17-cv-01515-LAS	MURCIA	2021-1268
45	1:17-cv-01516-LAS	KOCHARYAN	2021-1479
46	1:17-cv-01517-LAS	AGREDA	2021-1269
47	1:17-cv-01518-LAS	REED	2021-1309
48	1:17-cv-01519-LAS	ALFORD	2021-1270
49	1:17-cv-01520-LAS	RAVAT	2021-1482
50	1:17-cv-01521-LAS	NGUYEN	2021-1310
51	1:17-cv-01522-LAS	CHEN	2021-1275
52	1:17-cv-01523-LAS	PAGNOTTO	2021-1539
53	1:17-cv-01524-LAS	MORAN	2021-1271
54	1:17-cv-01525-LAS	RAZNAHAN	2021-1481
55	1:17-cv-01545-LAS	YOUNG et al.	2021-1192

56	1:17-cv-01555-LAS	WILLIAMS et al.	
57	1:17-cv-01564-LAS	ANGELL et al.	2021-1313
58	1:17-cv-01565-LAS	CORTE	2021-1472
59	1:17-cv-01567-LAS	UECKERT et al.	2021-1287
60	1:17-cv-01566-LAS	MILLER	2021-1540
61	1:17-cv-01577-LAS	BAE et al.	2021-1165
62	1:17-cv-01578-LAS	SINDELAR et al.	2021-1157
63	1:17-cv-01588-LAS	BARTLETT et al.	2021-1208
64	1:17-cv-01625-LAS	EGGLESTON et al.	2021-1199
65	1:17-cv-01645-LAS	DEMOPULOS	2021-1136
66	1:17-cv-01646-LAS	GARDNER et al.	2021-1152
67	1:17-cv-01647-LAS	SWIRES et al.	2021-1163
68	1:17-cv-01653-LAS	KEARNEY et al.	2021-1220
69	1:17-cv-01679-LAS	ALCANTARA et al.	2021-1161
70	1:17-cv-01680-LAS	KNUTSEN	2021-1483
71	1:17-cv-01681-LAS	BAKER	2021-1272
72	1:17-cv-01682-LAS	MARCUS	2021-1312
73	1:17-cv-01683-LAS	HARKNESS	2021-1311
74	1:17-cv-01684-LAS	AYERS	2021-1273

75	1:17-cv-01686-LAS	SCOTT	2021-1318
76	1:17-cv-01687-LAS	ROBERTS	
77	1:17-cv-01688-LAS	WOOLLEY	2021-1541
78	1:17-cv-01689-LAS	ROTAN	2021-1320
79	1:17-cv-01748-LAS	SIMONTON	2021-1276
80	1:17-cv-01814-LAS	WILSON	2021-1190
81	1:17-cv-01822-LAS	AHMAD et al.	2021-1172
82	1:17-cv-01828-LAS	ABEL et al.	2021-1231
83	1:17-cv-01833-LAS	WASSEF et al.	2021-1164
84	1:17-cv-01834-LAS	HUNT et al.	2021-1155
85	1:19-cv-00782-LAS	ABED-STEPHEN et al.	
86	1:19-cv-00807-LAS	ALFORD et al.	
87	1:19-cv-01082-LAS	LEFEVRE	2021-1254
88	1:19-cv-01180-LAS	ROWLAND et al.	2021-1255
89	1:19-cv-01207-LAS	AMICA MUTUAL INSURANCE COMPANY	2021-1280
90	1:19-cv-01208-LAS	PURE UNDERWRITERS RECIPROCAL EXCHANGE	2021-1216
91	1:19-cv-01215-LAS	DEVOY et al.	2021-1468
92	1:19-cv-01266-LAS	ASHBY et al.	

93	1:19-cv-01278-LAS	WHITFORD et al.	2021-1394
94	1:18-cv-01942-LAS	DELILLE et al.	2021-1243
95	1:19-cv-01321-LAS	AHANCHIAN et al.	2021-1398
96	1:18-cv-02000-LAS	BEY	
97	1:19-cv-01908-LAS	CARTMELL et al.	2021-1252
98	1:19-cv-01924-LAS	ALLEN et al.	
99	1:20-cv-00115-LAS	LONGHURST et al.	2021-1281
100	1:20-cv-00147-LAS	CROLEY et al.	2021-1293
101	1:19-cv-00698-LAS	ASGHARI et al.	
102	1:20-cv-00591-LAS	SHARROCK et al.	
103	1:20-cv-00686-LAS	RAY et al.	
104	1:20-cv-00696-LAS	RON et al.	
105	1:20-cv-00701-LAS	BAKALOVIC et al.	
106	1:20-cv-00704-LAS	PD LIQUIDATING TRUST	
107	1:18-cv-01968-LAS	BAMMEL	2021-1186
108	1:19-cv-01063-LAS	DARBY et al.	
109	1:19-cv-00036-LAS	VO et al.	2021-1230
110	1:19-cv-01077-LAS	WRIGHT et al.	2021-1288
111	1:19-cv-01078-LAS	KIMMONS	2021-1304

112	1:18-cv-01856-LAS	HASAN et al.	2021-1184
113	1:19-cv-00127-LAS	SMITH, JR. et al.	2021-1431
114	1:19-cv-00167-LAS	BARLOW et al.	2021-1253
115	1:19-cv-00423-LAS	PHAN et al.	2021-1162
116	1:19-cv-00465-LAS	WHILES et al.	2021-1405
117	1:19-cv-00588-LAS	LEVINE et al.	2021-1499
118	1:17-cv-16522-LAS	NGUYEN et al.	2021-1282
119	1:17-cv-01882-LAS	ABBAS et al.	2021-1207
120	1:17-cv-01685-LAS	BROWN	2021-1274
121	1:17-cv-01948-LAS	ALLENSWORTH et al.	2021-1335
122	1:17-cv-01949-LAS	ANDERSON et al.	2021-1277
123	1:17-cv-01954-LAS	MENDOZA et al.	2021-1189
124	1:17-cv-01972-LAS	AZAR et al.	2021-1222
125	1:18-cv-00707-LAS	PENA et al.	2021-1513
126	1:18-cv-00708-LAS	HORSAK	2021-1492
127	1:18-cv-00123-LAS	OLSEN et al.	
128	1:18-cv-00142-LAS	CARTER	2021-1187
129	1:18-cv-00144-LAS	AMERICAN HOME ASSURANCE COMPANY et al.	2021-1217
130	1:18-cv-00168-LAS	DALAL et al.	2021-1240

131	1:18-cv-00169-LAS	SALIGRAM et al.	2021-1427
132	1:18-cv-00230-LAS	DANIEL et al.	2021-1289/ 2021-1290
133	1:18-cv-00243-LAS	CASTROPAREDES et al.	2021-1146
134	1:18-cv-00244-LAS	PATOUT et al.	2021-1148
135	1:18-cv-00308-LAS	CUETO et al.	2021-1171
136	1:18-cv-00318-LAS	ARRIAGA COMPANIES, INC.	2021-1455
137	1:18-cv-00319-LAS	CANNON et al.	2021-1232
138	1:18-cv-00321-LAS	HOUK et al.	2021-1233
139	1:18-cv-00322-LAS	OBEROI	2021-1295
140	1:18-cv-00339-LAS	CARPENTER	2021-1133
141	1:18-cv-00338-LAS	BUSH et al.	2021-1132
142	1:18-cv-00341-LAS	RAY et al.	2021-1234
143	1:18-cv-00344-LAS	CHEN et al.	2021-1406
144	1:18-cv-00345-LAS	KICKERILLO et al.	
145	1:18-cv-00346-LAS	FLEMING et al.	2021-1145
146	1:18-cv-00347-LAS	KEMICK et al.	2021-1140
147	1:18-cv-00348-LAS	SCOTT et al.	2021-1142
148	1:18-cv-00349-LAS	SILBERMAN et al.	2021-1143
149	1:18-cv-00389-LAS	CLOONEY	2021-1147

150	1:18-cv-00463-LAS	21ST CENTURY CENTENNIAL INSURANCE CO. et al.	2021-1206
151	1:18-cv-00518-LAS	TEKELL	2021-1138
152	1:18-cv-00697-LAS	TRAN et al.	2021-1221
153	1:18-cv-00685-LAS	JOHN	2021-1256
154	1:18-cv-00700-LAS	DONALD et al.	2021-1198
155	1:18-cv-00778-LAS	MCCLOUD et al.	2021-1176
156	1:18-cv-00779-LAS	D&T NAIL LOUNGE et al.	2021-1218
157	1:18-cv-00974-LAS	AHMED et al.	2021-1319
158	1:18-cv-01068-LAS	VALLE et al.	2021-1296
159	1:18-cv-01165-LAS	ASPARILLA	2021-1283
160	1:18-cv-01166-LAS	BASDEN	2021-1324
161	1:18-cv-01167-LAS	CALVERT	2021-1284
162	1:18-cv-01169-LAS	DAVIS	2021-1325
163	1:18-cv-01168-LAS	DAVALOS	2021-1403
164	1:18-cv-01171-LAS	DURAN	2021-1314
165	1:18-cv-01173-LAS	HEARD	2021-1315
166	1:18-cv-01176-LAS	JARET	2021-1336
167	1:18-cv-01178-LAS	KENNISON	2021-1407
168	1:18-cv-01179-LAS	MARIN	2021-1338

169	1:18-cv-01180-LAS	OLGUIN	2021-1339
170	1:18-cv-01181-LAS	PADILLA	2021-1317
171	1:18-cv-01172-LAS	MARTINEZ	2021-1316
172	1:18-cv-01183-LAS	MATA	2021-1404
173	1:18-cv-01184-LAS	VALADEZ	2021-1341
174	1:18-cv-01170-LAS	DOROUGH	2021-1285
175	1:18-cv-01193-LAS	WHEELER et al.	2021-1200
176	1:18-cv-01263-LAS	BLAKE et al.	2021-1250
177	1:18-cv-01287-LAS	BERNAL et al.	2021-1322
178	1:18-cv-01307-LAS	HARRIS et al.	2021-1337
179	1:18-cv-01380-LAS	LIVE OAK APARTMENTS, LLC	2021-1177
180	1:18-cv-01417-LAS	CHAWDRY et al.	2021-1291
181	1:18-cv-01523-LAS	YI	2021-1178
182	1:18-cv-01610-LAS	DUNCAN et al.	2021-1139
183	1:18-cv-01611-LAS	MALEY et al.	2021-1137
184	1:18-cv-01612-LAS	PEIRO	2021-1135
185	1:18-cv-01613-LAS	WOODS	2021-1144
186	1:18-cv-01652-LAS	CHESS et al.	2021-1494
187	1:18-cv-01670-LAS	BERRY et al.	2021-1134

188	1:18-cv-01697-LAS	TRAVELERS EXCESS AND SURPLUS LINES COMPANY	
189	1:18-cv-01714-LAS	GRIGSBY et al.	2021-1279
190	1:17-cv-02003-LAS	JASPER et al.	2021-1215

FORM 26. Docketing Statement

Form 26 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DOCKETING STATEMENT

Case Number: 2021-1131

Short Case Caption: Milton v. US

Filing Party/Entity: Appellants under no. 21-1499

Instructions: Complete each section or check the box if a section is intentionally blank or not applicable. Attach additional pages as needed. Refer to the court's Mediation Guidelines for filing requirements. An amended docketing statement is required for each new appeal or cross-appeal consolidated after first filing.

Case Origin	Originating Number	Type of Case
U.S. Court of Federal Claims	1:19-cv-588	Takings

Relief sought on appeal: ☐ None/Not Applicable

Reversal and remand.

Relief awarded below (if damages, specify): ☐ None/Not Applicable

Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment was granted, and Plaintiffs' Cross-Motion for Summary Judgment was denied.

