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United States Court of Appeals For the Federal Circuit

VIRGINIA MILTON, AND, ARNOLD MILTON, on behalf of themselves and all other similarly situated persons, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

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on appeal from the United States Court of Federal Claims Nos. 1:17-cv-01189-LAS, 1:17-cv-01191, 1:17-cv-01195-LAS, 1:17-cv-01206-LAS, 1:17-cv-01215-LAS, 1:17-cv-01216-LAS, 1:17-cv-01232-LAS, 1:17-cv-01235-LAS, 1:17-cv-01300-LAS, 1:17-cv-01303-LAS, 1:17-cv-01332-LAS, 1:17-cv-01391-LAS, 1:17-cv-01393-LAS, 1:17-cv-01394-LAS, 1:17-cv-01395-LAS,1:17-cv-01396-LAS, 1:17-cv-01397-LAS, 1:17-cv-01398-LAS, 1:17-cv-01399-LAS, 1:17-cv-01408-LAS, 1:17-cv-01423-LAS, 1:17-cv-01427-LAS, 1:17-cv-

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CORRECTED OPENING BRIEF FOR 43 PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

Counsel for Plaintiffs-Appellants certifies the following:

1. The following people are represented by me:

Aurelio Agreda (2021-1269), Stan Alford (2021-1270), David Allensworth (2021-1335), Philip Angell (2021-1313), Daniel Aparviz (2021-1335), Becky Ayers (2021-1273), Arlene Baker (2021-1272), Norma Brown (2021-1274), Tarit Chaudhuri (2021-1277), Elaine Chen (2021-1275), Chih-Huai Chiu (2021-1335), Frederic Clos (2021-1277), Shirley Corte (2021-1472), Geraldine Croker (2021-1244), Mary Cruz (2021-1335), Joan Cupic (2021-1277), Wayne A. Dickson (2021-1277), Igor Effimoff (2021-1242), Lisa Erwin (2021-1429), Brian Eukel (2021-1277), James W. Farrell (2021-1335), Carlos Ferrari (2021-1277), Jane Gillis (2021-1464), Theodore John Godo (2021-1277), Christina Harkness (2021-1311), Thomas Haslam (2021-1277), Barbara Hensley (2021-1277), Rindy Hetherington (2021-1277), Richard Hobson (2021-1277), Keith Hoffman (2021-1277), Merilyn Hully (2021-1277), Donald G. Ishler (2021-1335), William Jackson (2021-1335), Maryam Jafarnia (2021-1305), Mary Khoury (2021-1467), Kjell Knutsen (2021-1483), Vladimir Kocharyan (2021-1479), Jonathan Levy (2021-1238), David Lewis (2021-1335), Charles Ludwigsen (2021-1303), Phil Magee (2021-1335), Thomas Malloy (2021-1277), Mary Jane Marcus (2021-

1312), Linda Marvin (2021-1335), Joel Mathiason (2021-1335), Larry Miller (2021-1540), Lindsey Molandes (2021-1277), Oscar Moran (2021-1271), Karla Murcia (2021-1268), Vahid Navissi (2021-1277), Joel Neal (2021-1306), Dan Nguyen (2021-1310), Kathryn Nocca (2021-1277), Carole Pagnotto (2021-1539), Martha Pollock (2021-1237), Naeem Ravat (2021-1482), David Raznahan (2021-1481), Thomas Reed (2021-1309), Gerardo Reyes (2021-1239), Marilyn Root-Walker (2021-1277), Doug Rotan (2021-1320), Jack Russo (2021-1465), Jeffrey Scott (2021-1318), Guy Merritt Shivitz (2021-1335), (2021-1277), Didier Terroir (2021-1277), Anil Thaker (2021-1307), Anil Thaker (2021-1308), Trey Thompson (2021-1277), Clay Trozzo (2021-1335), Scott Ueckert (2021-1287), Vanessa L. Vance (2021-1302), Jarret Venghaus (2021-1241), Ian Wilson (2021-1277), Joe Winston (2021-1277), Billie Woolley (2021-1541), Elena Wunderlich (2021-1335).

2. The full names of all real parties in interest.

None

3. 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.

4. A list of 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, but who have not already entered an appearance in this court.

None.

5. **The case names and titles of any cases 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.**

See Statement of related cases.

6. **Any information required under Fed. R. App. P. 26.1(b).**

N/A.

Dated March 8, 2021

Respectfully submitted,

/s/ J. Carl Cecere

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STATEMENT OF RELATED CASES

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

The downstream cases were consolidated by the Court of Federal Claims into a Downstream Sub-Master Docket. (Appx68-79) The "Opinion and Order" at issue in this appeal (Appx1-19) was entered in that docket, but that ruling technically affected only 13 test properties and their owners (the "Downstream Plaintiffs"). (Appx1-19, Appx770-771) The court therefore gave the remaining property owners a chance to show cause that their claims are distinguishable from those controlled by the CFC's ruling. (Appx20-21) Most of the downstream property owners accepted that their cases are subject to the same analysis. For these, the court directed that final judgments resulting from that order be entered in individual cases. (Appx22) This brief is filed on

behalf of 43 of the 171 appeals that resulted from those final judgments. All 171 appeals are "related cases."

There are still several cases awaiting final judgment in the court below. Some concern property owners who attempted to show cause that their claims are distinguishable. These cases remain pending. (Appx22-23) Some concern cases that were filed the end of the litigation—after the court's Order and Opinion and its show-cause order. These cases remain pending as well. (Appx22-23, Appx5670-5671) Both sets of cases are "related cases."

PRELIMINARY STATEMENT

In the early hours of August 28, 2017, the United States opened the floodgates on the Addicks and Barker Reservoirs ("Reservoirs"), located along the Buffalo Bayou west of Houston, Texas. The resulting deluge of water decimated the homes and businesses of thousands who lived and worked downstream from the Reservoirs—including the Appellants—and destroyed some of their dearest personal possessions. Most have still not fully recovered, and many never will.

The Government foresaw the devastation that would result when it opened the floodgates. Yet no emergency necessitated its action. The Government concedes that if the floodgates had remained closed, the dams would have held, and downstream property owners would have been spared nearly all the flooding they experienced. The Government's decision was driven instead by standard operating procedure—a plan for managing heavy flooding that relies on downstream landowners to bear the brunt of the heaviest floodwaters to spare other landowners any flooding, and to preserve the Reservoirs' long-term capability to protect Downtown Houston and the Houston Ship Channel. Pursuant to that procedure, the Government opened the floodgates after water levels in the Reservoirs rose above the government-

owned land upstream of the Reservoirs and on to private property. That meant both upstream and downstream property owners suffered government-induced flood destruction.

Yet the Court of Federal Claims held that only the *upstream* owners, and not *downstream* owners, could maintain claims under the Fifth Amendment's Takings Clause against the United States for the damage caused by the flooding. This disparate treatment resulted from the court's deeply flawed assumption that the flooding experienced by downstream property owners was the inevitable result of living and working downstream from a dammed reservoir, rather than a consequence of the Government's intentional choice. To the court, people who live and work downstream of a dam simply possess fewer rights in their homes, businesses, and possessions than others, based on a choice they did not know they had made. Thus, what amounted to compensable takings for the upstream landowners affected by government-induced flooding was for the downstream owners a demand for "perfect flood control" from an "Act of God"—even though the Government could have easily avoided flooding the downstream properties, and the "flood control" at issue was being conducted for others' benefit.

These supposed restrictions on downstream property owners' rights that the court below identified do not exist. They result only because the court, in deciding a question of property rights, ignored the governing property-law principles and instead delved into completely irrelevant aspects of tort law, Texas takings law, and the mechanics of dam operation. None of these things control property rights. Property law controls property rights. And under applicable principles of property law, this is an easy case: Landowners downstream of a dam possess the same rights in their property as upstream landowners. Those landowner rights are taken when the government floods their land to protect others' property. It is thus vital that the Court reverse the judgment below to protect the Appellants' property rights—and it is equally vital that the Court hold that the Government's actions constitute a compensable taking as a matter of law.

JURISDICTIONAL STATEMENT

The Court of Federal Claims had jurisdiction over Appellants' cases under 28 U.S.C. § 1491(a)(1). The court entered final judgment in each of the Appellants' cases between September 9, 2020 and September 10, 2020. (SAppx2016-2701) Appellants filed timely notices of appeal on November 9,

2020. (SAppx2016-2701) This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the Downstream Plaintiffs possess sufficient property interests in their homes, businesses, and personal possessions to support a claim under the Takings Clause of the Fifth Amendment for damages caused by the Government's intentional, non-emergent releases of floodwaters from the Addicks and Barker Reservoirs on August 28 and 29, 2017.

2. Whether the Downstream Plaintiffs are entitled to summary judgment on their claim that the Government's physical invasion of Appellants' properties via intentional, non-emergent releases of floodwaters, and unencumbered right to conduct similar releases in the future, effectuated a taking requiring compensation under the Fifth Amendment Takings Clause.

STATEMENT OF THE CASE

A. Background on takings by government-induced flooding.

In *Arkansas Game & Fish Commission v. United States*, the Supreme Court addressed the legal standards applicable to physical invasions of property by "government-induced flooding." 568 U.S. 23, 34 (2012). The Court concluded that "flooding" cases should stand on equal footing with "other

takings cases." *Id.* at 36. That wrought one big change in Fifth Amendment flood-related takings law: *Arkansas Game* held that government-induced floods enjoy no "automatic exemption" from takings liability simply because they are "temporary in duration." *Id.* at 38. *Arkansas Game* also announced that future flood-related takings cases should be resolved by the "'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Id.* (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

Arkansas Game also illustrates that there is no "blanket exclusionary rule" barring landowners who suffer government-induced flooding from maintaining takings claims simply because they live downstream of a dam. Its analysis turned on the purpose behind the government's flooding, not the location of the landowner's property, because the Government cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" without compensating them. *Id.* at 31 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Applying that principle, *Arkansas Game* held that a landowner could maintain a claim under the Takings Clause when the Government seasonally flooded a downstream property above normal flows, thereby damaging the property owners' trees,

as part of a policy designed to benefit other property owners—although it reserved the question of whether a taking had actually occurred for remand. *Id.* at 27-28.

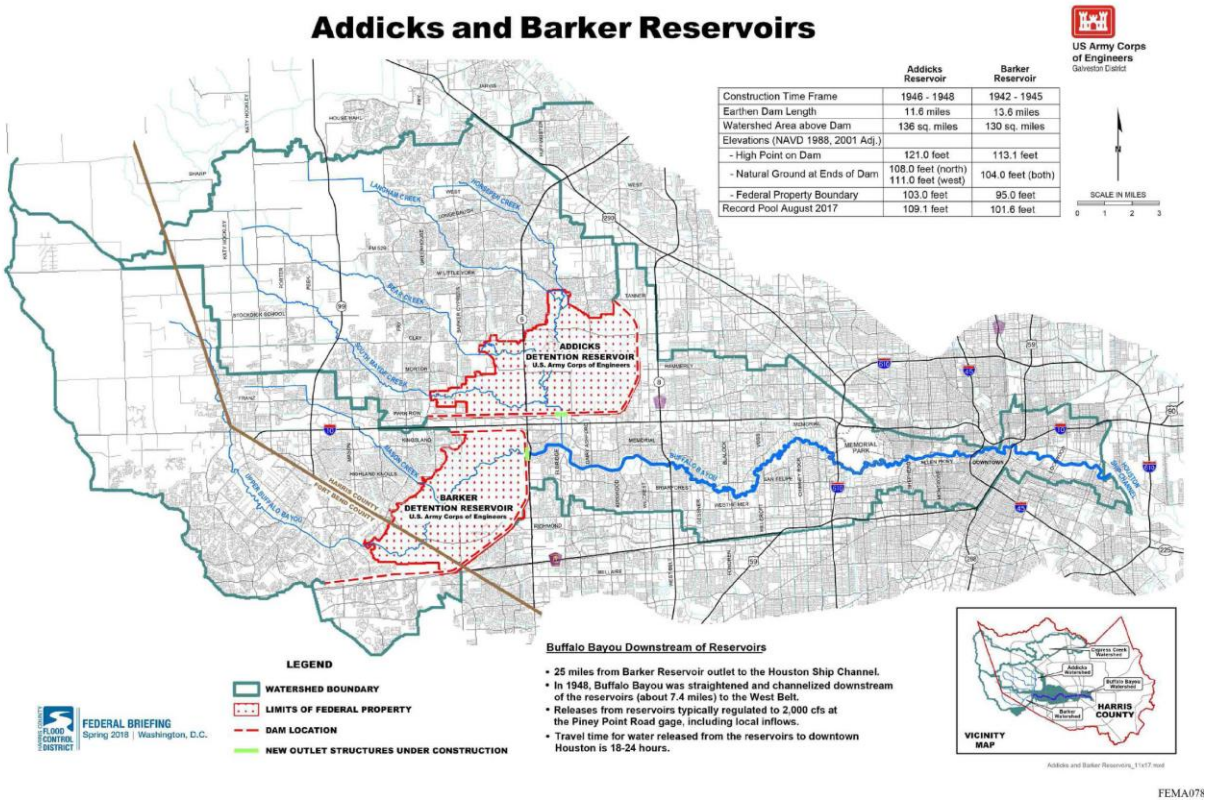
Texas law has approached its own takings jurisprudence with similar concerns about the burden-shifting that sometimes results from government-induced flooding. The Texas Supreme Court has held that landowners can maintain claims under the Takings Clause of the Texas Constitution, TEX. CONST. art. I, § 17, when "the government [makes] a conscious decision to subject particular properties to inundation so that other properties would be spared." *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 807 (Tex. 2016). And it has applied that principle to landowners downstream of a dam as well as those upstream. In *Tarrant Regional Water District v. Gragg*, the Court held that the Gragg family could maintain a state-law takings claim when the Tarrant Regional Water District intentionally released floodwaters from a dam on the Richland-Chambless Reservoir that damaged the Gragg family ranch, when it did so to keep the dam from overflowing and flooding others' land. 151 S.W.3d 546, 549, 550 (Tex. 2004). The controlling principle: The "public" should "not bear the burden of paying for property damage for which it received no benefit," even the downstream public. *Id.* at 554.

And *Gregg* is just the latest in a long line of Texas cases holding that government-induced flooding can constitute a taking, even when directed at properties downstream of a dam. *See, e.g.*, *Golden Harvest Co. Inc. v. City of Dallas*, 942 S.W.2d 682, 685 (Tex. App. 1997) (holding landowner downstream of dam on Lake Ray Hubbard could maintain a state-law takings claim resulting from city's abnormal releases of water from the lake after heavy rains); *Abbott v. City of Kaufman*, 717 S.W.2d 927, 928-29 (Tex. App. 1986) (holding that landowners downstream of a sewage treatment plant could maintain a state-law takings claim resulting from city sewage plant's continual sewage discharges, which flooded and contaminated their property). This includes cases involving government-induced flooding conducted in response to Harvey. *San Jacinto River Authority v. Burney* held that homeowners could bring a state-law takings challenge to the San Jacinto River Authority's decision to release water from Lake Conroe during Harvey to protect "the stability and integrity of the dam." 570 S.W.3d 820, 825, 837-38 (Tex. App. 2018) (review granted). And the court found the "varying physical location[s] of [the landowners' property" made no "material difference" in determining whether they could maintain takings claims. *Id.* at 825.

Yet despite all these cases, the Court of Federal Claims denied the Downstream Plaintiffs' takings claim and did so by imposing exactly the kinds of "blanket exclusionary rules" and location-specific disabilities *Arkansas Game* and Texas law both prohibit.

B. The Corps builds the Addicks and Barker Reservoirs to withstand heavy floods.

For much of the year, little or no water flows through the narrow streams of the Buffalo Bayou watershed. (Appx5623–5624) Yet the bayou is susceptible to periodic heavy flooding, resulting from a confluence of soil composition, foliage, and frequent heavy storms. (Appx4141, Appx5624) Accordingly, when the Army Corps of Engineering built the Addicks and Barker Reservoirs to mitigate flood risks to properties inside the watershed—including the City of Houston and the Houston Ship Channel—it designed the Reservoirs to handle the region's challenging flooding conditions. (Appx992, Appx1019-1020, Appx1091-1093, Appx2215, Appx2129, Appx2165)



The Reservoirs are formed by a pair of earthen dams—11.5 and 13.5 miles in length—that are normally "dry" like the Bayou in which they lie. (Appx992, Appx3205) Yet they are designed to channel high-volume flood waters when necessary. Each Reservoir has an outlet structure with five gated conduits that can be closed to retain water or opened to permit water to flow downstream "at a controlled rate" through concrete-lined channels. (Appx992-993)

BARKER RESERVOIR – OUTLET WORKS

ADDICKS RESERVOIR – OUTLET WORKS

(Appx977, Appx979, Appx2400)

The Corps has also constructed "spillways" along the dams; these sit at lower elevations than the dams' earthen embankments and work like the overflow holes in a sink, providing a safe path for flood waters to drain out of the Reservoirs so they never reach the tops of the embankments. (Appx992–993, Appx1019, Appx3197) When the Corps designed the Reservoir

embankments, spillways, and conduit structures, it did so with the worst of the area's historically fierce storms in mind—including one storm that produced a maximum rainfall depth of 31.4 inches. (Appx5625)

The Corps also maintains a plan, detailed in its Water Control Manual (Manual), for operating the dams' floodgates under a variety of flooding conditions. (Appx974-1131, Appx1166-1253) During "normal conditions" set out in the "Normal Flood Control Regulation," the Manual provides that the floodgates should remain closed during flood events, until water releases can occur in a manner that will not cause damaging downstream flooding. (Appx1022)

The Corps operated the Reservoirs under the Normal Flood Control Regulation for decades. (Appx1154, Appx4012, Appx3719, Appx3681, Appx3673-3674, Appx4127). And after one episode during which the regulation's operation caused some upstream neighborhoods to flood, Corps officials explained to the public that the upstream flooding was by design: "We will not open the dam to a point where it will cause flooding downstream." (Appx4341-42) The dam was operated to protect *downstream* landowners, not upstream ones.

Yet the Corps maintained another policy it did not share with the public, set in its "Induced Surcharge Flood Control Regulation," that had the opposite

effect. The Induced Surcharge Flood Control Regulation provides that when the depths of the Reservoir pools reach certain threshold levels and rates of pool elevation rise, the floodgates must be opened. Appx1023; *see also* Appx1119-1120; Appx1123; Appx1258-1259; Appx1397-1399. And that meant the heaviest floodwaters must be borne by downstream properties. (Appx1023) But the Corps had never invoked the Induced Surcharge Flood Control Regulation before Tropical Storm Harvey arrived in the Buffalo Bayou—so the public never knew of it. (Appx6)

C. The Corps intentionally floods Appellants' properties.

When Harvey arrived in Texas and made its way toward Harris County, it unleashed extensive rain on the Reservoir watersheds—roughly 32-35 inches (Appx5)—but never tested the Reservoirs' limits. The Corps responded by the book, in compliance with the Normal Flood Control Regulation. (Appx6) But around midnight on August 28, 2017, after the pools behind the Reservoirs exceeded the government-owned land and began flooding surrounding private properties, the Corps invoked the Induced Surcharge Flood Control Regulation for the first time and began releasing water from both Reservoirs. (Appx6, Appx2160, Appx2164, Appx2167, Appx2223) The next day, the Corps twice ramped up those releases, eventually reaching 13,000 cfs. (Appx2223,

Appx2237) Corps officials acknowledge that the releases' purpose was to prevent the neighborhoods around the Reservoirs from further flooding, to ensure the dams' structural stability, and to protect Downtown Houston and the Houston Ship Channel. (Appx938, Appx2135, Appx2157-2159, Appx2162, Appx4153, Appx4168, Appx4169, Appx4183)