Briefly describe the judgment/order appealed from:

(1) Judgment, No. 19-588, ECF No. 6, based on (2) Opinion and Order, No. 17-9002L, ECF No. 203, and (3) Order Directing Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237

Nature of judgment (select one): Date of judgment: 9/10/20

- ☑ Final Judgment, 28 USC § 1295
- ☐ Rule 54(b)
- ☐ Interlocutory Order (specify type) _____
- ☐ Other (explain) _____

Name and docket number of any related cases pending before this court, and the name of the writing judge if an opinion was issued. ☐ None/Not Applicable

This appeal relates to several appeals originating from the same Downstream Sub-Master Docket (17-9002L); Hon. Loren A. Smith; Explanation of related cases on additional pages

Issues to be raised on appeal: ☐ None/Not Applicable

As a matter of de novo review, the lower court erred in ruling that appellants failed to state a cognizable claim for a "taking" of private property by the U.S. Army Corps of Engineers.

Have there been discussions with other parties relating to settlement of this case?

☑ Yes ☐ No

If "yes," when were the last such discussions?

- ☐ Before the case was filed below
- ☑ During the pendency of the case below
- ☐ Following the judgment/order appealed from

If "yes," were the settlement discussions mediated? ☐ Yes ☑ No

If they were mediated, by whom?

N/A

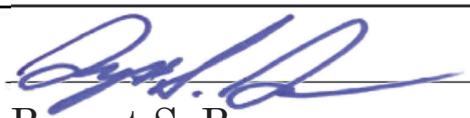
Do you believe that this case may be amenable to mediation? ☐ Yes ☑ No

Explain.

The question before the Federal Circuit is a matter of law that Appellants under no. 21-1499 do not believe is amenable to mediation at this time. Moreover, repeated settlement discussions occurred during the pendency of the case and no meaningful progress occurred. Given this, settlement at mediation on appeal would likely be unsuccessful.

Provide any other information relevant to the inclusion of this case in the court's mediation program.

N/A

Date: 2/3/21 Signature: 

Name: Bryant S. Banes

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Statement of Related Cases Under Fed. Cir. R. 47.5

This case (Appellants under No. 21-1499) is one (1) of approximately 190 cases brought by owners of properties in the Houston, Texas region that flooded downstream from the Addicks and Barker Reservoirs following Hurricane Harvey. These cases were filed in the Court of Federal Claims and are collectively known as the "Downstream" cases. All the 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.

The Downstream cases were consolidated by the Court of Federal Claims into a Downstream Sub-Master Docket. See No. 1:17-cv-9002L, In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs v. United States (Fed. Cl.); see also Management Order No. 3 (Order Establishing Sub-Master Docket for Downstream Claims), No. 17-9002L, ECF No. 2.

All substantive and legal briefing occurred in the Downstream Sub-Master Docket (No. 17-9002L). Ultimately, the court issued an "Opinion and Order" granting Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment. See Opinion and Order, No. 17-9002L, ECF No. 203. In a subsequent order, the court directed that the Downstream Sub-Master Docket (No. 17-9002L) be closed, and the final judgments be entered in the individual Downstream cases. See Order Directing the Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237.

The court exempted from this directive two (2) categories of Downstream cases: (1) cases in which property owners have attempted to show cause that their claims

are distinguishable from those controlled by the court's summary judgment ruling;[1] and (2) cases filed after the date of the show-cause order.[2] Otherwise, the court ordered that judgment be entered and appeals be filed in each individual docket. *Id.*

Starting on December 10, 2020, final judgments were entered in all the individual Downstream cases (except for the two (2) categories of cases in which the court reserved a ruling). Notices of appeal were filed in most of the cases and the cases have been docketed with this Court. All the appeals emanating from the Downstream Sub-Master Docket (No. 17-9002L) are "related cases."

The attorneys filing this Notice and Docketing Statement have been engaged to represent 136 of Downstream Appellants. At this time, counsel believes a complete list of the "related cases" is as follows:

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[1] Those cases are (1) *Banes et al. v United States*, No. 17-1191L; (2) *Salo et al. v. United States*, No. 17-1194L; (3) *Williamson et al. v. United States*, No. 17-1456L; (4) *Williams et al. v. United States*, No. 17-1555L; (5) *Olsen et al. v. United States*, No. 18-0123L; (6) *Kickerillo et al. v. United States*, No. 18-0345L; (7) *Travelers Excess and Surplus Lines v. United States*, No. 18-1697L; (8) *Asghari et al. v. United States*, No. 19-0698L; (9) *Abed-Stephen et al. v. United States*, No. 19-0782L; (10) *Alford et al. v. United States*, No. 19-0807L; (11) *Ashby et al. v. United States*, No. 19-1266L; (12) *Darby et al. v. United States*, No. 19-1063L; and (13) *Allen et al. v. United States*, No. 19-1924L. Moreover, in Daniel et al. v. United States, No. 18-0230L, one of the plaintiffs (Gregory Pudney) filed a show cause response while the other plaintiff did not (D.R. Daniel).

[2] Those cases are (1) *Sharrock et al. v. United States*, No. 20-0591L; (2) *Ray et al. v. United States*, No. 20-0686L; (3) *Ron et al. v. United States*, No. 20-0696L; (4) *Bakalovic et al. v. United States*, No. 20-0701L; and (5) *PD Liquidating Trust v. United States*, No. 20-0704L.

#	Trial Docket No.	Caption (v. United States)	Appeal Docket No.
1	1:17-cv-01189-LAS	Y AND J PROPERTIES, LTD.	2021-1286
2	1:17-cv-01191-LAS	BANES et al.	2021-1529
3	1:17-cv-01194-LAS	SOLA et al.	
4	1:17-cv-01195-LAS	BOUZERAND et al.	2021-1197
5	1:17-cv-01206-LAS	ALDRED et al.	2021-1223
6	1:17-cv-01215-LAS	SMITH et al.	2021-1204
7	1:17-cv-01216-LAS	STRICKLAND et al.	2021-1205
8	1 17-cv-01232-LAS	GOMEZ et al.	2021-1196
9	1:17-cv-01235-LAS	MILTON et al.	2021-1131
10	1:17-cv-01300-LAS	HOLLIS, JR. et al.	2021-1201
11	1:17-cv-01303-LAS	ARRIAGA et al.	2021-1225
12	1:17-cv-01332-LAS	MOUSILLI	2021-1174
13	1:17-cv-01390-LAS	DE LA GARZA et al.	
14	1:17-cv-01391-LAS	POLLOCK	2021-1237
15	1:17-cv-01394-LAS	AGL, LLC et al.	2021-1238
16	1:17-cv-01395-LAS	LUDWIGSEN FAMILY LIVING TRUST et al.	2021-1303
17	1:17-cv-01396-LAS	REYES	2021-1239
18	1:17-cv-01393-LAS	KHOURY	2021-1467

19	1:17-cv-01397-LAS	VANCE	2021-1302
20	1:17-cv-01398-LAS	ERWIN	2021-1429
21	1:17-cv-01399-LAS	JAFARNIA	2021-1305
22	1:17-cv-01408-LAS	BRUZOS et al.	2021-1195
23	1:17-cv-01423-LAS	GOVIA	2021-1224
24	1:17-cv-01427-LAS	HERING et al.	2021-1159
25	1:17-cv-01428-LAS	LEWIS	2021-1151
26	1:17-cv-01430-LAS	MURRAY et al.	2021-1188
27	1:17-cv-01433-LAS	VENGHAUS	2021-1241
28	1:17-cv-01436-LAS	EFFIMOFF	2021-1242
29	1:17-cv-01434-LAS	RUSSO	2021-1465
30	1:17-cv-01437-LAS	THAKER	2021-1307
31	1:17-cv-01435-LAS	NEAL	2021-1306
32	1:17-cv-01438-LAS	THAKER	2021-1308
33	1:17-cv-01439-LAS	GILLIS	2021-1464
34	1:17-cv-01450-LAS	WOLF et al.	2021-1251
35	1:17-cv-01451-LAS	MEMORIAL SMC INVESTMENT 2013 LP	2021-1173
36	1:17-cv-01454-LAS	DRONE et al.	2021-1175
37	1:17-cv-01456-LAS	WILLIAMSON et al.	

38	1:17-cv-01457-LAS	MEADOWS ON MEMORIAL OWNERS ASSOCIATION INC. et al.	2021-1214
39	1:17-cv-01458-LAS	BE MEMORIAL REALTY LTD	2021-1444
40	1:17-cv-01453-LAS	CEBALLOS et al.	2021-1193
41	1:17-cv-01461-LAS	TITA et al.	2021-1294
42	1:17-cv-01512-LAS	ABBOTT et al.	2021-1167
43	1:17-cv-01514-LAS	CROKER	2021-1244
44	1:17-cv-01515-LAS	MURCIA	2021-1268
45	1:17-cv-01516-LAS	KOCHARYAN	2021-1479
46	1:17-cv-01517-LAS	AGREDA	2021-1269
47	1:17-cv-01518-LAS	REED	2021-1309
48	1:17-cv-01519-LAS	ALFORD	2021-1270
49	1:17-cv-01520-LAS	RAVAT	2021-1482
50	1:17-cv-01521-LAS	NGUYEN	2021-1310
51	1:17-cv-01522-LAS	CHEN	2021-1275
52	1:17-cv-01523-LAS	PAGNOTTO	2021-1539
53	1:17-cv-01524-LAS	MORAN	2021-1271
54	1:17-cv-01525-LAS	RAZNAHAN	2021-1481
55	1:17-cv-01545-LAS	YOUNG et al.	2021-1192

56	1:17-cv-01555-LAS	WILLIAMS et al.	
57	1:17-cv-01564-LAS	ANGELL et al.	2021-1313
58	1:17-cv-01565-LAS	CORTE	2021-1472
59	1:17-cv-01567-LAS	UECKERT et al.	2021-1287
60	1:17-cv-01566-LAS	MILLER	2021-1540
61	1:17-cv-01577-LAS	BAE et al.	2021-1165
62	1:17-cv-01578-LAS	SINDELAR et al.	2021-1157
63	1:17-cv-01588-LAS	BARTLETT et al.	2021-1208
64	1:17-cv-01625-LAS	EGGLESTON et al.	2021-1199
65	1:17-cv-01645-LAS	DEMOPULOS	2021-1136
66	1:17-cv-01646-LAS	GARDNER et al.	2021-1152
67	1:17-cv-01647-LAS	SWIRES et al.	2021-1163
68	1:17-cv-01653-LAS	KEARNEY et al.	2021-1220
69	1:17-cv-01679-LAS	ALCANTARA et al.	2021-1161
70	1:17-cv-01680-LAS	KNUTSEN	2021-1483
71	1:17-cv-01681-LAS	BAKER	2021-1272
72	1:17-cv-01682-LAS	MARCUS	2021-1312
73	1:17-cv-01683-LAS	HARKNESS	2021-1311
74	1:17-cv-01684-LAS	AYERS	2021-1273

75	1:17-cv-01686-LAS	SCOTT	2021-1318
76	1:17-cv-01687-LAS	ROBERTS	
77	1:17-cv-01688-LAS	WOOLLEY	2021-1541
78	1:17-cv-01689-LAS	ROTAN	2021-1320
79	1:17-cv-01748-LAS	SIMONTON	2021-1276
80	1:17-cv-01814-LAS	WILSON	2021-1190
81	1:17-cv-01822-LAS	AHMAD et al.	2021-1172
82	1:17-cv-01828-LAS	ABEL et al.	2021-1231
83	1:17-cv-01833-LAS	WASSEF et al.	2021-1164
84	1:17-cv-01834-LAS	HUNT et al.	2021-1155
85	1:19-cv-00782-LAS	ABED-STEPHEN et al.	
86	1:19-cv-00807-LAS	ALFORD et al.	
87	1:19-cv-01082-LAS	LEFEVRE	2021-1254
88	1:19-cv-01180-LAS	ROWLAND et al.	2021-1255
89	1:19-cv-01207-LAS	AMICA MUTUAL INSURANCE COMPANY	2021-1280
90	1:19-cv-01208-LAS	PURE UNDERWRITERS RECIPROCAL EXCHANGE	2021-1216
91	1:19-cv-01215-LAS	DEVOY et al.	2021-1468
92	1:19-cv-01266-LAS	ASHBY et al.	

93	1:19-cv-01278-LAS	WHITFORD et al.	2021-1394
94	1:18-cv-01942-LAS	DELILLE et al.	2021-1243
95	1:19-cv-01321-LAS	AHANCHIAN et al.	2021-1398
96	1:18-cv-02000-LAS	BEY	
97	1:19-cv-01908-LAS	CARTMELL et al.	2021-1252
98	1:19-cv-01924-LAS	ALLEN et al.	
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106	1:20-cv-00704-LAS	PD LIQUIDATING TRUST	
107	1:18-cv-01968-LAS	BAMMEL	2021-1186
108	1:19-cv-01063-LAS	DARBY et al.	
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111	1:19-cv-01078-LAS	KIMMONS	2021-1304

112	1:18-cv-01856-LAS	HASAN et al.	2021-1184
113	1:19-cv-00127-LAS	SMITH, JR. et al.	2021-1431
114	1:19-cv-00167-LAS	BARLOW et al.	2021-1253
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118	1:17-cv-16522-LAS	NGUYEN et al.	2021-1282
119	1:17-cv-01882-LAS	ABBAS et al.	2021-1207
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124	1:17-cv-01972-LAS	AZAR et al.	2021-1222
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127	1:18-cv-00123-LAS	OLSEN et al.	
128	1:18-cv-00142-LAS	CARTER	2021-1187
129	1:18-cv-00144-LAS	AMERICAN HOME ASSURANCE COMPANY et al.	2021-1217
130	1:18-cv-00168-LAS	DALAL et al.	2021-1240

131	1:18-cv-00169-LAS	SALIGRAM et al.	2021-1427
132	1:18-cv-00230-LAS	DANIEL et al.	2021-1289/ 2021-1290
133	1:18-cv-00243-LAS	CASTROPAREDES et al.	2021-1146
134	1:18-cv-00244-LAS	PATOUT et al.	2021-1148
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136	1:18-cv-00318-LAS	ARRIAGA COMPANIES, INC.	2021-1455
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138	1:18-cv-00321-LAS	HOUK et al.	2021-1233
139	1:18-cv-00322-LAS	OBEROI	2021-1295
140	1:18-cv-00339-LAS	CARPENTER	2021-1133
141	1:18-cv-00338-LAS	BUSH et al.	2021-1132
142	1:18-cv-00341-LAS	RAY et al.	2021-1234
143	1:18-cv-00344-LAS	CHEN et al.	2021-1406
144	1:18-cv-00345-LAS	KICKERILLO et al.	
145	1:18-cv-00346-LAS	FLEMING et al.	2021-1145
146	1:18-cv-00347-LAS	KEMICK et al.	2021-1140
147	1:18-cv-00348-LAS	SCOTT et al.	2021-1142
148	1:18-cv-00349-LAS	SILBERMAN et al.	2021-1143
149	1:18-cv-00389-LAS	CLOONEY	2021-1147

150	1:18-cv-00463-LAS	21ST CENTURY CENTENNIAL INSURANCE CO. et al.	2021-1206
151	1:18-cv-00518-LAS	TEKELL	2021-1138
152	1:18-cv-00697-LAS	TRAN et al.	2021-1221
153	1:18-cv-00685-LAS	JOHN	2021-1256
154	1:18-cv-00700-LAS	DONALD et al.	2021-1198
155	1:18-cv-00778-LAS	MCCLOUD et al.	2021-1176
156	1:18-cv-00779-LAS	D&T NAIL LOUNGE et al.	2021-1218
157	1:18-cv-00974-LAS	AHMED et al.	2021-1319
158	1:18-cv-01068-LAS	VALLE et al.	2021-1296
159	1:18-cv-01165-LAS	ASPARILLA	2021-1283
160	1:18-cv-01166-LAS	BASDEN	2021-1324
161	1:18-cv-01167-LAS	CALVERT	2021-1284
162	1:18-cv-01169-LAS	DAVIS	2021-1325
163	1:18-cv-01168-LAS	DAVALOS	2021-1403
164	1:18-cv-01171-LAS	DURAN	2021-1314
165	1:18-cv-01173-LAS	HEARD	2021-1315
166	1:18-cv-01176-LAS	JARET	2021-1336
167	1:18-cv-01178-LAS	KENNISON	2021-1407
168	1:18-cv-01179-LAS	MARIN	2021-1338

169	1:18-cv-01180-LAS	OLGUIN	2021-1339
170	1:18-cv-01181-LAS	PADILLA	2021-1317
171	1:18-cv-01172-LAS	MARTINEZ	2021-1316
172	1:18-cv-01183-LAS	MATA	2021-1404
173	1:18-cv-01184-LAS	VALADEZ	2021-1341
174	1:18-cv-01170-LAS	DOROUGH	2021-1285
175	1:18-cv-01193-LAS	WHEELER et al.	2021-1200
176	1:18-cv-01263-LAS	BLAKE et al.	2021-1250
177	1:18-cv-01287-LAS	BERNAL et al.	2021-1322
178	1:18-cv-01307-LAS	HARRIS et al.	2021-1337
179	1:18-cv-01380-LAS	LIVE OAK APARTMENTS, LLC	2021-1177
180	1:18-cv-01417-LAS	CHAWDRY et al.	2021-1291
181	1:18-cv-01523-LAS	YI	2021-1178
182	1:18-cv-01610-LAS	DUNCAN et al.	2021-1139
183	1:18-cv-01611-LAS	MALEY et al.	2021-1137
184	1:18-cv-01612-LAS	PEIRO	2021-1135
185	1:18-cv-01613-LAS	WOODS	2021-1144
186	1:18-cv-01652-LAS	CHESS et al.	2021-1494
187	1:18-cv-01670-LAS	BERRY et al.	2021-1134

188	1:18-cv-01697-LAS	TRAVELERS EXCESS AND SURPLUS LINES COMPANY	
189	1:18-cv-01714-LAS	GRIGSBY et al.	2021-1279
190	1:17-cv-02003-LAS	JASPER et al.	2021-1215

FORM 26. Docketing Statement

Form 26 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DOCKETING STATEMENT

Case Number: 2021-1131

Short Case Caption: Milton v. US

Filing Party/Entity: Appellants under no. 21-1492

Instructions: Complete each section or check the box if a section is intentionally blank or not applicable. Attach additional pages as needed. Refer to the court's Mediation Guidelines for filing requirements. An amended docketing statement is required for each new appeal or cross-appeal consolidated after first filing.

Case Origin	Originating Number	Type of Case
U.S. Court of Federal Claims	1:18-cv-708	Takings

Relief sought on appeal: ☐ None/Not Applicable

Reversal and remand.

Relief awarded below (if damages, specify): ☐ None/Not Applicable

Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment was granted, and Plaintiffs' Cross-Motion for Summary Judgment was denied.

Briefly describe the judgment/order appealed from:

(1) Judgment, No. 18-708, ECF No. 9, based on (2) Opinion and Order, No. 17-9002L, ECF No. 203, and (3) Order Directing Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237

Nature of judgment (select one): Date of judgment: 9/10/20

- ☑ Final Judgment, 28 USC § 1295
- ☐ Rule 54(b)
- ☐ Interlocutory Order (specify type) _____
- ☐ Other (explain) _____

Name and docket number of any related cases pending before this court, and the name of the writing judge if an opinion was issued. ☐ None/Not Applicable

This appeal relates to several appeals originating from the same Downstream Sub-Master Docket (17-9002L); Hon. Loren A. Smith; Explanation of related cases on additional pages

Issues to be raised on appeal: ☐ None/Not Applicable

As a matter of de novo review, the lower court erred in ruling that appellants failed to state a cognizable claim for a "taking" of private property by the U.S. Army Corps of Engineers.

Have there been discussions with other parties relating to settlement of this case?

☑ Yes ☐ No

If "yes," when were the last such discussions?

- ☐ Before the case was filed below
- ☑ During the pendency of the case below
- ☐ Following the judgment/order appealed from

If "yes," were the settlement discussions mediated? ☐ Yes ☑ No

If they were mediated, by whom?

N/A

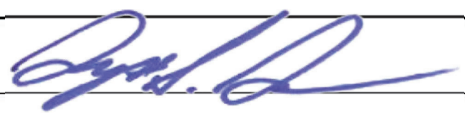
Do you believe that this case may be amenable to mediation? ☐ Yes ☑ No

Explain.

The question before the Federal Circuit is a matter of law that Appellants under no. 21-1492 do not believe is amenable to mediation at this time. Moreover, repeated settlement discussions occurred during the pendency of the case and no meaningful progress occurred. Given this, settlement at mediation on appeal would likely be unsuccessful.

Provide any other information relevant to the inclusion of this case in the court's mediation program.

N/A

Date: 2/3/21 Signature: 

Name: Bryant S. Banes

Save for Filing

Statement of Related Cases Under Fed. Cir. R. 47.5

This case (Appellant under Nos. 21-1492) is one (1) of approximately 190 cases brought by owners of properties in the Houston, Texas region that flooded downstream from the Addicks and Barker Reservoirs following Hurricane Harvey. These cases were filed in the Court of Federal Claims and are collectively known as the "Downstream" cases. All the 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.

The Downstream cases were consolidated by the Court of Federal Claims into a Downstream Sub-Master Docket. See No. 1:17-cv-9002L, In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs v. United States (Fed. Cl.); see also Management Order No. 3 (Order Establishing Sub-Master Docket for Downstream Claims), No. 17-9002L, ECF No. 2.

All substantive and legal briefing occurred in the Downstream Sub-Master Docket (No. 17-9002L). Ultimately, the court issued an "Opinion and Order" granting Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment. See Opinion and Order, No. 17-9002L, ECF No. 203. In a subsequent order, the court directed that the Downstream Sub-Master Docket (No. 17-9002L) be closed, and the final judgments be entered in the individual Downstream cases. See Order Directing the Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237.

The court exempted from this directive two (2) categories of Downstream cases: (1) cases in which property owners have attempted to show cause that their claims

are distinguishable from those controlled by the court's summary judgment ruling;[1] and (2) cases filed after the date of the show-cause order.[2] Otherwise, the court ordered that judgment be entered and appeals be filed in each individual docket. *Id.*

Starting on December 10, 2020, final judgments were entered in all the individual Downstream cases (except for the two (2) categories of cases in which the court reserved a ruling). Notices of appeal were filed in most of the cases and the cases have been docketed with this Court. All the appeals emanating from the Downstream Sub-Master Docket (No. 17-9002L) are "related cases."

The attorneys filing this Notice and Docketing Statement have been engaged to represent 136 of Downstream Appellants. At this time, counsel believes a complete list of the "related cases" is as follows:

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[1] Those cases are (1) *Banes et al. v United States*, No. 17-1191L; (2) *Salo et al. v. United States*, No. 17-1194L; (3) *Williamson et al. v. United States*, No. 17-1456L; (4) *Williams et al. v. United States*, No. 17-1555L; (5) *Olsen et al. v. United States*, No. 18-0123L; (6) *Kickerillo et al. v. United States*, No. 18-0345L; (7) *Travelers Excess and Surplus Lines v. United States*, No. 18-1697L; (8) *Asghari et al. v. United States*, No. 19-0698L; (9) *Abed-Stephen et al. v. United States*, No. 19-0782L; (10) *Alford et al. v. United States*, No. 19-0807L; (11) *Ashby et al. v. United States*, No. 19-1266L; (12) *Darby et al. v. United States*, No. 19-1063L; and (13) *Allen et al. v. United States*, No. 19-1924L. Moreover, in Daniel et al. v. United States, No. 18-0230L, one of the plaintiffs (Gregory Pudney) filed a show cause response while the other plaintiff did not (D.R. Daniel).

[2] Those cases are (1) *Sharrock et al. v. United States*, No. 20-0591L; (2) *Ray et al. v. United States*, No. 20-0686L; (3) *Ron et al. v. United States*, No. 20-0696L; (4) *Bakalovic et al. v. United States*, No. 20-0701L; and (5) *PD Liquidating Trust v. United States*, No. 20-0704L.