Yet even as the Corps was conducting these releases, officials recognized that these gains for the "entire population" came at the expense of "making people hurt downstream." (Appx2128) Based on extensive modeling (Appx933-934), the Corps knew that flow rates exceeding 3,000 cfs could damage properties miles downriver, and even the initial release exceeded that critical threshold. (Appx1255) That modeling also enabled the Corps to know—down to street, intersection, and block—which properties would flood at those waterflows. (Appx934, Appx1246, Appx1256) Accordingly, the Corps knew with great certainty that the releases would inundate the Downstream Plaintiffs' properties. (Appx938, Appx2127, Appx2160)

That is exactly what happened. Without any advanced warning, and within hours of the discharges, a massive influx of water from the Buffalo Bayou poured into the downstream areas where Appellants live and work. (Appx2223-2224) And as Harvey's rainfall dissipated, the discharges became

the primary source of water within the Bayou—more than enough to flood their properties. (Appx2315; Appx2180-2181, Appx2234-2347) The devastation was complete. As the experience of the Downstream Plaintiffs attests, homes and businesses were engulfed by flooding reaching many feet in height (Appx942 (citing Appx1639-1639, Appx2015-2126, Appx2315)), and lasting many days (Appx942, Appx1706, Appx2315, Appx4271)

Many could not even access their properties for weeks. (Appx942, Appx1695-1720, Appx4271; *see also* Appx1703-1704, Appx1710, Appx1713, Appx1885, Appx2315) And many were displaced from their homes, unable to use or enjoy their properties, for months—for some, right up through when their depositions in this case were taken. (Appx943, Appx1862-1945; *see also* Appx1868-1870, Appx1905, Appx1915). Many businesses could not reopen for many months. (Appx944, Appx1900, Appx1907-1909, Appx1899). Virtually all the Downstream Plaintiffs' possessions stored on the first floors of their homes were destroyed—and what could be salvaged cost hundreds of thousands—or many millions—to repair. (Appx1721-1861, Appx1752, Appx1721, Appx1734, Appx1752, Appx1757-1758, Appx1780, Appx1788-1789, Appx1855-1857, Appx4195)

But there was never any emergency that mandated inundating the Downstream Plaintiffs' properties. True, the Reservoirs reached record levels (Appx5), but only "minor" amounts of water went over the spillways (Appx992, Appx1421). The Corps did not even access the *first* of three levels of emergency action plans it maintains for the Reservoirs. (Appx937, Appx1289-90, Appx1421, Appx2133) The Reservoirs "perform[ed] as expected with no significant problems." (Appx1419, Appx2136) This was standard operating procedure.

D. The Corps plans to use the same Induced Surcharge Procedures for future flooding.

The Government also admits it will definitely have to follow that standard procedure again. The Government's own expert acknowledges that the Reservoirs will "inevitably" experience "[a] rain event similar to Harvey," even "next week." (Appx2728) Yet even after witnessing first-hand the devastation the Induced Surcharge Procedures can cause, the Government has no plans to abandon them. The Government has confirmed that "Induced Surcharge" remains a part of the Manual. (Appx931-932, Appx1414) And members of the Corps testified that, in the event a rainfall event like Harvey arises again, the Corps will "inevitably" follow their instructions. (Appx2132; Appx2733)

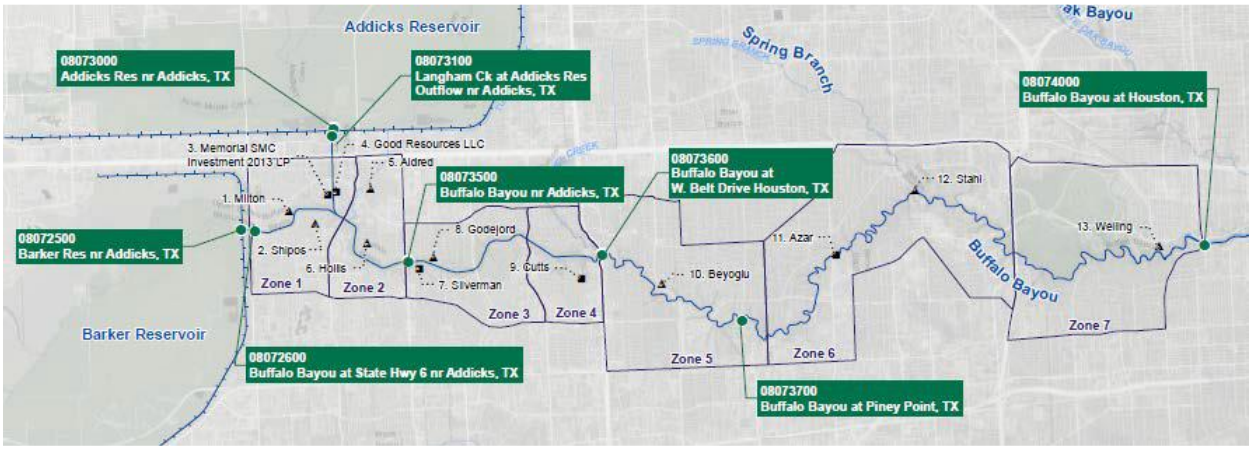
The only post-Harvey changes the Corps has explored have nothing to do with the floodgates' operation. Rather, it plans to "talk" more with the public "about surcharge releases, notifications and communications" before future releases. (Appx4187, Appx4189) And the Corps has requested federal funding to buy properties "in the surcharge corridor" where Plaintiffs' properties are located (Appx4189) because they remain "at risk for flood or erosion damage" from the Reservoirs' dams. (Appx3681) Yet no such purchases have taken place.

E. The Court of Federal Claims rejects the Downstream Plaintiffs' takings claims.

The Appellants sued in in the Court of Federal Claims along with thousands of other affected landowners (Appx927), arguing that by releasing water from the Reservoirs, and by inundating, destroying, damaging, and devaluating Appellants' property, the Government took their property without just compensation in violation of the Fifth Amendment's Takings Clause.

After their cases were consolidated into the downstream docket (Appx68-69), the court designated a group of test properties, belonging to the Downstream Plaintiffs (Appx7), to provide a sampling of the conditions at various locations inundated by the Reservoirs during and after Harvey. These

properties were situated at various points along the Buffalo Bayou downstream of the Reservoirs. (Appx770)



(Appx2761)

These test properties are typical of Appellants' properties. Each was purchased by the Downstream Plaintiffs between 1976 and 2015 (Appx1436–1470), and the houses and structures on their properties were built between 1962 and 2016, under the ownership of the Downstream Plaintiffs or their predecessors. (Appx4)

Of the 13 test properties, three are located within the 100-year flood zone, eight are located within the 500-year flood zone, and two fall outside the 500-year floodplain entirely. (Appx2015, 2126) Yet none of the Downstream Plaintiffs were aware of any flooding when they purchased their properties. (Appx1471-1505) And nine of the Downstream Plaintiffs had never experienced flooding on their properties before Harvey. (Appx1577–1603,

Appx2015–2126) As for the remaining four, Harvey brought flooding far more severe than anything they had previously experienced. (Appx1604–1638, Appx2234-2247, Appx804-2811, Appx1946-2104, Appx2109, Appx2112, Appx2125) And none of the Downstream Plaintiffs anticipated that the Government would deliberately release water onto their properties.

Yet the Government's own expert concedes that the Government's releases caused flooding that would not have existed for eight of the 13 Downstream Plaintiffs, and the remaining five suffered worse flooding than if the Government had never opened the gates. (*Compare* Appx2315 [actual flooding data] *with* Appx2726 ["gates closed" model]; *see also* Appx2828-2830; Appx2804-2811 [Appellants' expert])

The Downstream Plaintiffs alleged several theories why the Government's actions constituted a taking of a "flowage easement" on their properties—stemming from both the government-induced flooding of their properties during Harvey, and the Government's plans to handle future storms with future flooding. (Appx120-121)

These takings theories were similar to those raised by the plaintiffs in the upstream case (Upstream Plaintiffs) (Appx5646) and involved similar operative facts: Both allege that the Government caused their properties to

experience flooding that would not have otherwise occurred, and the flooding harmed their properties to benefit others.' The only difference was *which* acts constituted the taking, and *which* properties benefited from the respective takings. And in the beginning, the cases were handled similarly, with the Chief Judge denying the Governments' motions to dismiss in both cases, deferring the outcome until trial. (Appx803, Appx5623)

Yet the ultimate outcome of each case was very different. The Chief Judge reassigned the upstream docket to Senior Judge Lettow (Appx5614), and the downstream docket to Senior Judge Smith. (Appx7) Senior Judge Lettow held that the Upstream Plaintiffs possessed "a valid property interest" sufficient to maintain a Fifth Amendment takings claim (Appx5649), by virtue of the fact that they "own[ed]" their properties, which were "not subject to flowage easements" before the government-induced flooding (Appx5648). As a result, Senior Judge Lettow held that the Government's actions constituted a taking of a "permanent" "flowage easement." (Appx5646, Appx5666)

But when it came to the Downstream Plaintiffs, the Upstream Plaintiffs, and court's decision in this case, mere ownership of the property and the lack of an easement were not enough. (Appx1-19) That ruling formally addressed only the 13 test properties, but the court recognized that its reasons for

decision would "govern all cases covered by the Downstream Sub-Master Docket," including Appellants.' (Appx20) The court held that Appellants lacked the "requisite property interest" necessary to challenge the Government's decision to inundate their land, dispossess them from their homes and businesses, and damage their real and personal property. (Appx1, Appx10, Appx19) In doing so, the court made no mention of *Arkansas Game*, *Gregg*, or any of the other state cases permitting property owners downstream of a dam to maintain takings claims based on floodwater releases, even though those cases should have been dispositive on the question of the Appellants' property rights. After all, if the downstream landowners in *those* cases possessed the requisite property interests to maintain a takings claim, the Downstream Plaintiffs—and Appellants—should too.