#	Trial Docket No.	Caption (v. United States)	Appeal Docket No.
1	1:17-cv-01189-LAS	Y AND J PROPERTIES, LTD.	2021-1286
2	1:17-cv-01191-LAS	BANES et al.	2021-1529
3	1:17-cv-01194-LAS	SOLA et al.	
4	1:17-cv-01195-LAS	BOUZERAND et al.	2021-1197
5	1:17-cv-01206-LAS	ALDRED et al.	2021-1223
6	1:17-cv-01215-LAS	SMITH et al.	2021-1204
7	1:17-cv-01216-LAS	STRICKLAND et al.	2021-1205
8	1 17-cv-01232-LAS	GOMEZ et al.	2021-1196
9	1:17-cv-01235-LAS	MILTON et al.	2021-1131
10	1:17-cv-01300-LAS	HOLLIS, JR. et al.	2021-1201
11	1:17-cv-01303-LAS	ARRIAGA et al.	2021-1225
12	1:17-cv-01332-LAS	MOUSILLI	2021-1174
13	1:17-cv-01390-LAS	DE LA GARZA et al.	
14	1:17-cv-01391-LAS	POLLOCK	2021-1237
15	1:17-cv-01394-LAS	AGL, LLC et al.	2021-1238
16	1:17-cv-01395-LAS	LUDWIGSEN FAMILY LIVING TRUST et al.	2021-1303
17	1:17-cv-01396-LAS	REYES	2021-1239
18	1:17-cv-01393-LAS	KHOURY	2021-1467

19	1:17-cv-01397-LAS	VANCE	2021-1302
20	1:17-cv-01398-LAS	ERWIN	2021-1429
21	1:17-cv-01399-LAS	JAFARNIA	2021-1305
22	1:17-cv-01408-LAS	BRUZOS et al.	2021-1195
23	1:17-cv-01423-LAS	GOVIA	2021-1224
24	1:17-cv-01427-LAS	HERING et al.	2021-1159
25	1:17-cv-01428-LAS	LEWIS	2021-1151
26	1:17-cv-01430-LAS	MURRAY et al.	2021-1188
27	1:17-cv-01433-LAS	VENGHAUS	2021-1241
28	1:17-cv-01436-LAS	EFFIMOFF	2021-1242
29	1:17-cv-01434-LAS	RUSSO	2021-1465
30	1:17-cv-01437-LAS	THAKER	2021-1307
31	1:17-cv-01435-LAS	NEAL	2021-1306
32	1:17-cv-01438-LAS	THAKER	2021-1308
33	1:17-cv-01439-LAS	GILLIS	2021-1464
34	1:17-cv-01450-LAS	WOLF et al.	2021-1251
35	1:17-cv-01451-LAS	MEMORIAL SMC INVESTMENT 2013 LP	2021-1173
36	1:17-cv-01454-LAS	DRONE et al.	2021-1175
37	1:17-cv-01456-LAS	WILLIAMSON et al.	

38	1:17-cv-01457-LAS	MEADOWS ON MEMORIAL OWNERS ASSOCIATION INC. et al.	2021-1214
39	1:17-cv-01458-LAS	BE MEMORIAL REALTY LTD	2021-1444
40	1:17-cv-01453-LAS	CEBALLOS et al.	2021-1193
41	1:17-cv-01461-LAS	TITA et al.	2021-1294
42	1:17-cv-01512-LAS	ABBOTT et al.	2021-1167
43	1:17-cv-01514-LAS	CROKER	2021-1244
44	1:17-cv-01515-LAS	MURCIA	2021-1268
45	1:17-cv-01516-LAS	KOCHARYAN	2021-1479
46	1:17-cv-01517-LAS	AGREDA	2021-1269
47	1:17-cv-01518-LAS	REED	2021-1309
48	1:17-cv-01519-LAS	ALFORD	2021-1270
49	1:17-cv-01520-LAS	RAVAT	2021-1482
50	1:17-cv-01521-LAS	NGUYEN	2021-1310
51	1:17-cv-01522-LAS	CHEN	2021-1275
52	1:17-cv-01523-LAS	PAGNOTTO	2021-1539
53	1:17-cv-01524-LAS	MORAN	2021-1271
54	1:17-cv-01525-LAS	RAZNAHAN	2021-1481
55	1:17-cv-01545-LAS	YOUNG et al.	2021-1192

56	1:17-cv-01555-LAS	WILLIAMS et al.	
57	1:17-cv-01564-LAS	ANGELL et al.	2021-1313
58	1:17-cv-01565-LAS	CORTE	2021-1472
59	1:17-cv-01567-LAS	UECKERT et al.	2021-1287
60	1:17-cv-01566-LAS	MILLER	2021-1540
61	1:17-cv-01577-LAS	BAE et al.	2021-1165
62	1:17-cv-01578-LAS	SINDELAR et al.	2021-1157
63	1:17-cv-01588-LAS	BARTLETT et al.	2021-1208
64	1:17-cv-01625-LAS	EGGLESTON et al.	2021-1199
65	1:17-cv-01645-LAS	DEMOPULOS	2021-1136
66	1:17-cv-01646-LAS	GARDNER et al.	2021-1152
67	1:17-cv-01647-LAS	SWIRES et al.	2021-1163
68	1:17-cv-01653-LAS	KEARNEY et al.	2021-1220
69	1:17-cv-01679-LAS	ALCANTARA et al.	2021-1161
70	1:17-cv-01680-LAS	KNUTSEN	2021-1483
71	1:17-cv-01681-LAS	BAKER	2021-1272
72	1:17-cv-01682-LAS	MARCUS	2021-1312
73	1:17-cv-01683-LAS	HARKNESS	2021-1311
74	1:17-cv-01684-LAS	AYERS	2021-1273

75	1:17-cv-01686-LAS	SCOTT	2021-1318
76	1:17-cv-01687-LAS	ROBERTS	
77	1:17-cv-01688-LAS	WOOLLEY	2021-1541
78	1:17-cv-01689-LAS	ROTAN	2021-1320
79	1:17-cv-01748-LAS	SIMONTON	2021-1276
80	1:17-cv-01814-LAS	WILSON	2021-1190
81	1:17-cv-01822-LAS	AHMAD et al.	2021-1172
82	1:17-cv-01828-LAS	ABEL et al.	2021-1231
83	1:17-cv-01833-LAS	WASSEF et al.	2021-1164
84	1:17-cv-01834-LAS	HUNT et al.	2021-1155
85	1:19-cv-00782-LAS	ABED-STEPHEN et al.	
86	1:19-cv-00807-LAS	ALFORD et al.	
87	1:19-cv-01082-LAS	LEFEVRE	2021-1254
88	1:19-cv-01180-LAS	ROWLAND et al.	2021-1255
89	1:19-cv-01207-LAS	AMICA MUTUAL INSURANCE COMPANY	2021-1280
90	1:19-cv-01208-LAS	PURE UNDERWRITERS RECIPROCAL EXCHANGE	2021-1216
91	1:19-cv-01215-LAS	DEVOY et al.	2021-1468
92	1:19-cv-01266-LAS	ASHBY et al.	

93	1:19-cv-01278-LAS	WHITFORD et al.	2021-1394
94	1:18-cv-01942-LAS	DELILLE et al.	2021-1243
95	1:19-cv-01321-LAS	AHANCHIAN et al.	2021-1398
96	1:18-cv-02000-LAS	BEY	
97	1:19-cv-01908-LAS	CARTMELL et al.	2021-1252
98	1:19-cv-01924-LAS	ALLEN et al.	
99	1:20-cv-00115-LAS	LONGHURST et al.	2021-1281
100	1:20-cv-00147-LAS	CROLEY et al.	2021-1293
101	1:19-cv-00698-LAS	ASGHARI et al.	
102	1:20-cv-00591-LAS	SHARROCK et al.	
103	1:20-cv-00686-LAS	RAY et al.	
104	1:20-cv-00696-LAS	RON et al.	
105	1:20-cv-00701-LAS	BAKALOVIC et al.	
106	1:20-cv-00704-LAS	PD LIQUIDATING TRUST	
107	1:18-cv-01968-LAS	BAMMEL	2021-1186
108	1:19-cv-01063-LAS	DARBY et al.	
109	1:19-cv-00036-LAS	VO et al.	2021-1230
110	1:19-cv-01077-LAS	WRIGHT et al.	2021-1288
111	1:19-cv-01078-LAS	KIMMONS	2021-1304

112	1:18-cv-01856-LAS	HASAN et al.	2021-1184
113	1:19-cv-00127-LAS	SMITH, JR. et al.	2021-1431
114	1:19-cv-00167-LAS	BARLOW et al.	2021-1253
115	1:19-cv-00423-LAS	PHAN et al.	2021-1162
116	1:19-cv-00465-LAS	WHILES et al.	2021-1405
117	1:19-cv-00588-LAS	LEVINE et al.	2021-1499
118	1:17-cv-16522-LAS	NGUYEN et al.	2021-1282
119	1:17-cv-01882-LAS	ABBAS et al.	2021-1207
120	1:17-cv-01685-LAS	BROWN	2021-1274
121	1:17-cv-01948-LAS	ALLENSWORTH et al.	2021-1335
122	1:17-cv-01949-LAS	ANDERSON et al.	2021-1277
123	1:17-cv-01954-LAS	MENDOZA et al.	2021-1189
124	1:17-cv-01972-LAS	AZAR et al.	2021-1222
125	1:18-cv-00707-LAS	PENA et al.	2021-1513
126	1:18-cv-00708-LAS	HORSAK	2021-1492
127	1:18-cv-00123-LAS	OLSEN et al.	
128	1:18-cv-00142-LAS	CARTER	2021-1187
129	1:18-cv-00144-LAS	AMERICAN HOME ASSURANCE COMPANY et al.	2021-1217
130	1:18-cv-00168-LAS	DALAL et al.	2021-1240

131	1:18-cv-00169-LAS	SALIGRAM et al.	2021-1427
132	1:18-cv-00230-LAS	DANIEL et al.	2021-1289/ 2021-1290
133	1:18-cv-00243-LAS	CASTROPAREDES et al.	2021-1146
134	1:18-cv-00244-LAS	PATOUT et al.	2021-1148
135	1:18-cv-00308-LAS	CUETO et al.	2021-1171
136	1:18-cv-00318-LAS	ARRIAGA COMPANIES, INC.	2021-1455
137	1:18-cv-00319-LAS	CANNON et al.	2021-1232
138	1:18-cv-00321-LAS	HOUK et al.	2021-1233
139	1:18-cv-00322-LAS	OBEROI	2021-1295
140	1:18-cv-00339-LAS	CARPENTER	2021-1133
141	1:18-cv-00338-LAS	BUSH et al.	2021-1132
142	1:18-cv-00341-LAS	RAY et al.	2021-1234
143	1:18-cv-00344-LAS	CHEN et al.	2021-1406
144	1:18-cv-00345-LAS	KICKERILLO et al.	
145	1:18-cv-00346-LAS	FLEMING et al.	2021-1145
146	1:18-cv-00347-LAS	KEMICK et al.	2021-1140
147	1:18-cv-00348-LAS	SCOTT et al.	2021-1142
148	1:18-cv-00349-LAS	SILBERMAN et al.	2021-1143
149	1:18-cv-00389-LAS	CLOONEY	2021-1147

150	1:18-cv-00463-LAS	21ST CENTURY CENTENNIAL INSURANCE CO. et al.	2021-1206
151	1:18-cv-00518-LAS	TEKELL	2021-1138
152	1:18-cv-00697-LAS	TRAN et al.	2021-1221
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154	1:18-cv-00700-LAS	DONALD et al.	2021-1198
155	1:18-cv-00778-LAS	MCCLOUD et al.	2021-1176
156	1:18-cv-00779-LAS	D&T NAIL LOUNGE et al.	2021-1218
157	1:18-cv-00974-LAS	AHMED et al.	2021-1319
158	1:18-cv-01068-LAS	VALLE et al.	2021-1296
159	1:18-cv-01165-LAS	ASPARILLA	2021-1283
160	1:18-cv-01166-LAS	BASDEN	2021-1324
161	1:18-cv-01167-LAS	CALVERT	2021-1284
162	1:18-cv-01169-LAS	DAVIS	2021-1325
163	1:18-cv-01168-LAS	DAVALOS	2021-1403
164	1:18-cv-01171-LAS	DURAN	2021-1314
165	1:18-cv-01173-LAS	HEARD	2021-1315
166	1:18-cv-01176-LAS	JARET	2021-1336
167	1:18-cv-01178-LAS	KENNISON	2021-1407
168	1:18-cv-01179-LAS	MARIN	2021-1338

169	1:18-cv-01180-LAS	OLGUIN	2021-1339
170	1:18-cv-01181-LAS	PADILLA	2021-1317
171	1:18-cv-01172-LAS	MARTINEZ	2021-1316
172	1:18-cv-01183-LAS	MATA	2021-1404
173	1:18-cv-01184-LAS	VALADEZ	2021-1341
174	1:18-cv-01170-LAS	DOROUGH	2021-1285
175	1:18-cv-01193-LAS	WHEELER et al.	2021-1200
176	1:18-cv-01263-LAS	BLAKE et al.	2021-1250
177	1:18-cv-01287-LAS	BERNAL et al.	2021-1322
178	1:18-cv-01307-LAS	HARRIS et al.	2021-1337
179	1:18-cv-01380-LAS	LIVE OAK APARTMENTS, LLC	2021-1177
180	1:18-cv-01417-LAS	CHAWDRY et al.	2021-1291
181	1:18-cv-01523-LAS	YI	2021-1178
182	1:18-cv-01610-LAS	DUNCAN et al.	2021-1139
183	1:18-cv-01611-LAS	MALEY et al.	2021-1137
184	1:18-cv-01612-LAS	PEIRO	2021-1135
185	1:18-cv-01613-LAS	WOODS	2021-1144
186	1:18-cv-01652-LAS	CHESS et al.	2021-1494
187	1:18-cv-01670-LAS	BERRY et al.	2021-1134

188	1:18-cv-01697-LAS	TRAVELERS EXCESS AND SURPLUS LINES COMPANY	
189	1:18-cv-01714-LAS	GRIGSBY et al.	2021-1279
190	1:17-cv-02003-LAS	JASPER et al.	2021-1215

FORM 26. Docketing Statement

Form 26 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DOCKETING STATEMENT

Case Number: 2021-1131

Short Case Caption: Milton v. US

Filing Party/Entity: Appellants under no. 21-1494

Instructions: Complete each section or check the box if a section is intentionally blank or not applicable. Attach additional pages as needed. Refer to the court's Mediation Guidelines for filing requirements. An amended docketing statement is required for each new appeal or cross-appeal consolidated after first filing.

Case Origin	Originating Number	Type of Case
U.S. Court of Federal Claims	1:18-cv-1652L	Takings

Relief sought on appeal: ☐ None/Not Applicable

Reversal and remand.

Relief awarded below (if damages, specify): ☐ None/Not Applicable

Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment was granted, and Plaintiffs' Cross-Motion for Summary Judgment was denied.

Briefly describe the judgment/order appealed from:

(1) Judgment, No. 18-1652L, ECF No. 9, based on (2) Opinion and Order, No. 17-9002L, ECF No. 203, and (3) Order Directing Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237

Nature of judgment (select one): Date of judgment: 9/10/20

- ☑ Final Judgment, 28 USC § 1295
- ☐ Rule 54(b)
- ☐ Interlocutory Order (specify type) _____
- ☐ Other (explain) _____

Name and docket number of any related cases pending before this court, and the name of the writing judge if an opinion was issued. ☐ None/Not Applicable

This appeal relates to several appeals originating from the same Downstream Sub-Master Docket (17-9002L); Hon. Loren A. Smith; Explanation of related cases on additional pages

Issues to be raised on appeal: ☐ None/Not Applicable

As a matter of de novo review, the lower court erred in ruling that appellants failed to state a cognizable claim for a "taking" of private property by the U.S. Army Corps of Engineers.

Have there been discussions with other parties relating to settlement of this case?

☑ Yes ☐ No

If "yes," when were the last such discussions?

- ☐ Before the case was filed below
- ☑ During the pendency of the case below
- ☐ Following the judgment/order appealed from

If "yes," were the settlement discussions mediated? ☐ Yes ☑ No

If they were mediated, by whom?

N/A

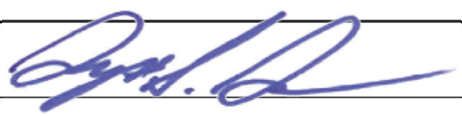
Do you believe that this case may be amenable to mediation? ☐ Yes ☑ No

Explain.

The question before the Federal Circuit is a matter of law that Appellants under no. 21-1494 do not believe is amenable to mediation at this time. Moreover, repeated settlement discussions occurred during the pendency of the case and no meaningful progress occurred. Given this, settlement at mediation on appeal would likely be unsuccessful.

Provide any other information relevant to the inclusion of this case in the court's mediation program.

N/A

Date: 2/3/21 Signature: 

Name: Bryant S. Banes

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Statement of Related Cases Under Fed. Cir. R. 47.5

This case (Appellants under Nos. 21-1494) is one (1) of approximately 190 cases brought by owners of properties in the Houston, Texas region that flooded downstream from the Addicks and Barker Reservoirs following Hurricane Harvey. These cases were filed in the Court of Federal Claims and are collectively known as the "Downstream" cases. All the 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.

The Downstream cases were consolidated by the Court of Federal Claims into a Downstream Sub-Master Docket. See No. 1:17-cv-9002L, In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs v. United States (Fed. Cl.); see also Management Order No. 3 (Order Establishing Sub-Master Docket for Downstream Claims), No. 17-9002L, ECF No. 2.

All substantive and legal briefing occurred in the Downstream Sub-Master Docket (No. 17-9002L). Ultimately, the court issued an "Opinion and Order" granting Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment. See Opinion and Order, No. 17-9002L, ECF No. 203. In a subsequent order, the court directed that the Downstream Sub-Master Docket (No. 17-9002L) be closed, and the final judgments be entered in the individual Downstream cases. See Order Directing the Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237.

The court exempted from this directive two (2) categories of Downstream cases: (1) cases in which property owners have attempted to show cause that their claims

are distinguishable from those controlled by the court's summary judgment ruling;[1] and (2) cases filed after the date of the show-cause order.[2] Otherwise, the court ordered that judgment be entered and appeals be filed in each individual docket. *Id.*

Starting on December 10, 2020, final judgments were entered in all the individual Downstream cases (except for the two (2) categories of cases in which the court reserved a ruling). Notices of appeal were filed in most of the cases and the cases have been docketed with this Court. All the appeals emanating from the Downstream Sub-Master Docket (No. 17-9002L) are "related cases."

The attorneys filing this Notice and Docketing Statement have been engaged to represent 136 of Downstream Appellants. At this time, counsel believes a complete list of the "related cases" is as follows:

---

[1] Those cases are (1) *Banes et al. v United States*, No. 17-1191L; (2) *Salo et al. v. United States*, No. 17-1194L; (3) *Williamson et al. v. United States*, No. 17-1456L; (4) *Williams et al. v. United States*, No. 17-1555L; (5) *Olsen et al. v. United States*, No. 18-0123L; (6) *Kickerillo et al. v. United States*, No. 18-0345L; (7) *Travelers Excess and Surplus Lines v. United States*, No. 18-1697L; (8) *Asghari et al. v. United States*, No. 19-0698L; (9) *Abed-Stephen et al. v. United States*, No. 19-0782L; (10) *Alford et al. v. United States*, No. 19-0807L; (11) *Ashby et al. v. United States*, No. 19-1266L; (12) *Darby et al. v. United States*, No. 19-1063L; and (13) *Allen et al. v. United States*, No. 19-1924L. Moreover, in Daniel et al. v. United States, No. 18-0230L, one of the plaintiffs (Gregory Pudney) filed a show cause response while the other plaintiff did not (D.R. Daniel).

[2] Those cases are (1) *Sharrock et al. v. United States*, No. 20-0591L; (2) *Ray et al. v. United States*, No. 20-0686L; (3) *Ron et al. v. United States*, No. 20-0696L; (4) *Bakalovic et al. v. United States*, No. 20-0701L; and (5) *PD Liquidating Trust v. United States*, No. 20-0704L.

#	Trial Docket No.	Caption (v. United States)	Appeal Docket No.
1	1:17-cv-01189-LAS	Y AND J PROPERTIES, LTD.	2021-1286
2	1:17-cv-01191-LAS	BANES et al.	2021-1529
3	1:17-cv-01194-LAS	SOLA et al.	
4	1:17-cv-01195-LAS	BOUZERAND et al.	2021-1197
5	1:17-cv-01206-LAS	ALDRED et al.	2021-1223
6	1:17-cv-01215-LAS	SMITH et al.	2021-1204
7	1:17-cv-01216-LAS	STRICKLAND et al.	2021-1205
8	1 17-cv-01232-LAS	GOMEZ et al.	2021-1196
9	1:17-cv-01235-LAS	MILTON et al.	2021-1131
10	1:17-cv-01300-LAS	HOLLIS, JR. et al.	2021-1201
11	1:17-cv-01303-LAS	ARRIAGA et al.	2021-1225
12	1:17-cv-01332-LAS	MOUSILLI	2021-1174
13	1:17-cv-01390-LAS	DE LA GARZA et al.	
14	1:17-cv-01391-LAS	POLLOCK	2021-1237
15	1:17-cv-01394-LAS	AGL, LLC et al.	2021-1238
16	1:17-cv-01395-LAS	LUDWIGSEN FAMILY LIVING TRUST et al.	2021-1303
17	1:17-cv-01396-LAS	REYES	2021-1239
18	1:17-cv-01393-LAS	KHOURY	2021-1467

19	1:17-cv-01397-LAS	VANCE	2021-1302
20	1:17-cv-01398-LAS	ERWIN	2021-1429
21	1:17-cv-01399-LAS	JAFARNIA	2021-1305
22	1:17-cv-01408-LAS	BRUZOS et al.	2021-1195
23	1:17-cv-01423-LAS	GOVIA	2021-1224
24	1:17-cv-01427-LAS	HERING et al.	2021-1159
25	1:17-cv-01428-LAS	LEWIS	2021-1151
26	1:17-cv-01430-LAS	MURRAY et al.	2021-1188
27	1:17-cv-01433-LAS	VENGHAUS	2021-1241
28	1:17-cv-01436-LAS	EFFIMOFF	2021-1242
29	1:17-cv-01434-LAS	RUSSO	2021-1465
30	1:17-cv-01437-LAS	THAKER	2021-1307
31	1:17-cv-01435-LAS	NEAL	2021-1306
32	1:17-cv-01438-LAS	THAKER	2021-1308
33	1:17-cv-01439-LAS	GILLIS	2021-1464
34	1:17-cv-01450-LAS	WOLF et al.	2021-1251
35	1:17-cv-01451-LAS	MEMORIAL SMC INVESTMENT 2013 LP	2021-1173
36	1:17-cv-01454-LAS	DRONE et al.	2021-1175
37	1:17-cv-01456-LAS	WILLIAMSON et al.	