The court acknowledged the tension between its decision and Judge Lettow's ruling in the Upstream Cases. (Appx9) But the court believed dam mechanics resolved the tension. The court decided that the Upstream Plaintiffs and Appellants were differently situated because the Upstream Plaintiffs were challenging the "Corps' decision to *close* the flood gates" (Appx9, emphasis added), while the Appellants were challenging the Corps' decision to later "open" them. (*Id.*) The court found a dispositive difference in

the fact that the Government initially closed the Reservoirs' floodgates "for the sole purpose of protecting [Appellants'] properties from floodwaters," providing "mitigation" benefits—even though the Government later took those mitigation benefits away when it opened the floodgates. (Appx8-9) And the court concluded that "such mitigation failed because the impounded storm waters exceeded the Reservoirs' controllable capacity"—even though the evidence conclusively demonstrates that the Reservoirs' capacity was never actually exceeded. (Appx9) To the court, that made Harvey—"an Act of God" and a "record-setting storm"—the "sole and proximate cause" of the Downstream Plaintiffs' losses, excusing the Government's liability under Texas tort law principles. (Appx7-10) And it made the Appellants' claims an impermissible "demand for perfect flood control" that was not cognizable under the Takings Clause. (Appx10)

The court determined that the right to "perfect" government "flood control" is simply absent from the "'bundle of sticks' afforded property owners downstream of water control structures." (Appx11, 14) The court traced these supposed limitations on downstream property-holders' rights to several state-law takings rules under the "Texas State Constitution." (Appx11, citing TEX. CONST. art. I, § 17) First, it applied the state's "exception to takings liability"

for operations conducted under the "police power," concluding that the "state's authority to mitigate against flooding" was "superior to the rights of property owners." (Appx11, 12) The court also determined, based on cases "finding no taking" under Texas takings law where property owners purchased properties adjacent to preexisting existing water control structures, that the Appellants "acquired their properties subject to the superior right of the Corps to engage in flood mitigation and to operate according to its Manual." (Appx14. 15) The court then interpreted state-takings law rules prohibiting liability for acts of "negligence" or "'inaction'" as negating any "right" the Appellants might have "to be free from unintentional flooding." (Appx13-14, quoting *Kerr*, 499 S.W.3d at 804, 805) And finally, the court held that, "regardless of the intentionality of the waters' release," the Appellants' rights were subject to a series of specialized takings rules applied by just one Texas intermediate court of appeals. (Appx14) These rules categorically deny landowners compensation from flood-related releases whenever "'the [water control structure] never released more water than was entering the reservoir via rainfall'" and "the water is not released directly onto a plaintiff's property, but rather is released into a river that consequently floods downstream." (Appx14, quoting *Sabine River Auth. v. Hughes*, 92 S.W.3d 40, 642 (Tex. App. 2002), and citing

Wickham v. San Jacinto River Auth., 979 S.W.2d 876 (Tex. App. 1998)) Based on these state *takings* law rules, the court made a conclusion under state *property* law—that the Government did not take anything belonging to the Downstream Plaintiffs when it flooded their properties and drove them from their businesses and homes. (Appx18)

The court therefore denied the Downstream Plaintiffs' motion for summary judgment, granted the Government's motion to dismiss for failure to state a claim, and granted the Government's motion for summary judgment. (Appx19)

SUMMARY OF ARGUMENT

The outcome of this case is controlled by *Arkansas Game*, *Gragg* and the entire line of Texas cases holding that downstream property owners possess sufficient property rights to maintain challenges under the Takings Clause against government-induced flooding conducted on their properties for other properties' benefit. Those cases are directly applicable here. Like the landowners in those cases, the Downstream Plaintiffs are fee simple property owners, possessing the same right to exclude others from invading, physically possessing, damaging, and destroying their properties. And Appellants' interests are comparable. Being upstream or downstream of a dam makes no

difference because property rights do not depend upon the property's orientation relative to a dam.

In trying to demonstrate otherwise, the court digs deep into tort law, state takings law, and dam mechanics, with some time spent parodying the Appellants' claims as constituting an improper demand for "perfect flood control." These efforts are overblown. But equally important, they are unavailing, because none of them has anything to do with *property* rights. It does not matter whether a property owner is challenging the opening of a dam or the closing of one, nor does it matter if the property enjoyed some benefit from a dam before being inundated by it. Dam mechanics do not control property rights. It is immaterial whether Texas tort law excuses liability for damages resulting from an "Act of God." Tort law does not control property rights. It makes no difference whether Texas *takings* law would permit the government to conduct "flood control" operations on Appellants' property without compensating them. State takings law does not control property rights—indeed it does not even control *federal* takings law. It does not even matter how the court characterizes the Appellants' claims. That characterization does not control their property rights. *Property law controls property rights*. And according to Texas property law, Appellants possess

compensable rights that were taken when the Government intentionally invaded their land by flood. Smuggling other areas of the law into that inquiry erects precisely the sort of "blanket exclusionary rules" *Arkansas Game* prohibits. 568 U.S. at 37. The court erred in concluding otherwise, and its judgment must be reversed.

With the lower court's improper analysis cleared away, the Court should undertake the proper analysis and hold that the Government's actions constitute a taking of Appellants' property as a matter of law. The relevant facts are not in dispute—the Government's actions caused all the Appellants to suffer flooding they would not have otherwise experienced. The Government undertook those actions to benefit other people's property to the Appellants' detriment. Those past physical invasions constitute the classic taking, and the Government's plan—and unqualified right—to inevitably conduct similar physical invasions in the future make the deprivation categorical and permanent. That constitutes a flowage easement, a permanent servitude on the land. Appellants are therefore entitled to summary judgment on the takings claim, and the court's judgment to the contrary must be reversed. If the Government wants to use the Appellants' land as the focus for

its flood-controlling efforts, "it must pay for it." *Nollan v. California Coastal Com'n*, 483 U.S. 825, 842 (1987).

ARGUMENT

I. Standard of review

The Court of Federal Claims granted the Government's motion to dismiss for failure to state a claim, as well as its cross-motion for summary judgment. As the court below relied on matters outside of the pleadings in reaching its decision, the standard of appellate review applicable to summary judgment motions governs. *Colvin Cattle Company v United States*, 468 F.3d 803, 806 (Fed. Cir. 2006).

This Court reviews the grant of summary judgment de novo, utilizing the same standards as those applied by the court below. *Ladd v United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v Catrett*, 477 U.S. 317, 322 (1986). The Court must draw all reasonable inferences in the light most favorable to the nonmoving party, *Matsushita Elec. Ind. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and must not weigh the evidence or make findings of fact, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

II. The Court of Federal Claims erred in holding that Appellants lack the requisite property rights to maintain a claim under the Takings Clause.

The court's decision in this case begins—and ends—with the first element of a Fifth Amendment takings claim: "'whether the plaintiff possesses a valid interest in the property affected by the governmental action.'" (Appx9, quoting *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002)) That element should have posed no difficulty for the Downstream Plaintiffs. As fee simple owners, they possess *all* the property rights in their homes and businesses. *All* the property rights affected by the Government's flooding and flood control-efforts belongs to them. The court could only conclude otherwise by consulting sources that have nothing to do with property rights.

A. Appellants' property interests are sufficient to maintain a Fifth Amendment takings claim against the Government.

Whether a landowner possesses sufficient property rights to maintain a Fifth Amendment takings claim is an issue of "property" rights—"whether the plaintiff possessed a stick" in the bundle of rights property-owners possess, and whether the Government took that stick away. *Boise Cascade Corp.*, 296 F.3d at 1343. That is a question of "state law," because "[p]roperty rights" are

not "created by the constitution." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

And it should have been an easy question because each of the Downstream Plaintiffs "owned their [real] property in fee simple at the time of the taking" (Appx954; *see also* Appx935, Appx2029, Appx3175), and possessed equally extensive interests in the personal property damaged or destroyed by the releases (Appx954). And the Appellants have alleged similar property interests. (SAppx2016-2701) A fee simple interest "does not only mean the real estate, but every right which accompanies its ownership." *Texas v. Moore Outdoor Props., L.P.*, 416 S.W.3d 237, 242-43 (Tex. App. 2013). It is the entire "bundle of sticks."

The Fifth Amendment protects that entire bundle—"every sort of [real property] interest [a] citizen may possess," *United States v. General Motors*, 323 U.S. 373, 378 (1945), as well as every personal property interest, *see Horne v. Department of Agric.*, 135 S. Ct. 2419, 2426 (2015). That includes the right to "use and enjoyment of their land," *United States v. Causby*, 328 U.S. 256, 258 (1946). And it includes one of the "most valued" of property rights: "the right to sole and exclusive possession." *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991). That is "the right to exclude all others from use of

the property," *Envt'l Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 424 (Tex. 2015) (quotation omitted)—"strangers," "friends," and "especially the Government." *Hendler*, 952 F.2d at 1374.

The Government took away that right when it physically invaded the Appellants' properties, and the Manual's allowance for other invasions made that invasion permanent. That imposed a permanent servitude on land: an "easement," which is a "relinquishment of the right to exclude." *Envt'l Processing Sys.*, 457 S.W.3d at 424. An easement that allows the government to "occasionally flood" property "without incurring liability" is called a "flowage easement," and it is a recognized property interest under Texas law. *Bennett v. Tarrant Cty. Water Control & Imp. Dist. No. One*, 894 S.W.2d 441, 444 (Tex. App. 1995). The Government in this case imposed a flowage easement on the Appellants' property, just like the Tarrant Regional Water District imposed on the ranch at issue in *Gragg*. *See* 151 S.W.3d at 550, 559. And that fatally undermines the court's decision in this case, because *Gragg* involved an owner of property downstream of a dam. *Gragg* therefore demonstrates that under Texas property law, a fee simple is a fee simple, regardless of its orientation relative to a dam. And the numerous other Texas cases holding similarly confirm the point. Upstream fee simple owners do not

possess more, nor do downstream owners possess less, simply because of their location. And downstream owners possess *enough* to exclude others from coming on the land, and to be entitled to compensation when the government takes that right away. Accordingly, the court below could be correct only if *Gragg*, *Burney*, *Golden Harvest*, *Abbott*, and *Arkansas Game* all came out the wrong way.

B. The Appellants' property rights are not subordinated to the Government's flood-control powers.

The court never identified anything wrong with the application of Texas property law in any of these cases. Indeed, while the court lampoons the Appellants' claims as demanding "perfect flood control," and insists that such "property right" is "specifically excluded from the 'bundle of sticks' afforded property owners downstream of water control structures," the court never actually takes Texas property law into account. (Appx11) Instead, it focuses exclusively on sources *outside* of property law, including extended excursions into tort law, Texas takings law, and dam mechanics. Yet each of these excursions is irrelevant in determining the Appellants' property rights. And the court erred in relying on them.

1. Tort principles do not control property rights.

The court delves into tort law (Appx12, Appx13n.4) with a series of cases in which people were relieved of liability based on "Acts of God" or "heavy rainfall." (Appx12, quoting *Benavedez v. Gonzalez*, 396 S.W.2d 512, 514 (Tex. App. 1965); *see also McWlliams v. Masterson*, 112 S.W.3d 314 (Tex. App. 2003)) But Texas tort law's defense against liability for "Acts of God," and whether Harvey—a "2000-year storm"—could qualify as one, are completely beside the point. (Appx12, Appx13) Heavy rainfalls or storms do not wash away property rights, giving anyone license to intentionally invade others' land with impunity—either physically or through "diversions of water." (Appx12, citing *Benavides*, 396 S.W.2d at 512) They simply provide a "good defense" against being held liable for such invasions. *Benavides*, 396 S.W.2d at 512. In such cases, a property invasion has still occurred; it is simply excused. Tort rules do not determine property rights.

Furthermore, the court's conclusion that Harvey's mere existence absolves the Government of any responsibility under these principles conflicts with the law and the undisputed facts. As the court recognized, determining whether "an occurrence was an Act of God" requires asking whether the event was "so unusual that it could not have been reasonably expected or provided

against." (Appx12, quoting *Gulf, C. & S. F.R. Co. v. Texas Star Flour Mills*, 143 S.W. 1179, 1182 (Tex. Civ. App. 1912)) And the Government could have easily "provided against" the flooding that the Appellants' properties suffered, despite Harvey's record rainfalls. All the Government had to do was leave the floodgates closed. The Government's own expert confirms that, had it done so, the properties either would not have flooded at all, or would not have flooded as badly. (Appx5462, Appx5642, Appx2315, Appx2726) The flooding did not inevitably result from Harvey. It resulted *solely* from the Government's decision to open the floodgates.

Nor was there any emergency that required opening the floodgates. The Reservoirs never actually hit "capacity." (Appx1) Only "minor" amounts of water went over the spillways" (Appx992, Appx142), which meant water levels never came near the tops of the Reservoirs' earthen dams (Appx992–993, Appx1019, Appx3197). And Corps engineers confirm that the dams themselves were never at risk of failing. They admit that, had the floodgates remained closed, the floodwaters would simply have reached into "additional neighborhoods" surrounding the Reservoirs, rather than inundating the downstream ones. (Appx631) Harvey's rainfall may have been a "once-in-2000-year event" beyond the Government's control. (Appx1) But the Government's

response to that rainfall was well within its control. Accordingly, the Government has no "Act of God" defense.

2. Dam mechanics do not control property rights.

The court fares no better with dam mechanics—the court's sole justification for concluding that the Upstream Plaintiffs possess property rights that Appellants and the Downstream Plaintiffs do not. The court found it dispositive that the Upstream Plaintiffs were challenging the Government's decision to "close" the floodgates, while the Downstream Plaintiffs were challenging its decision to "open" them, and that the closed floodgates "protected" the Downstream Plaintiffs from flooding before that protection was taken away with inundation. (Appx9) But these facts are insignificant—they have nothing to do with property rights. Fee simple property interests do not turn on the opening and closing of floodgates.

Nor did Appellants' fee-simple property interests turn on whether their properties obtained any benefit from the Reservoirs or their floodgates' operation. The ranch at issue in *Gragg* gained a similar and unquestionable benefit from the floodgates on the Richland-Chambers Reservoir. 151 S.W.3d at 549. Those floodgates held back water from tributaries of the Trinity River—water that caused millions of dollars in damages to the ranch once the

floodgates opened. *Id.* at 550. Similar benefits were obtained by the landowners in *Burney*, *Golden Harvest*, and *Abbott*. Yet not once did those benefits figure into Texas courts' reasoning that the landowners in these cases possessed sufficient property rights to obtain compensation for the flowage easement appropriated through inundations of water. Nor should they have. Any benefit provided by a dam or its floodgates cannot convert a fee simple property interest into something less, especially when the government withdraws the benefit. These technicalities of dam operation cannot control property rights.

If dam mechanics end up having any relevance in this case, it will be in defining the scope of the Governments' liability rather than Appellants' property rights. They mean that the Government may have to provide compensation to both the Upstream and Downstream Plaintiffs, and Appellants too. But that consequence results solely from the Government's split-the-baby approach to flood control. And that choice of approach is no reason to deny the Appellants any recovery.

3. Texas takings law does not control property rights.

The court's sojourn into Texas takings law is also misguided, in both theory and in practice. The theory is bad because state takings law plays no

part in defining the Appellants' property rights or in determining whether they were taken away. It cannot control *federal* takings law because the issue of what constitutes a 'taking'" under the Fifth Amendment "is a 'federal question' governed entirely by federal law." *Bartz v. United States*, 633 F.2d 571, 677 (Ct. Cl. 1980) (per curiam) (quoting *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 279 (1943)).

State takings law cannot control property rights either. Texas takings law defines when "property" may be "taken" for "public use," and whether "compensation" must be given for the taking. TEX. CONST. art. I, § 17(a). But what is taken remains "property." *Id.* Accordingly, it may sometimes be possible to draw property-law lessons from cases allowing takings claims like *Arkansas Game*, *Gragg*, and the like, because no taking could have occurred if there was no property to take. But takings law cannot *restrict* property rights. The government may in some instances be permitted to take property rights without paying for them. But that does not mean property was not taken.

Things get only worse when the property restrictions the court claims to have identified are examined. For example, nothing supports the court's conclusion that the "police power" places any limit on landowners' property

rights that would allow the government to flood their land without compensating them. "[F]lood mitigation" may be a legitimate exercise of the "police power" (Appx12), but that does not mean the government's power to conduct flood mitigation trumps private property rights (much less destroys them). That is because the "police power" from which the government's flood-control interest arises does not trump property rights.

In contending otherwise, the court relied on observations in Texas case law that "'all property is held subject to valid exercises of the police power.'" (Appx11, *Lombardo v. Dallas*, 124 Tex. 1 (1934), and citing *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926)) But the Texas Supreme Court in *Brazos River Authority v. City of Graham*, specifically addressed *Motl*, the case from which this principle is derived. (Appx11) And *Graham* specifically declined to give that principle the expansive interpretation the court adopts. 354 S.W.2d 99, 105 (1961).

Indeed, *Graham* rejected a public agency's attempt to invoke the police power as a basis to flood without paying. *Id.* In doing so, it held that state actors are "generally required to proceed under the power of eminent domain rather than under the police power," even when conducting "flood control." *Id.* at 105. Accordingly, Texas law refutes any notion that the "police power"

exception to state takings law subordinates property owners' property rights to government "flood control" efforts.

The court once again misinterprets the very takings principles it relies upon in concluding that, by "acquir[ing] their properties after the *construction*" of the Reservoirs, Appellants lost any right to challenge what the Government *did* with the Reservoirs. (Appx14, emphasis added) What the Reservoirs did to capture water is one thing. What the Government did with that water is another. And one of the court's own authorities, *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. App. 1961), explains the difference. *City of Tyler* explains that a state-law taking can occur either as the result of "the construction of public works *or their subsequent maintenance and operation*." *Id.* at 504-05 (emphasis added). Accordingly, even if the Appellants lacked any right to challenge the construction of the Reservoirs themselves because it was baked into their properties' the purchase price, they could still challenge the manner in which the Government operated the Reservoirs.

Finally, the Appellants' property rights do not depend upon the way their property was taken. The court gives great significance to cases holding that liability under Texas takings law, like liability under Fifth Amendment takings law, cannot depend upon mere "tortious" behavior or "inaction."

(Appx13, quoting *Kerr*, 499 S.W.3d at 805 and *Texas Highway Dep't v. Weber*, 219 S.W.2d 70, 72 (Tex. 1949)) The rules in those cases make sense as takings law, where intent matters. But they make no sense as property law. If the Government seizes property negligently, it remains seized, and it remains property. Property rights do not vary with mental state.

Furthermore, the Appellants are not challenging Government inaction, or mere tortious behavior. Their claims do not turn on whether the Government "could have done more," or *should* have done more, to protect their property from flooding. (Appx13, quoting *Kerr*, 499 S.W.3d at 804) They do not challenge the wisdom of the Government's flood mitigation efforts, or the soundness of its decision to prioritize upstream properties over downstream ones during heavy flooding. They do not suggest the Government has done "something wrong" or conducted flood control *badly*. (Appx2) They do not demand "perfect flood control." Their sole contention is that the Government's plan for preventing flooding on others' properties required flooding theirs. And if Government wants to do that, it must pay for the right.

That, at base, is what separates this case from *Kerr*, in which the Texas Supreme Court held that liability under state takings law could not lie where a state agency had a flood control plan—the "Pate Plan"—and "never fully

implemented it." 499 S.W.3d at 796. Here, the Government *had* a plan and *did* fully implement it. That was intentional action, not tortious inaction, and would be a compensable under Texas takings law, so these state-law takings principles requiring intent and action could not negatively affect the Downstream Plaintiffs' property rights.

Nor can supremely technical rules regarding dam operation applicable only in a single Texas intermediate court of appeals control the rights of thousands of landowners immediately outside Houston. The court below referred to a pair of opinions suggesting that there can be no "taking" under Texas law when the "'the [water control structure] never released more water than was entering the reservoir via rainfall'" or when the water "is not released directly onto a plaintiff's property, but rather is released into a river that consequently floods properties downstream." (Appx14, quoting *Sabine River Auth.*, 92 S.W.3d at 642; *see also Wickham*, 979 S.W.2d at 880) The court attributes these opinions to the 'Texas Supreme Court" (Appx14), although they actually come the intermediate appellate court in Beaumont, Texas. That means these supremely technical requirements do not hold sway anywhere outside the Beaumont court's tiny jurisdiction. And other Texas courts have rejected them as inconsistent with the "later-decided *Gragg* case, which

affirmed a takings judgment despite evidence that a water district released lake water directly into a river during heavy rains and the water traveled about eight miles downstream before causing flood damage." *Burney*, 570 S.W.3d at 836 (citing *Gragg*, 151 S.W.3d at 550, 554-55). These later cases like *Burney* and *Gragg* are on the better side of these issues.

Taken individually, these takings principles make no sense as property restrictions. Taken together, they only get worse. Permitting a person's property rights to turn on such arbitrary considerations as the source of a government's power to seize it, the state of mind of the person who took it, the property's purchase date, or the water levels in a dam located miles away would produce exactly the "blanket exclusionary rules" *Arkansas Game* prohibits. And they are not even good ways of distinguishing upstream property interests from downstream ones, because they could heedlessly destroy property rights regardless of the property's orientation relative to a dam. That is why the court in the Upstream Case properly rejected them (Appx564-565) This Court should do the same.

Accordingly, the court's conclusion that the Downstream Plaintiffs lacked requisite property interests affected by the Government's actions to maintain a Takings claim has no grounding in applicable Texas property law.

The Court should therefore reverse the judgment of the Court of Federal Claims.

III. Appellants are entitled to summary judgment on the takings claim.

The Court should then go further because disposing of the lower court's *improper* analysis clears the way for the Court to conduct the *proper* analysis and determine that the Appellants have proven their Fifth Amendment takings claim as a matter of law. The facts are not in dispute, and the law is clear that the Government's appropriation of a flowage easement constitutes a taking requiring compensation under the Fifth Amendment.

A. The Government's actions effectuated takings as a matter of law.

One good thing about the lower court's erroneous decision is that the process of reversing it establishes the "first" element for a taking: There is no doubt the Downstream Plaintiffs possess the requisite "stick in the bundle of property rights" to maintain a Fifth Amendment takings claim. *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000). That leaves only the "second" element: whether "the governmental action at issue constituted a taking of that 'stick.'" *Id.* Appellants can conclusively establish this element as well.

1. The Government's actions caused the flooding on the Downstream Plaintiffs' properties.

Whether a taking occurred is a question of federal law with factual predicates. *Ridge Line Inc. v. United States*, 346 F.3d 1346, 1352 (Fed. Cir. 2003). It requires the Appellants to prove causation, which "requires a showing of 'what would have occurred' if the government had not acted." *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018) (internal quotation omitted).

The causation analysis naturally focuses on the Government's choice to open the floodgates and inundate Appellants' property. That is the action the Appellants are challenging, so they must demonstrate "what would have occurred" if the Government had not taken that action. And the analysis is straightforward. There is no doubt what would have occurred if the floodgates had remained closed: All the Appellants would have fared better. Eight of the 13 test properties would not have experienced any flooding, because after the rains stopped, virtually all of the water in the watershed was release water. (Appx5462, Appx5642, Appx2315, Appx2726) Three of the other test properties had experienced some minor flooding before the floodgates opened, but the Government agrees that opening the floodgates made their flooding substantially worse. (Appx2315, Appx2726, Appx2828-2830, Appx2804-2811)

And while the Government quibbles about the magnitude of additional flooding for the remaining two properties (Appx2345, Appx2347, Appx2809-2811), it still concedes that these would have fared better with the gates closed. (Appx2315, Appx2726, Appx2828-2830) Causation is established as a matter of law and undisputed fact based on the Government's decision to open the floodgates.

Having lost on this causation battlefield, the Government tries to shift the fight to another. The Government insists, based on cases like *St. Bernard Parish*, that it is not enough for Appellants to prove they would have been better off in a world in which the Reservoir floodgates had remained closed. Instead, the Government would force Appellants to prove they would have been better off if the Reservoirs *did not exist*. That notion is wrongheaded—and repeats the mistake of the court below.

The Government bases this argument on cases involving federal construction projects, in which property owners bring takings claims contending that the construction projects caused passive flooding. In such cases, the "but-for" causation inquiry naturally focuses on a hypothetical world in which the construction project at issue did not exist. *See United States v. Sponenbarger*, 308 U.S. 256, 265-66 (1939) (comparing flood-control project to

preexisting flood protection); *Sanguinetti v. United States*, 264 U.S. 146, 147 (1924) (comparing effects of canal to flooding prior to the canal); *United States v. Archer*, 241 U.S. 119, 132 (1916) (comparing effects of dike to "what would have occurred if the dike had not been constructed").

But that is because a focus on construction is essential in cases *challenging* construction projects. The causation inquiry must focus on "what would have occurred" if the construction had never happened and the project had never been built. *St. Bernard Parish*, 887 F.3d at 1362. If the "affirmative government act" alleged to be a taking involves construction, then the causation inquiry should focus on construction. *Id.* at 1361.

Similarly, this Court sometimes requires landowners to conduct a risk-benefit analysis in takings claims involving very large-scale federal construction projects. For a given "risk," courts are required to determine whether the "risk increasing" activities conducted by the Government that the landowner challenges are offset by other "risk-decreasing" activities conducted by the Government, *id.* at 1365, and their effects on the landowner's "particular property." *Alford v. United States*, 961 F.3d 1380, 1384 (Fed. Cir. 2020). That too makes sense. When the landowner contends the a government-constructed structure is creating a specific risk to the landowner's property,

the Court should consider every structure the Government has erected to mitigate that risk. After all, these risk-decreasing activities may "break[] whatever causal chain" exists from the risk-increasing activities to the landowner's true injuries. *Id.* And if the risk-mitigating benefits from one structure completely offset the risk-increasing harms from another, then "'there has been no taking.'" *Id.* at 1364 (quoting *Accardi v. United States*, 599 F.2d 423, 430 (Ct. Cl. 1979)).

So held the Court in *John B. Hardwicke Co. v. United States*, 467 F.2d 488 (Ct. Cl. 1972), There, the government built two dams as part of a "flood control project," where one dam "increased the risk of flooding," on the landowner's property, while the other "decreased the risk." 887 F.3d at 1364 (citing 467 F.3d at 490-91). The Court determined there was no taking when "the expectation of flooding was still far less than it would have been if there had been no flood control program at all." *Hardwicke*, 467 F.3d at 490-91. And in *St. Barnard Parish*, the Court rejected a takings claim where the landowner failed to consider both the burdens imposed by a channel-construction project in the St. Bernard basin (the MRGO) and the benefits provided by a series of levees and floodwalls the Government built in the same area (the LPV levees). 887 F.3d at 1357, 1348. That was the only way for the landowners to prove

whether they experienced any increased "flooding risk" as the result of the "government action" as a whole. *Id.* at 1368.

Yet none of these general rules relating to federal construction projects and structures should require Appellants to prove that they would have been better off without the Reservoirs. The "affirmative act" Appellants challenge is not Reservoir-construction. It is Reservoir-operation. The causation inquiry should therefore be tailored to whether the Reservoir-operation at issue made any difference in causing the flooding they experienced.

Nor should Appellants be forced to offset any benefits Appellants experienced from the Reservoirs *as a whole* against the risk-increasing harms of the floodgates. Any passive protection provided by the Reservoirs cannot offset the Government's active, purposeful releases of water from the floodgates. Nothing about the Reservoirs can "break[] whatever causal chain exists" between the Government's intentional releases of water and the flooding that the Downstream Plaintiffs experienced. *St. Bernard Parish*, 887 F.3d at 1365. Once water is released from the floodgates, no feature of the Reservoirs does anything to stop it. That also means nothing about the Reservoirs themselves is capable of offsetting and negating a floodgate-caused taking.

In any event, this Court's decisions require landowners to compare benefits and burdens of different flood-control programs only when the challenged actions were "contemplated" at the time the original action was taken. *St. Bernard Parish*, 887 F.3d at 1367 n.14; *Hardwicke*, 467 F.2d at 393-95. And no one contemplated when the Reservoirs were built that the Government would use them to intentionally inundate downstream landowners' property. The Government never used the Induced Surcharge Flood Control Regulation prior to Harvey, and it did not publicize the Regulation's existence to the public at large. Accordingly, residents had no reason to know of the surcharge procedures, and therefore did not "contemplate" being subjected to those procedures. Appellants should not therefore be required to perform any risk-benefit analysis or conduct a "but-for" causation inquiry imaging a world without the Reservoirs. Causation is established as a matter of law.

2. This government-induced flooding appropriated the Downstream Plaintiffs' property for a public purpose.

The Government cannot "'force[] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game*, 568 U.S. at 34 (quoting *Armstrong,* 364 U.S. at 49). And "'[w]hen the government physically takes possession of an interest in

property for some public purpose, it has a categorical duty to compensate the former owner.'" *Id.* (quoting *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002)). These basic principles establish that the Government's surcharge-based flooding is a classic taking. The Government burdened the Appellants' properties for others' sake, and, in doing so, it physically invaded and took possession of interests in their properties.

There are several categories of Government action that are considered takings under the Fifth Amendment, each with different requirements. Takings can be conducted "physically or by regulation;" they can be "categorical and non-categorical" in extent; and "permanent or temporary in duration." *Caquelin v. United States*, 140 Fed. Cl. 564, 573 (2018).

The interest that the Government appropriated was a flowage easement, based on the Water Control Manual. And "government actions may not impose upon a private landowner a flowage easement without just compensation." *Ridge Line, Inc.*, 346 F.3d 1346 at 1353 (citing *United States v. Dickinson*, 331 U.S. 745, 750-51 (1947)). In the Manual, the Government asserts a unilateral right to invade downstream properties for flood control. It might do so at any time, for as long as it deems necessary. Landowners cannot do anything to

stop the invasions. And the Government's own expert admits such invasions are "inevitable," because future events like Harvey are inevitable. (Appx2132)

The Manual therefore deprived Appellants of "one of the most essential sticks in the bundle of rights that are commonly characterized as property:" the right to exclude. *Nollan*, 483 U.S. 825 at 831 (internal quotation omitted). A flowage easement fits in the "physical" category of takings because flooding of land is a physical rather than regulatory intrusion. It is also "categorical," because the appropriation of an easement constitutes a "permanent physical occupation" of the land, *id.*(citation omitted), depriving a property owner of the right to exclude others by conveying to the Government a "permanent and continuous right" to access the property, even if that right is not continually exercised. *Id.* at 832; *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546-47 (2005). There is no need for further analysis. The only remaining question is damages.