38	1:17-cv-01457-LAS	MEADOWS ON MEMORIAL OWNERS ASSOCIATION INC. et al.	2021-1214
39	1:17-cv-01458-LAS	BE MEMORIAL REALTY LTD	2021-1444
40	1:17-cv-01453-LAS	CEBALLOS et al.	2021-1193
41	1:17-cv-01461-LAS	TITA et al.	2021-1294
42	1:17-cv-01512-LAS	ABBOTT et al.	2021-1167
43	1:17-cv-01514-LAS	CROKER	2021-1244
44	1:17-cv-01515-LAS	MURCIA	2021-1268
45	1:17-cv-01516-LAS	KOCHARYAN	2021-1479
46	1:17-cv-01517-LAS	AGREDA	2021-1269
47	1:17-cv-01518-LAS	REED	2021-1309
48	1:17-cv-01519-LAS	ALFORD	2021-1270
49	1:17-cv-01520-LAS	RAVAT	2021-1482
50	1:17-cv-01521-LAS	NGUYEN	2021-1310
51	1:17-cv-01522-LAS	CHEN	2021-1275
52	1:17-cv-01523-LAS	PAGNOTTO	2021-1539
53	1:17-cv-01524-LAS	MORAN	2021-1271
54	1:17-cv-01525-LAS	RAZNAHAN	2021-1481
55	1:17-cv-01545-LAS	YOUNG et al.	2021-1192

56	1:17-cv-01555-LAS	WILLIAMS et al.	
57	1:17-cv-01564-LAS	ANGELL et al.	2021-1313
58	1:17-cv-01565-LAS	CORTE	2021-1472
59	1:17-cv-01567-LAS	UECKERT et al.	2021-1287
60	1:17-cv-01566-LAS	MILLER	2021-1540
61	1:17-cv-01577-LAS	BAE et al.	2021-1165
62	1:17-cv-01578-LAS	SINDELAR et al.	2021-1157
63	1:17-cv-01588-LAS	BARTLETT et al.	2021-1208
64	1:17-cv-01625-LAS	EGGLESTON et al.	2021-1199
65	1:17-cv-01645-LAS	DEMOPULOS	2021-1136
66	1:17-cv-01646-LAS	GARDNER et al.	2021-1152
67	1:17-cv-01647-LAS	SWIRES et al.	2021-1163
68	1:17-cv-01653-LAS	KEARNEY et al.	2021-1220
69	1:17-cv-01679-LAS	ALCANTARA et al.	2021-1161
70	1:17-cv-01680-LAS	KNUTSEN	2021-1483
71	1:17-cv-01681-LAS	BAKER	2021-1272
72	1:17-cv-01682-LAS	MARCUS	2021-1312
73	1:17-cv-01683-LAS	HARKNESS	2021-1311
74	1:17-cv-01684-LAS	AYERS	2021-1273

75	1:17-cv-01686-LAS	SCOTT	2021-1318
76	1:17-cv-01687-LAS	ROBERTS	
77	1:17-cv-01688-LAS	WOOLLEY	2021-1541
78	1:17-cv-01689-LAS	ROTAN	2021-1320
79	1:17-cv-01748-LAS	SIMONTON	2021-1276
80	1:17-cv-01814-LAS	WILSON	2021-1190
81	1:17-cv-01822-LAS	AHMAD et al.	2021-1172
82	1:17-cv-01828-LAS	ABEL et al.	2021-1231
83	1:17-cv-01833-LAS	WASSEF et al.	2021-1164
84	1:17-cv-01834-LAS	HUNT et al.	2021-1155
85	1:19-cv-00782-LAS	ABED-STEPHEN et al.	
86	1:19-cv-00807-LAS	ALFORD et al.	
87	1:19-cv-01082-LAS	LEFEVRE	2021-1254
88	1:19-cv-01180-LAS	ROWLAND et al.	2021-1255
89	1:19-cv-01207-LAS	AMICA MUTUAL INSURANCE COMPANY	2021-1280
90	1:19-cv-01208-LAS	PURE UNDERWRITERS RECIPROCAL EXCHANGE	2021-1216
91	1:19-cv-01215-LAS	DEVOY et al.	2021-1468
92	1:19-cv-01266-LAS	ASHBY et al.	

93	1:19-cv-01278-LAS	WHITFORD et al.	2021-1394
94	1:18-cv-01942-LAS	DELILLE et al.	2021-1243
95	1:19-cv-01321-LAS	AHANCHIAN et al.	2021-1398
96	1:18-cv-02000-LAS	BEY	
97	1:19-cv-01908-LAS	CARTMELL et al.	2021-1252
98	1:19-cv-01924-LAS	ALLEN et al.	
99	1:20-cv-00115-LAS	LONGHURST et al.	2021-1281
100	1:20-cv-00147-LAS	CROLEY et al.	2021-1293
101	1:19-cv-00698-LAS	ASGHARI et al.	
102	1:20-cv-00591-LAS	SHARROCK et al.	
103	1:20-cv-00686-LAS	RAY et al.	
104	1:20-cv-00696-LAS	RON et al.	
105	1:20-cv-00701-LAS	BAKALOVIC et al.	
106	1:20-cv-00704-LAS	PD LIQUIDATING TRUST	
107	1:18-cv-01968-LAS	BAMMEL	2021-1186
108	1:19-cv-01063-LAS	DARBY et al.	
109	1:19-cv-00036-LAS	VO et al.	2021-1230
110	1:19-cv-01077-LAS	WRIGHT et al.	2021-1288
111	1:19-cv-01078-LAS	KIMMONS	2021-1304

112	1:18-cv-01856-LAS	HASAN et al.	2021-1184
113	1:19-cv-00127-LAS	SMITH, JR. et al.	2021-1431
114	1:19-cv-00167-LAS	BARLOW et al.	2021-1253
115	1:19-cv-00423-LAS	PHAN et al.	2021-1162
116	1:19-cv-00465-LAS	WHILES et al.	2021-1405
117	1:19-cv-00588-LAS	LEVINE et al.	2021-1499
118	1:17-cv-16522-LAS	NGUYEN et al.	2021-1282
119	1:17-cv-01882-LAS	ABBAS et al.	2021-1207
120	1:17-cv-01685-LAS	BROWN	2021-1274
121	1:17-cv-01948-LAS	ALLENSWORTH et al.	2021-1335
122	1:17-cv-01949-LAS	ANDERSON et al.	2021-1277
123	1:17-cv-01954-LAS	MENDOZA et al.	2021-1189
124	1:17-cv-01972-LAS	AZAR et al.	2021-1222
125	1:18-cv-00707-LAS	PENA et al.	2021-1513
126	1:18-cv-00708-LAS	HORSAK	2021-1492
127	1:18-cv-00123-LAS	OLSEN et al.	
128	1:18-cv-00142-LAS	CARTER	2021-1187
129	1:18-cv-00144-LAS	AMERICAN HOME ASSURANCE COMPANY et al.	2021-1217
130	1:18-cv-00168-LAS	DALAL et al.	2021-1240

131	1:18-cv-00169-LAS	SALIGRAM et al.	2021-1427
132	1:18-cv-00230-LAS	DANIEL et al.	2021-1289/ 2021-1290
133	1:18-cv-00243-LAS	CASTROPAREDES et al.	2021-1146
134	1:18-cv-00244-LAS	PATOUT et al.	2021-1148
135	1:18-cv-00308-LAS	CUETO et al.	2021-1171
136	1:18-cv-00318-LAS	ARRIAGA COMPANIES, INC.	2021-1455
137	1:18-cv-00319-LAS	CANNON et al.	2021-1232
138	1:18-cv-00321-LAS	HOUK et al.	2021-1233
139	1:18-cv-00322-LAS	OBEROI	2021-1295
140	1:18-cv-00339-LAS	CARPENTER	2021-1133
141	1:18-cv-00338-LAS	BUSH et al.	2021-1132
142	1:18-cv-00341-LAS	RAY et al.	2021-1234
143	1:18-cv-00344-LAS	CHEN et al.	2021-1406
144	1:18-cv-00345-LAS	KICKERILLO et al.	
145	1:18-cv-00346-LAS	FLEMING et al.	2021-1145
146	1:18-cv-00347-LAS	KEMICK et al.	2021-1140
147	1:18-cv-00348-LAS	SCOTT et al.	2021-1142
148	1:18-cv-00349-LAS	SILBERMAN et al.	2021-1143
149	1:18-cv-00389-LAS	CLOONEY	2021-1147

150	1:18-cv-00463-LAS	21ST CENTURY CENTENNIAL INSURANCE CO. et al.	2021-1206
151	1:18-cv-00518-LAS	TEKELL	2021-1138
152	1:18-cv-00697-LAS	TRAN et al.	2021-1221
153	1:18-cv-00685-LAS	JOHN	2021-1256
154	1:18-cv-00700-LAS	DONALD et al.	2021-1198
155	1:18-cv-00778-LAS	MCCLOUD et al.	2021-1176
156	1:18-cv-00779-LAS	D&T NAIL LOUNGE et al.	2021-1218
157	1:18-cv-00974-LAS	AHMED et al.	2021-1319
158	1:18-cv-01068-LAS	VALLE et al.	2021-1296
159	1:18-cv-01165-LAS	ASPARILLA	2021-1283
160	1:18-cv-01166-LAS	BASDEN	2021-1324
161	1:18-cv-01167-LAS	CALVERT	2021-1284
162	1:18-cv-01169-LAS	DAVIS	2021-1325
163	1:18-cv-01168-LAS	DAVALOS	2021-1403
164	1:18-cv-01171-LAS	DURAN	2021-1314
165	1:18-cv-01173-LAS	HEARD	2021-1315
166	1:18-cv-01176-LAS	JARET	2021-1336
167	1:18-cv-01178-LAS	KENNISON	2021-1407
168	1:18-cv-01179-LAS	MARIN	2021-1338

169	1:18-cv-01180-LAS	OLGUIN	2021-1339
170	1:18-cv-01181-LAS	PADILLA	2021-1317
171	1:18-cv-01172-LAS	MARTINEZ	2021-1316
172	1:18-cv-01183-LAS	MATA	2021-1404
173	1:18-cv-01184-LAS	VALADEZ	2021-1341
174	1:18-cv-01170-LAS	DOROUGH	2021-1285
175	1:18-cv-01193-LAS	WHEELER et al.	2021-1200
176	1:18-cv-01263-LAS	BLAKE et al.	2021-1250
177	1:18-cv-01287-LAS	BERNAL et al.	2021-1322
178	1:18-cv-01307-LAS	HARRIS et al.	2021-1337
179	1:18-cv-01380-LAS	LIVE OAK APARTMENTS, LLC	2021-1177
180	1:18-cv-01417-LAS	CHAWDRY et al.	2021-1291
181	1:18-cv-01523-LAS	YI	2021-1178
182	1:18-cv-01610-LAS	DUNCAN et al.	2021-1139
183	1:18-cv-01611-LAS	MALEY et al.	2021-1137
184	1:18-cv-01612-LAS	PEIRO	2021-1135
185	1:18-cv-01613-LAS	WOODS	2021-1144
186	1:18-cv-01652-LAS	CHESS et al.	2021-1494
187	1:18-cv-01670-LAS	BERRY et al.	2021-1134

188	1:18-cv-01697-LAS	TRAVELERS EXCESS AND SURPLUS LINES COMPANY	
189	1:18-cv-01714-LAS	GRIGSBY et al.	2021-1279
190	1:17-cv-02003-LAS	JASPER et al.	2021-1215

FORM 26. Docketing Statement

Form 26 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DOCKETING STATEMENT

Case Number: 2021-1131

Short Case Caption: Milton v. US

Filing Party/Entity: Appellants under no. 21-1529

Instructions: Complete each section or check the box if a section is intentionally blank or not applicable. Attach additional pages as needed. Refer to the court's Mediation Guidelines for filing requirements. An amended docketing statement is required for each new appeal or cross-appeal consolidated after first filing.

Case Origin	Originating Number	Type of Case
U.S. Court of Federal Claims	1:17-cv-1191LAS	Takings

Relief sought on appeal: ☐ None/Not Applicable

Reversal and remand.

Relief awarded below (if damages, specify): ☐ None/Not Applicable

Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment was granted, and Plaintiffs' Cross-Motion for Summary Judgment was denied.

Briefly describe the judgment/order appealed from:

No. 179002L, ECF 237. When the trial court issued the case consolidation order (No. 17-9002L, ECF 236) and denied reconsideration (ECF 251), this case was placed in a procedural posture that is difficult to untangle from the other cases. Filing as protective measure, this case was retained by court below because a Response to Show Cause Order was entered. The Court has not issued a final judgment as to Banes v. United States, however, the same bases for appeal in the other cases apply to this case. To the extent this appeal is premature, we ask the Court consider it sua sponte. We docket this case as a protective measure to ensure that any supplements or amendments to pleadings done pursuant to the lower court orders are captured for this case as well. Some of the plaintiffs in this case are reiterated in the other cases and the judge dismissed all of them. That action destroyed the independence and separateness of the cases; the cases are interrelated and procedurally amended by other cases below.

Nature of judgment (select one): Date of judgment: 9/10/20

- ☑ Final Judgment, 28 USC § 1295
- ☐ Rule 54(b)
- ☐ Interlocutory Order (specify type) _____
- ☐ Other (explain) _____

Name and docket number of any related cases pending before this court, and the name of the writing judge if an opinion was issued. ☐ None/Not Applicable

This appeal relates to several appeals originating from the same Downstream Sub-Master Docket (17-9002L); Hon. Loren A. Smith; Explanation of related cases on additional pages

Issues to be raised on appeal: ☐ None/Not Applicable

As a matter of de novo review, the lower court erred in ruling that appellants failed to state a cognizable claim for a "taking" of private property by the U.S. Army Corps of Engineers.