Yet there is an alternative reason the Government's actions constitute a taking: The Government physically invaded the Downstream Plaintiffs' property with water. And *Arkansas Game* establishes that government-induced flooding may constitute a taking of private property, even if "temporary" in duration. 568 U.S. at 32.

In *Arkansas Game*, the Supreme Court outlined several factors that determine "the existence *vel non* of a compensable taking" in a case of temporary flooding. 568 U.S. at 38; *cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (temporary invasion cases "are subject to a more complex balancing process to determine whether they are a taking"). Appellants satisfy each of these factors.

Time and duration. First, when deciding whether a temporary taking has occurred in a flooding case, "time is indeed a factor." *Arkansas Game*, 568 U.S. at 38. And time is on the side of a taking. The Government's flooding was no fleeting episode. Harvey's floodwaters sat on Appellants' properties for days, and their effects will last a lifetime. Many Appellants could not even access their properties for weeks because of the floodwaters. (*See* p. 13, *supra*) And even after the floodwaters receded, the devastation they left behind left Appellants unable to use their properties for months—temporarily shuttering businesses and forcing people out of their homes even through the close of summary judgment evidence. (*Id.*)

The financial devastation will also continue long after all the physical signs of Harvey's destruction are gone. Some of the disruptions will never be undone. The government-induced flooding is therefore "properly viewed as

having lasted" for the entire duration of these impacts." *Arkansas Game & Fish Com'n v. United States*, 736 F.3d 1364, 1370 (Fed. Cir. 2013). And looming over all is the fact that another invasion could happen any time—and "inevitably" will. (Appx2132, Appx2733) The time element is therefore effectively permanent.

Severity. "Severity of the interference figures in the calculus as well." *Arkansas Game*, 568 U.S. at 39. It is an important consideration marking the boundary between a taking and a tort. *Ridge Line*, 346 F.3d at 1355. And by any measure, the toll suffered by Appellants from the Government's flooding of their properties was severe. The physical and monetary losses were bad enough—for some, reaching into the tens of millions of dollars. (*See* p. 14, *supra*) But the intangible losses were staggering too. Virtually all of the Appellants had everything on the first floors of their homes destroyed, and saw prized personal possessions carried away by floodwaters. (*Id.*) Those losses are irreplaceable.

The Government's invasion of the Appellants' property rights was "significant" too. It went deep, coopting every one of the "bundle" of rights commensurate with ownership, both during the 12 days when the Government stored water on their properties and afterward during the months they could

not access their properties. (*See* p. 14, *supra*) "[T]he interference [was] complete, *i.e.*, as severe as possible," *Caquelin*, 140 Fed. Cl. at 584, and it has interfered with Appellants' ability to use their land "for its intended purposes." *Ideker Farms, Inc. v. United States*, 136 Fed. Cl. 654, 679-80 (2018); *see also United States v. Cress*, 243 U.S. 316, 328 (1917). Any of these effects would render the Government's intrusion severe. Taken together, they make the severity of the intrusion undeniable.

Intent and foreseeability. Third, the Supreme Court instructs Courts to consider "the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Arkansas Game*, 568 U.S. at 39. In this case, the Government *intended* to flood Plaintiffs' property. It was the specific, predicted, and foreseeable result of a plan the Government had set into motion: the "direct, natural, [and] probable result" of the Government's actions. *Ridge Line, Inc.*, 346 F.3d at 1355. The flooding was by design.

And it was foreseen. From the Government's extensive modeling efforts, it knew that flow rates exceeding 3,000 cfs could damage properties miles downriver. (Appx1225) But the Government ramped up releases by four times that amount, greatly exceeded the acceptable threshold. (Appx2223, Appx2237) Moreover, Corps engineers knew which properties would be

affected, down to street, block, and home. (*See* p. 14, *supra*) Yet they continued conducting releases even as they witnessed the damage. The Government's flooding of the Appellants' property was foreseeable. It was foreseen. It occurred exactly as the Corps predicted. And it was necessary to fulfill the Government's plan. For its goal of sparing others' property to succeed, Appellants' land had to be flooded. Everything went exactly according to plan.

Accordingly, this is not one of those hard cases where the Court would be forced to distinguish a "predictable result" or "'direct, natural or probable result'" of authorized government action from a mere "'incidental or consequential injury.'" *Ridge Line*, 346 F.3d at 1355-56 (citation omitted). The Government's actions were intentional, and the destructive result was foreseeable.

Character of land and investment-backed expectations. The final factor *Arkansas Game* directs Courts to consider is "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use." *Arkansas Game*, 568 U.S. at 39 (citation omitted). The "character" of the test properties consisted mainly of residences along with several commercial properties.

Each of the Appellants, like the Downstream Plaintiffs, had acquired their properties based on reasonable, investment-backed, and justified expectations that the Government would not flood their properties. (*See* p. 17, *supra*) Of the 13 test properties, three were located in a 100-year flood zone, eight were located in a 500-year flood zone, and three were not located in any flood zone. (*Id.*) The Downstream Plaintiffs all acquired their properties between 1976 and 2015, and none was aware of any prior flooding at the time of purchase. (*Id.*) And after purchasing their homes, none of the owners experienced flooding that was remotely "comparable" to what the Government unleashed on their properties. *Arkansas Game*, 568 U.S. at 29.

Nine of the test properties had never experienced any flooding, while four had experienced only minor flooding one year after acquisition. (*See* p. 17-18, *supra*) Nothing about their properties indicated any risk that they would be subject to government-induced flooding. And the Government's releases were orders of magnitude beyond their prior flooding experience. The Downstream Plaintiffs did not expect their properties to be vulnerable to government-induced flooding.

Time, and the Government's explicit assurances, only confirmed these expectations. Throughout the Reservoirs' entire history, the Government had

never invoked the "Induced Surcharge Flood Control Regulation" even once, and residents had no reason to know it even existed. The Government never publicized an intention to flood downstream properties under any circumstances. (*See* p. 12, *supra*) And none of the Upstream Plaintiffs testified to being aware of the Manual or any possibility that the Government might deliberately release water from the reservoirs at levels that would reach their homes.

For decades, the Government hewed to the "Normal Flood Control Regulations," under which the floodgates were kept closed during flood events "to prevent flooding below the dams." (Appx1022; *see* p. 11, *supra*) The Government's internal assessments of development in the Buffalo Bayou confirmed that the Reservoirs should be "operated strictly to prevent downstream flooding; therefore the gates remain shut even if pool levels increase and flood upstream properties." (Appx1154) And just one year before the floods, Corps officials had reassured locals in the newspaper that "We will not open the dam to a point where it will cause flooding downstream." (Appx4341-4342) The message could not be any clearer. The Appellants had a reasonable, investment-backed expectation that the Government would not

flood their properties. And this evidence, together with all the other evidence above, establishes their entitlement to a taking as a matter of law.

B. Nothing defeats the Appellants' takings claim.

The Government raises a pair of affirmative defenses against liability under the Takings Clause: the federal "police power," and the Flood Control Act (FCA). But neither of these is availing.

1. There is no police power exception to the Takings Clause.

First, there is no police-power exception to the Takings Clause. The Government cannot simply declare a course of action "good," or "necessary," seize private property to pursue it, and avoid liability under the Fifth Amendment. If it could do so, there would be no Takings Clause. The whole point of the Takings Clause is to *condition* the Government's power to do good and necessary things: Seize all you want for "public use"—You just have to pay for it. "[T]he Constitution in the 5th Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation." *United States v. Lynah*, 188 U.S. 445, 465 (1903), *overruled on other grounds by United States v. Chicago, M, St. P. & P. R. Co.*, 312 U.S. 592 (1941); *see also Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1329-30 (Fed. Cir. 2005)

(explaining that "a compensable taking has occurred" when private property "has been appropriated by the government *for the benefit of the public*") (emphasis added). The Government does not gain more power to seize property simply because it is taking the property for a good reason.

Nor does the Government's capacity to avoid takings liability vary with the source of the power invoked in the taking. The Government enjoys no more license to take property without paying for it under the "police power" than it does under the "eminent domain" power—or at least it does not have such license *any more*. "It *was* once said" that the Takings clause limited only the Government's eminent domain authority, giving the Government a zone of autonomy to conduct "regulatory" takings with impunity. *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 900 (Fed. Cir. 1986) (emphasis added). Accordingly, it *was* once possible for the Government to do anything short of "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879), if the government's action "was not an exercise of the power of eminent domain but of the police power or some other different source of authority." 791 F.2d at 900.

But that zone of autonomy exists no longer. As Justice Scalia explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the government's unbridled authority to take property without compensation under the police power did not survive *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Until *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" 505 U.S. at 1014 (citations omitted); *see also Lingle*, 544 U.S. at 537 (same). But in *Mahon*, Justice Holmes recognized that allowing unbridled, uncompensated regulation of property "under the police power" would swallow the Takings Clause. *Lucas*, 505 U.S. at 1014. Accordingly, it is now "insufficient to avoid the burdens imposed by the Takings Clause simply to invoke the 'police powers' of the state, regardless of the respective benefits to the public and burdens on the property owner." *Acadia Tech., Inc., Global Win Tech., Ltd. v. United States*, 458 F.3d 1327, 1330, 1332–33 (Fed. Cir. 2006) ("[A] taking does not result simply because the government acted unlawfully, nor does a takings claim fail simply because the government's conduct is subject to challenge as unlawful.").

In any event, whatever zone of compensation-free takings authority the Government once enjoyed extended only to regulatory takings. "Where "permanent physical occupation of land is concerned," the Court has been steadfast in "refus[ing] to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

And the zone was never wide enough to encompass flooding—because flooding cases have never been subject to the police power. *See Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (noting a wharf owner's argument that city's diversion of water pursuant to its police power could support a Fifth Amendment claim, but holding that the Fifth Amendment only limited the actions of the national government); *see also Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871) (rejecting argument that no taking was possible because defendant had not exercised eminent domain power and was acting pursuant to the state's regulatory power); *United States v. Cress*, 243 U.S. 316, 328 (1917) ("Where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment.").

Accordingly, the Government's "police power" argument is no longer good law for part of this case, and never was good law for the remainder. It was never the case that the government could physically take property by flooding it and escape liability. And it is no longer the case that the Government may reserve for all time a right to engage in such physical invasions in the future without triggering liability under the Fifth Amendment.

Now considerations of whether the government's actions should be absolved because of an action's vital necessity are consigned to the "necessity defense." This principle "absolv[es] the State ... of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent' ... or forestall ... grave threats to the lives and property of others." *Lucas*, 505 U.S. at 1029 n. 16. But the necessity defense requires an "actual emergency." *Pennington v. Didrickson*, 22 F.3d 1376, 1380 (7th Cir. 1994). And the Government never faced an actual emergency, which is why it abandoned the defense after the Chief Judge denied its motion to dismiss. (Appx2664)

2. Section 702(c) of The Flood Control Act has no impact on this case.

The Government also seems to have abandoned its defense based on Section 702(c) of the Flood Control Act (FCA), but the Court of Federal

Claims briefly discussed it in its decision, so Appellants address it in an abundance of cation. (Appx16-17) Section 702(c) of the 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. (Appx16-17) But the FCA is no barrier to a takings claim—because Congress is powerless to exempt any category of takings claims from the Fifth Amendment.

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

Scranton v. Wheeler, 179 U.S. 141, 153 (1900). The FCA is not an exemption for constitutional takings.

CONCLUSION

Appellants respectfully request that the Court reverse the judgment of the Court of Federal Claims, enter judgment for the Appellants on the takings claim, and remand for further proceedings on damages.

Respectfully submitted,

/s/ J. Carl Cecere

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United States Court of Appeals For the Federal Circuit

VIRGINIA MILTON, AND, ARNOLD MILTON, on behalf of themselves and all other similarly situated persons, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

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on appeal from the United States Court of Federal Claims Nos. 1:17-cv-01189-LAS, 1:17-cv-01191, 1:17-cv-01195-LAS, 1:17-cv-01206-LAS, 1:17-cv-01215-LAS, 1:17-cv-01216-LAS, 1:17-cv-01232-LAS, 1:17-cv-01235-LAS, 1:17-cv-01300-LAS, 1:17-cv-01303-LAS, 1:17-cv-01332-LAS, 1:17-cv-01391-LAS, 1:17-cv-01393-LAS, 1:17-cv-01394-LAS, 1:17-cv-01395-LAS,1:17-cv-01396-LAS, 1:17-cv-01397-LAS, 1:17-cv-01398-LAS, 1:17-cv-01399-LAS, 1:17-cv-01408-LAS, 1:17-cv-01423-LAS, 1:17-cv-01427-LAS, 1:17-cv-

01428-LAS, 1:17-cv-01430-LAS, 1:17-cv-01433-LAS,1:17-cv-01434-LAS, 1:17-cv-01435-LAS, 1:17-cv-01436-LAS, 1:17-cv-01437-LAS, 1:17-cv-01438-LAS, 1:17-cv-01439-LAS, 1:17-cv-01450-LAS, 1:17-cv-01451-LAS, 1:17-cv-01453-LAS, 1:17-cv-01454-LAS, 1:17-cv-01457-LAS, 1:17-cv-01458-LAS, 1:17-cv-01461-LAS, 1:17-cv-01512-LAS, 1:17-cv-01514-LAS, 1:17-cv-01515-LAS, 1:17-cv-01516-LAS, 1:17-cv-01517-LAS, 1:17-cv-01518-LAS, 1:17-cv-01519-LAS, 1:17-cv-01520-LAS, 1:17-cv-01521-LAS, 1:17-cv-01522-LAS, 1:17-cv-01523-LAS, 1:17-cv-01524-LAS, 1:17-cv-01525-LAS, 1:17-cv-01545-LAS, 1:17-cv-01564-LAS, 1:17-cv-01565-LAS, 1:17-cv-01566-LAS, 1:17-cv-01567-LAS, 1:17-cv-01577-LAS, 1:17-cv-01578-LAS, 1:17-cv-01588-LAS, 1:17-cv-01625-LAS, 1:17-cv-01645-LAS, 1:17-cv-01646-LAS, 1:17-cv-01647-LAS, 1:17-cv-01653-LAS, 1:17-cv-01679-LAS, 1:17-cv-01680-LAS, 1:17-cv-01681-LAS, 1:17-cv-01682-LAS, 1:17-cv-01683-LAS, 1:17-cv-01684-LAS, 1:17-cv-01685-LAS, 1:17-cv-01686-LAS, 1:17-cv-01688-LAS, 1:17-cv-01689-LAS, 1:17-cv-01748-LAS,1:17-cv-01814-LAS, 1:17-cv-01822-LAS, 1:17-cv-01828-LAS, 1:17-cv-01833-LAS, 1:17-cv-01834-LAS,1:17-cv-01882-LAS, 1:17-cv-01948-LAS, 1:17-cv-01949-LAS, 1:17-cv-01954-LAS, 1:17-cv-01972-LAS, 1:17-cv-02003-LAS, 1:17-cv-09002-LAS, 1:17-cv-16522-LAS, 1:18-cv-00142-LAS, 1:18-cv-00144-LAS; 1:18-cv-00168- LAS, 1:18-cv-00230-LAS, 1:18-cv-00230-LAS, 1:18-cv-00243-LAS, 1:18-cv-00244-LAS, 1:18-cv-00308-LAS, 1:18-cv-00318-LAS, 1:18-cv-00319-LAS, 1:18-cv-00321-LAS, 1:18-cv-00322-LAS, 1:18-cv-00338-LAS, 1:18-cv-00339-LAS, 1:18-cv-00341-LAS, 1:18-cv-00344-LAS, 1:18-cv-00346-LAS, 1:18-cv-00347-LAS, 1:18-cv-00348-LAS, 1:18-cv-00349-LAS, 1:18-cv-00389-LAS, 1:18-cv-00463-LAS, 1:18-cv-00518-LAS, 1:18-cv-00685-LAS, 1:18-cv-00697-LAS, 1:18-cv-00700-LAS, 1:18-cv-00707-LAS, 1:18-cv-00708-LAS, 1:18-cv-00778-LAS, 1:18-cv-

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ADDENDUM

TAB A

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

[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

TAB B

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

TAB C

In the United States Court of Federal Claims

No. 17-1517 L
Filed: September 10, 2020

AURELIO AGREDA

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1519 L
Filed: September 10, 2020

STAN ALFORD

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1948 L
Filed: September 11, 2020

DAVID ALLENSWORTH,
et al.

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1949 L
Filed: September 11, 2020

ERIN ANDERSON,
et al.

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1564 L
Filed: September 10, 2020

PHILIP ANGELL and
PATRICIA LEE

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1684 L
Filed: September 10, 2020

BECKY AYERS

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1681 L
Filed: September 10, 2020

ARLENE BAKER

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1685 L
Filed: September 10, 2020

NORMA BROWN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1522 L
Filed: September 10, 2020

ELAINE CHEN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1565 L
Filed: September 10, 2020

SHIRLEY CORTE

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1514 L
Filed: September 10, 2020

GERALDINE CROKER

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1436 L
Filed: September 10, 2020

IGOR EFFIMOFF

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1398 L
Filed: September 10, 2020

LISA ERWIN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1439 L
Filed: September 10, 2020

JANE GILLIS

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1683 L
Filed: September 10, 2020

CHRISTINA HARKNESS

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1399 L
Filed: September 10, 2020

MARYAM JAFARNIA

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1393 L
Filed: September 10, 2020

MARY KHOURY

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1680 L
Filed: September 10, 2020

KJELL KNUTSEN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1516 L
Filed: September 10, 2020

VLADIMIR KOCHARYAN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1394 L
Filed: September 10, 2020

AGL, LLC &
JONATHAN LEVY

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1395 L
Filed: September 10, 2020

LUDWIGSEN FAMILY LIVING TRUST and CHARLES LUDWIGSEN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1682 L
Filed: September 10, 2020

MARY JANE MARCUS

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1566 L
Filed: September 10, 2020

LARRY MILLER

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1524 L
Filed: September 10, 2020

OSCAR MORAN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1515 L
Filed: September 10, 2020

KARLA MURCIA

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1435 L
Filed: September 10, 2020

JOSEPH NEAL

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1521 L
Filed: September 10, 2020

DAN NGUYEN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1523 L
Filed: September 10, 2020

CAROLE PAGNOTTO

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1391 L
Filed: September 10, 2020

MARTHA POLLOCK

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1520 L
Filed: September 10, 2020

NAEEM RAVAT

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1525 L
Filed: September 10, 2020

DAVID RAZNAHAN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1518 L
Filed: September 10, 2020

THOMAS REED

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1396 L
Filed: September 10, 2020

GERARDO REYES

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1689 L
Filed: September 11, 2020

DOUG ROTAN

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1434 L
Filed: September 10, 2020

JACK RUSSO

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1686 L
Filed: September 10, 2020

JEFFREY SCOTT

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1748 L
Filed: September 11, 2020

FRANK SIMONTON, III

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1437 L
Filed: September 10, 2020

ANIL THAKER

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1438 L
Filed: September 10, 2020

ANIL THAKER

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1567 L
Filed: September 10, 2020

SCOTT UECKERT and
MEREDITH UECKERT

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1397 L
Filed: September 10, 2020

VANESSA VANCE

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1433 L
Filed: September 10, 2020

JARRET VENGHAUS

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

In the United States Court of Federal Claims

No. 17-1688 L
Filed: September 10, 2020

BILLIE WOOLLEY

v. **JUDGMENT**

THE UNITED STATES

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

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

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

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

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P. 35(b)(2)(A)(d) because: this brief contains 11,922 words, excluding the parts of the motion exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R.APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 pt. Century Expanded BT font (and 13 pt. for footnotes).

/s/ J. Carl Cecere

J. Carl Cecere

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2021, I electronically filed the Corrected Opening Brief for 43 Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF.

/s/ J. Carl Cecere

J. Carl Cecere