Have there been discussions with other parties relating to settlement of this case?

☑ Yes ☐ No

If "yes," when were the last such discussions?

- ☐ Before the case was filed below
- ☑ During the pendency of the case below
- ☐ Following the judgment/order appealed from

If "yes," were the settlement discussions mediated? ☐ Yes ☑ No

If they were mediated, by whom?

N/A

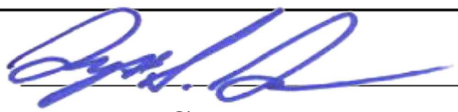
Do you believe that this case may be amenable to mediation? ☐ Yes ☑ No

Explain.

The question before the Federal Circuit is a matter of law that Appellants under no. 21-1529 do not believe is amenable to mediation at this time. Moreover, repeated settlement discussions occurred during the pendency of the case and no meaningful progress occurred. Given this, settlement at mediation on appeal would likely be unsuccessful.

Provide any other information relevant to the inclusion of this case in the court's mediation program.

N/A

Date: 2/4/21 Signature: 

Name: Bryant S. Banes

Save for Filing

Statement of Related Cases Under Fed. Cir. R. 47.5

This case (Appellants under No. 21-1529) is one (1) of approximately 190 cases brought by owners of properties in the Houston, Texas region that flooded downstream from the Addicks and Barker Reservoirs following Hurricane Harvey. These cases were filed in the Court of Federal Claims and are collectively known as the "Downstream" cases. All the 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.

The Downstream cases were consolidated by the Court of Federal Claims into a Downstream Sub-Master Docket. See No. 1:17-cv-9002L, In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs v. United States (Fed. Cl.); see also Management Order No. 3 (Order Establishing Sub-Master Docket for Downstream Claims), No. 17-9002L, ECF No. 2.

All substantive and legal briefing occurred in the Downstream Sub-Master Docket (No. 17-9002L). Ultimately, the court issued an "Opinion and Order" granting Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment. See Opinion and Order, No. 17-9002L, ECF No. 203. In a subsequent order, the court directed that the Downstream Sub-Master Docket (No. 17-9002L) be closed, and the final judgments be entered in the individual Downstream cases. See Order Directing the Entry of Judgment in Downstream Cases, No. 17-9002L, ECF No. 237.

The court exempted from this directive two (2) categories of Downstream cases: (1) cases in which property owners have attempted to show cause that their claims

are distinguishable from those controlled by the court's summary judgment ruling;[1] and (2) cases filed after the date of the show-cause order.[2] Otherwise, the court ordered that judgment be entered and appeals be filed in each individual docket. *Id.*

Starting on December 10, 2020, final judgments were entered in all the individual Downstream cases (except for the two (2) categories of cases in which the court reserved a ruling). Notices of appeal were filed in most of the cases and the cases have been docketed with this Court. All the appeals emanating from the Downstream Sub-Master Docket (No. 17-9002L) are "related cases."

The attorneys filing this Notice and Docketing Statement have been engaged to represent 136 of Downstream Appellants. At this time, counsel believes a complete list of the "related cases" is as follows:

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[1] Those cases are (1) *Banes et al. v United States*, No. 17-1191L; (2) *Salo et al. v. United States*, No. 17-1194L; (3) *Williamson et al. v. United States*, No. 17-1456L; (4) *Williams et al. v. United States*, No. 17-1555L; (5) *Olsen et al. v. United States*, No. 18-0123L; (6) *Kickerillo et al. v. United States*, No. 18-0345L; (7) *Travelers Excess and Surplus Lines v. United States*, No. 18-1697L; (8) *Asghari et al. v. United States*, No. 19-0698L; (9) *Abed-Stephen et al. v. United States*, No. 19-0782L; (10) *Alford et al. v. United States*, No. 19-0807L; (11) *Ashby et al. v. United States*, No. 19-1266L; (12) *Darby et al. v. United States*, No. 19-1063L; and (13) *Allen et al. v. United States*, No. 19-1924L. Moreover, in Daniel et al. v. United States, No. 18-0230L, one of the plaintiffs (Gregory Pudney) filed a show cause response while the other plaintiff did not (D.R. Daniel).

[2] Those cases are (1) *Sharrock et al. v. United States*, No. 20-0591L; (2) *Ray et al. v. United States*, No. 20-0686L; (3) *Ron et al. v. United States*, No. 20-0696L; (4) *Bakalovic et al. v. United States*, No. 20-0701L; and (5) *PD Liquidating Trust v. United States*, No. 20-0704L.

#	Trial Docket No.	Caption (v. United States)	Appeal Docket No.
1	1:17-cv-01189-LAS	Y AND J PROPERTIES, LTD.	2021-1286
2	1:17-cv-01191-LAS	BANES et al.	2021-1529
3	1:17-cv-01194-LAS	SOLA et al.	
4	1:17-cv-01195-LAS	BOUZERAND et al.	2021-1197
5	1:17-cv-01206-LAS	ALDRED et al.	2021-1223
6	1:17-cv-01215-LAS	SMITH et al.	2021-1204
7	1:17-cv-01216-LAS	STRICKLAND et al.	2021-1205
8	1 17-cv-01232-LAS	GOMEZ et al.	2021-1196
9	1:17-cv-01235-LAS	MILTON et al.	2021-1131
10	1:17-cv-01300-LAS	HOLLIS, JR. et al.	2021-1201
11	1:17-cv-01303-LAS	ARRIAGA et al.	2021-1225
12	1:17-cv-01332-LAS	MOUSILLI	2021-1174
13	1:17-cv-01390-LAS	DE LA GARZA et al.	
14	1:17-cv-01391-LAS	POLLOCK	2021-1237
15	1:17-cv-01394-LAS	AGL, LLC et al.	2021-1238
16	1:17-cv-01395-LAS	LUDWIGSEN FAMILY LIVING TRUST et al.	2021-1303
17	1:17-cv-01396-LAS	REYES	2021-1239
18	1:17-cv-01393-LAS	KHOURY	2021-1467

19	1:17-cv-01397-LAS	VANCE	2021-1302
20	1:17-cv-01398-LAS	ERWIN	2021-1429
21	1:17-cv-01399-LAS	JAFARNIA	2021-1305
22	1:17-cv-01408-LAS	BRUZOS et al.	2021-1195
23	1:17-cv-01423-LAS	GOVIA	2021-1224
24	1:17-cv-01427-LAS	HERING et al.	2021-1159
25	1:17-cv-01428-LAS	LEWIS	2021-1151
26	1:17-cv-01430-LAS	MURRAY et al.	2021-1188
27	1:17-cv-01433-LAS	VENGHAUS	2021-1241
28	1:17-cv-01436-LAS	EFFIMOFF	2021-1242
29	1:17-cv-01434-LAS	RUSSO	2021-1465
30	1:17-cv-01437-LAS	THAKER	2021-1307
31	1:17-cv-01435-LAS	NEAL	2021-1306
32	1:17-cv-01438-LAS	THAKER	2021-1308
33	1:17-cv-01439-LAS	GILLIS	2021-1464
34	1:17-cv-01450-LAS	WOLF et al.	2021-1251
35	1:17-cv-01451-LAS	MEMORIAL SMC INVESTMENT 2013 LP	2021-1173
36	1:17-cv-01454-LAS	DRONE et al.	2021-1175
37	1:17-cv-01456-LAS	WILLIAMSON et al.	

38	1:17-cv-01457-LAS	MEADOWS ON MEMORIAL OWNERS ASSOCIATION INC. et al.	2021-1214
39	1:17-cv-01458-LAS	BE MEMORIAL REALTY LTD	2021-1444
40	1:17-cv-01453-LAS	CEBALLOS et al.	2021-1193
41	1:17-cv-01461-LAS	TITA et al.	2021-1294
42	1:17-cv-01512-LAS	ABBOTT et al.	2021-1167
43	1:17-cv-01514-LAS	CROKER	2021-1244
44	1:17-cv-01515-LAS	MURCIA	2021-1268
45	1:17-cv-01516-LAS	KOCHARYAN	2021-1479
46	1:17-cv-01517-LAS	AGREDA	2021-1269
47	1:17-cv-01518-LAS	REED	2021-1309
48	1:17-cv-01519-LAS	ALFORD	2021-1270
49	1:17-cv-01520-LAS	RAVAT	2021-1482
50	1:17-cv-01521-LAS	NGUYEN	2021-1310
51	1:17-cv-01522-LAS	CHEN	2021-1275
52	1:17-cv-01523-LAS	PAGNOTTO	2021-1539
53	1:17-cv-01524-LAS	MORAN	2021-1271
54	1:17-cv-01525-LAS	RAZNAHAN	2021-1481
55	1:17-cv-01545-LAS	YOUNG et al.	2021-1192

56	1:17-cv-01555-LAS	WILLIAMS et al.	
57	1:17-cv-01564-LAS	ANGELL et al.	2021-1313
58	1:17-cv-01565-LAS	CORTE	2021-1472
59	1:17-cv-01567-LAS	UECKERT et al.	2021-1287
60	1:17-cv-01566-LAS	MILLER	2021-1540
61	1:17-cv-01577-LAS	BAE et al.	2021-1165
62	1:17-cv-01578-LAS	SINDELAR et al.	2021-1157
63	1:17-cv-01588-LAS	BARTLETT et al.	2021-1208
64	1:17-cv-01625-LAS	EGGLESTON et al.	2021-1199
65	1:17-cv-01645-LAS	DEMOPULOS	2021-1136
66	1:17-cv-01646-LAS	GARDNER et al.	2021-1152
67	1:17-cv-01647-LAS	SWIRES et al.	2021-1163
68	1:17-cv-01653-LAS	KEARNEY et al.	2021-1220
69	1:17-cv-01679-LAS	ALCANTARA et al.	2021-1161
70	1:17-cv-01680-LAS	KNUTSEN	2021-1483
71	1:17-cv-01681-LAS	BAKER	2021-1272
72	1:17-cv-01682-LAS	MARCUS	2021-1312
73	1:17-cv-01683-LAS	HARKNESS	2021-1311
74	1:17-cv-01684-LAS	AYERS	2021-1273

75	1:17-cv-01686-LAS	SCOTT	2021-1318
76	1:17-cv-01687-LAS	ROBERTS	
77	1:17-cv-01688-LAS	WOOLLEY	2021-1541
78	1:17-cv-01689-LAS	ROTAN	2021-1320
79	1:17-cv-01748-LAS	SIMONTON	2021-1276
80	1:17-cv-01814-LAS	WILSON	2021-1190
81	1:17-cv-01822-LAS	AHMAD et al.	2021-1172
82	1:17-cv-01828-LAS	ABEL et al.	2021-1231
83	1:17-cv-01833-LAS	WASSEF et al.	2021-1164
84	1:17-cv-01834-LAS	HUNT et al.	2021-1155
85	1:19-cv-00782-LAS	ABED-STEPHEN et al.	
86	1:19-cv-00807-LAS	ALFORD et al.	
87	1:19-cv-01082-LAS	LEFEVRE	2021-1254
88	1:19-cv-01180-LAS	ROWLAND et al.	2021-1255
89	1:19-cv-01207-LAS	AMICA MUTUAL INSURANCE COMPANY	2021-1280
90	1:19-cv-01208-LAS	PURE UNDERWRITERS RECIPROCAL EXCHANGE	2021-1216
91	1:19-cv-01215-LAS	DEVOY et al.	2021-1468
92	1:19-cv-01266-LAS	ASHBY et al.	

93	1:19-cv-01278-LAS	WHITFORD et al.	2021-1394
94	1:18-cv-01942-LAS	DELILLE et al.	2021-1243
95	1:19-cv-01321-LAS	AHANCHIAN et al.	2021-1398
96	1:18-cv-02000-LAS	BEY	
97	1:19-cv-01908-LAS	CARTMELL et al.	2021-1252
98	1:19-cv-01924-LAS	ALLEN et al.	
99	1:20-cv-00115-LAS	LONGHURST et al.	2021-1281
100	1:20-cv-00147-LAS	CROLEY et al.	2021-1293
101	1:19-cv-00698-LAS	ASGHARI et al.	
102	1:20-cv-00591-LAS	SHARROCK et al.	
103	1:20-cv-00686-LAS	RAY et al.	
104	1:20-cv-00696-LAS	RON et al.	
105	1:20-cv-00701-LAS	BAKALOVIC et al.	
106	1:20-cv-00704-LAS	PD LIQUIDATING TRUST	
107	1:18-cv-01968-LAS	BAMMEL	2021-1186
108	1:19-cv-01063-LAS	DARBY et al.	
109	1:19-cv-00036-LAS	VO et al.	2021-1230
110	1:19-cv-01077-LAS	WRIGHT et al.	2021-1288
111	1:19-cv-01078-LAS	KIMMONS	2021-1304

112	1:18-cv-01856-LAS	HASAN et al.	2021-1184
113	1:19-cv-00127-LAS	SMITH, JR. et al.	2021-1431
114	1:19-cv-00167-LAS	BARLOW et al.	2021-1253
115	1:19-cv-00423-LAS	PHAN et al.	2021-1162
116	1:19-cv-00465-LAS	WHILES et al.	2021-1405
117	1:19-cv-00588-LAS	LEVINE et al.	2021-1499
118	1:17-cv-16522-LAS	NGUYEN et al.	2021-1282
119	1:17-cv-01882-LAS	ABBAS et al.	2021-1207
120	1:17-cv-01685-LAS	BROWN	2021-1274
121	1:17-cv-01948-LAS	ALLENSWORTH et al.	2021-1335
122	1:17-cv-01949-LAS	ANDERSON et al.	2021-1277
123	1:17-cv-01954-LAS	MENDOZA et al.	2021-1189
124	1:17-cv-01972-LAS	AZAR et al.	2021-1222
125	1:18-cv-00707-LAS	PENA et al.	2021-1513
126	1:18-cv-00708-LAS	HORSAK	2021-1492
127	1:18-cv-00123-LAS	OLSEN et al.	
128	1:18-cv-00142-LAS	CARTER	2021-1187
129	1:18-cv-00144-LAS	AMERICAN HOME ASSURANCE COMPANY et al.	2021-1217
130	1:18-cv-00168-LAS	DALAL et al.	2021-1240

131	1:18-cv-00169-LAS	SALIGRAM et al.	2021-1427
132	1:18-cv-00230-LAS	DANIEL et al.	2021-1289/ 2021-1290
133	1:18-cv-00243-LAS	CASTROPAREDES et al.	2021-1146
134	1:18-cv-00244-LAS	PATOUT et al.	2021-1148
135	1:18-cv-00308-LAS	CUETO et al.	2021-1171
136	1:18-cv-00318-LAS	ARRIAGA COMPANIES, INC.	2021-1455
137	1:18-cv-00319-LAS	CANNON et al.	2021-1232
138	1:18-cv-00321-LAS	HOUK et al.	2021-1233
139	1:18-cv-00322-LAS	OBEROI	2021-1295
140	1:18-cv-00339-LAS	CARPENTER	2021-1133
141	1:18-cv-00338-LAS	BUSH et al.	2021-1132
142	1:18-cv-00341-LAS	RAY et al.	2021-1234
143	1:18-cv-00344-LAS	CHEN et al.	2021-1406
144	1:18-cv-00345-LAS	KICKERILLO et al.	
145	1:18-cv-00346-LAS	FLEMING et al.	2021-1145
146	1:18-cv-00347-LAS	KEMICK et al.	2021-1140
147	1:18-cv-00348-LAS	SCOTT et al.	2021-1142
148	1:18-cv-00349-LAS	SILBERMAN et al.	2021-1143
149	1:18-cv-00389-LAS	CLOONEY	2021-1147

150	1:18-cv-00463-LAS	21ST CENTURY CENTENNIAL INSURANCE CO. et al.	2021-1206
151	1:18-cv-00518-LAS	TEKELL	2021-1138
152	1:18-cv-00697-LAS	TRAN et al.	2021-1221
153	1:18-cv-00685-LAS	JOHN	2021-1256
154	1:18-cv-00700-LAS	DONALD et al.	2021-1198
155	1:18-cv-00778-LAS	MCCLOUD et al.	2021-1176
156	1:18-cv-00779-LAS	D&T NAIL LOUNGE et al.	2021-1218
157	1:18-cv-00974-LAS	AHMED et al.	2021-1319
158	1:18-cv-01068-LAS	VALLE et al.	2021-1296
159	1:18-cv-01165-LAS	ASPARILLA	2021-1283
160	1:18-cv-01166-LAS	BASDEN	2021-1324
161	1:18-cv-01167-LAS	CALVERT	2021-1284
162	1:18-cv-01169-LAS	DAVIS	2021-1325
163	1:18-cv-01168-LAS	DAVALOS	2021-1403
164	1:18-cv-01171-LAS	DURAN	2021-1314
165	1:18-cv-01173-LAS	HEARD	2021-1315
166	1:18-cv-01176-LAS	JARET	2021-1336
167	1:18-cv-01178-LAS	KENNISON	2021-1407
168	1:18-cv-01179-LAS	MARIN	2021-1338

169	1:18-cv-01180-LAS	OLGUIN	2021-1339
170	1:18-cv-01181-LAS	PADILLA	2021-1317
171	1:18-cv-01172-LAS	MARTINEZ	2021-1316
172	1:18-cv-01183-LAS	MATA	2021-1404
173	1:18-cv-01184-LAS	VALADEZ	2021-1341
174	1:18-cv-01170-LAS	DOROUGH	2021-1285
175	1:18-cv-01193-LAS	WHEELER et al.	2021-1200
176	1:18-cv-01263-LAS	BLAKE et al.	2021-1250
177	1:18-cv-01287-LAS	BERNAL et al.	2021-1322
178	1:18-cv-01307-LAS	HARRIS et al.	2021-1337
179	1:18-cv-01380-LAS	LIVE OAK APARTMENTS, LLC	2021-1177
180	1:18-cv-01417-LAS	CHAWDRY et al.	2021-1291
181	1:18-cv-01523-LAS	YI	2021-1178
182	1:18-cv-01610-LAS	DUNCAN et al.	2021-1139
183	1:18-cv-01611-LAS	MALEY et al.	2021-1137
184	1:18-cv-01612-LAS	PEIRO	2021-1135
185	1:18-cv-01613-LAS	WOODS	2021-1144
186	1:18-cv-01652-LAS	CHESS et al.	2021-1494
187	1:18-cv-01670-LAS	BERRY et al.	2021-1134

188	1:18-cv-01697-LAS	TRAVELERS EXCESS AND SURPLUS LINES COMPANY	
189	1:18-cv-01714-LAS	GRIGSBY et al.	2021-1279
190	1:17-cv-02003-LAS	JASPER et al.	2021-1215

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-1131

Short Case Caption Milton v. US

Filing Party/Entity Appellants under nos. 21-1492, 21-1494, 21-1499, 21-1513, 21-1529

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

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

Date: 01/19/2021

Signature:

Name: Bryant S. Banes

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Randy D. Horsak	None.	
Mervin Chess	None.	
Randall Teufel	None.	
Amy Teufel	None.	
Michael Henry	None.	
Kenneth Loep	None.	
Eileen Galoostian, Trustee	Galoostian Family Trust	
Lynn Levine	None.	
Esther Levine	None.	
Luis Gomez	None.	
Roxana Gomez	None.	
Hedaiat Chaharlangi	None.	

☑ Additional pages attached

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
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Beth Chaharlangi	None.	
Famil Mammadov	None.	
Sara Mammadov	None.	
Lori D. Washington	None.	
Alberto A. Pena	None.	
Alexander Oraevsky	None.	
Juanita Oraevsky	None.	
Amanda Deal	None.	
Antoon Athmer	None.	
Barbara Baldaro	None.	
Donece Knudsen	None.	
Benoit Deschamps	None.	

☑ Additional pages attached

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Julie Bastien	None.	
Bernd J. Linden	None.	
Candice M. Courtney	None.	
Carlos Mazas	None.	
Myriam Mazas	None.	
Carlton Jones	None.	
Jacqueline Jones	None.	
Cecile Lambert	None.	
Connor Metzger	None.	
Dagoberto Aldrete	None.	
Debra Aldrete	None.	
Dale Russell	None.	

☑ Additional pages attached

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Susan Russell	None.	
Daniel Scholtyssek	None.	
Lorena Scholtyssek	None.	
Darryl Springs	None.	
Delores Springs	None.	
David Aldridge	None.	
Elizabeth Aldridge	None.	
David Tavyev	None.	
Ellen Tavyev	None.	
Dennison Courtney	None.	
Christine Courtney	None.	
Donald C. Dingwall	None.	

☑ Additional pages attached

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Eric Frugier	None.	
Tracy Dorrington	None.	
Gary Flam	None.	
Annalea Flam	None.	
Gary Donelson	None.	
Julie Youssef	None.	
George Mann	None.	
Jeri Mann	None.	
Harry L. Bowles	None.	
Harvin Moore	None.	
Mary Moore	None.	
Hector Rodrigues	None.	

☑ Additional pages attached

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
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Luisa Rodrigues	None.	
Henry Regnier	None.	
Ada Regnier	None.	
James Zike	None.	
Jane Joseph	None.	
Jo Anne Scott	None.	
John Kassarjian	None.	
Carolyn Kassarjian	None.	
John Reeves	None.	
Susan Reeves	None.	
Kenneth McCormack	None.	
Brenda Bradsher	None.	

☑ Additional pages attached

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Kent Edwards	None.	
Julia Edwards	None.	
Kim Lively	None.	
Lawrence R. Leib	None.	
Laura A. Leib	None.	
Catherine Parmley	None.	
Marcela Zambra	None.	
Curtiss Beinhorn	None.	
Marcia Midence	None.	
Maziar A. Bouyeh	None.	
Michel Shapiro	None.	
Lily Goldfeder	None.	

☑ Additional pages attached

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Michael J. Ziemba	None.	
Kathryn B. Ziemba	None.	
Patricia Escamilla	None.	
Peter Borgards	None.	
Johanna Borgards	None.	
Peter Forster	None.	
Roxanne Forster	None.	
Philomena Meekey	None.	
Raphael Van Der Weiden	None.	
Alice Van Der Weiden	None.	
Richard Birchwood	None.	
Robert Black	None.	

☑ Additional pages attached

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Huguette Black	None.	
Sarah Read	None.	
Stephan Read	None.	
Sean Palmer	None.	
Jacquelin Strange-Palmer	None.	
Sidney Binder	None.	
Anna Binder	None.	
Solange Jones	None.	
Stephanie D. Gould	None.	
Susan Grisham Waltermire	None.	
Suzann Still	None.	
Virginia Roberts-Bailey	None.	

☑ Additional pages attached

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Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Warren Barrett	None.	
Patricia Barrett	None.	
William Crook	None.	
Ilene Crook	None.	
William Justice	None.	
Martha Justice	None.	
William S. Rhea	None.	
Bryant Banes	None.	
Neva Banes	None.	
Arnstein Godejord	None.	
Inga Godejord	None.	
Dwight Kranz	None.	

☑ Additional pages attached

FORM 9. Certificate of Interest

Form 9 (p. 2)
July 2020

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Barbara Kranz	None.	
Edward Podoba	None.	
Elizabeth McClain	None.	
Jana Beyoglu	None.	
Gokhan Beyoglu	None.	
Jennifer Shipos	None.	
Kathryn Clark	None.	
RobertClark	None.	
Mary Linden	None.	
Robert Weed	None.	
NB Research, Inc.	None.	
Ivy Parkway, LLC	None.	

☑ Additional pages attached

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Heathlake Community Association c/o Graham Management	None.	
GMG Investment Holdings, Ltd.	None.	
Karyn Weed	None.	

☐ Additional pages attached

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

☐ None/Not Applicable ☐ Additional pages attached

Neel, Hooper & Banes, P.C.	Bryant S. Banes	Sean D. Forbes
Sarah P. Harris		

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

☐ None/Not Applicable ☐ Additional pages attached

21-1494	21-1529	
21-1499	21-1492	
21-1513		

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

☑ None/Not Applicable ☐ Additional pages attached
