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

United States Court of Appeals for the Federal Circuit

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

v.

UNITED STATES,
Defendant-Appellee

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

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

Oral Argument Requested

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I. INTRODUCTION

The Trial Court's Opinion and Order is based on a single premise -- Plaintiffs[1] did not possess a property interest that could be taken by Defendant-Appellee United States ("Defendant"). In their Opening Brief, the Subrogated Insurers engaged in a searching examination of that decision, and established this premise finds no support under controlling Texas law. To the contrary, Texas cases are quite clear that, as a matter of law, fee simple owners of property (like Plaintiffs) do indeed possess a property interest that can be taken by the government.

In its zeal to address arguments made by other Plaintiffs, and get to its alternate grounds to affirm, Defendant has submitted a Response Brief that fails to refute (let alone even mention) most of the Subrogated Insurers' main arguments. As a result, Defendant has effectively conceded the Trial Court reversibly erred.

Turning to Defendant's alternate grounds to affirm, they are unconvincing. To start, given the fact-intensive nature of takings claims, the Subrogated Insurers respectfully submit this Court should limit its review to rulings the Trial Court actually made. All other issues raised on appeal (whether by other Plaintiffs or Defendant) should be left for resolution on remand.

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[1] When reference is made to "Plaintiffs," this means the owners of the 13 "Test Properties" previously selected by the Trial Court. Conversely, the Plaintiff-Appellant Subrogated Insurers will be referred to as "the Subrogated Insurers."

Furthermore, at a minimum genuine issues of material fact remain regarding each of Defendant's alternate grounds. Starting with causation, there are unresolved genuine issues of fact as the evidence establishes 1) the waters Defendant released from the Addicks/Barker reservoirs were what flooded Plaintiff's properties, and 2) when the bulk of these waters were released the rains from Hurricane Harvey had largely stopped. Even if this Court incorrectly applies causation standards from *St. Bernard Parish Government v United States*, 887 F.3d 1354 (Fed. Cir. 2018), *cert den*, 139 S. Ct. 796 (2019), genuine issues of material fact do not go away.

The same is true regarding Defendant's tort vs. taking argument. Pursuant to *Ridge Line, Inc. v United States*, 346 F.3d 1346 (Fed. Cir. 2003), a taking occurs when 1) the government intends to invade a protected property interest or the invasion is the direct, natural, or probable result of governmental activity, and 2) the nature and magnitude of the government action preempts the property owner's right to enjoy their property for an extended period of time.

Both elements exist here (or at least genuine issues of fact remain). The evidence in the record clearly establishes intent (the first *Ridge Line* element) -- the United States knew exactly who would be flooded (and to what degree) if it opened the reservoir gates, but it chose to open them anyway. With regard to the second *Ridge Line* element, the severity and lengthy duration of Defendant's interference with Plaintiffs' property rights cannot be questioned, and it could happen again.

Defendant attempts to convince this Court otherwise by asserting a single flood can never constitute a taking. The United States Supreme Court rejected this approach in *Arkansas Game and Fish Commission v United States*, 568 U.S. 23 (2012). Instead, each case (single flood or otherwise) must be examined on its facts to determine whether a taking has occurred. Once again, genuine issues of material fact remain as to the taking question, so Defendant's alternate ground to affirm should be rejected by this Court.

II. ARGUMENT

A. The Trial Court Reversibly Erred By Holding Plaintiffs Possessed No Property Interest That Could Be Taken By Defendant

In order to prevail with a takings claim, a plaintiff must establish 1) she/he holds a property interest for the purposes of the Fifth Amendment, and 2) the government action at issue amounted to compensable taking of that property interest. The existence of a property interest is largely determined by state law, while the question of whether a taking occurred is governed by federal law. *See Acceptance Insurance Companies, Inc. v United States*, 583 F.3d 849 (Fed. Cir. 2009); *Air Pegasus of D.C., Inc. v United States*, 424 F.3d 1206 (Fed. Cir. 2005); *American Pelagic Fishing Company, L.P. v United States*, 379 F.3d 1363 (Fed. Cir. 2004), *cert den*, 545 U.S. 1139 (2005).

Once again, in this case the Trial Court only examined the first step of this takings test, finding Plaintiffs did not hold a property interest for the purposes of the

Fifth Amendment. It reached this erroneous conclusion by 1) ignoring on point Texas law to the contrary, and 2) misapplying Texas cases that did not address the property interest question (rather, they addressed the second step of the takings test -- whether a taking occurred). In its Response Brief, Defendant makes the same mistakes, so the fact remains the Trial Court's decision should be reversed.

1. Texas law is clear that Plaintiffs' fee simple ownership of their property is a property interest that can be taken

In the Subrogated Insurers' Opening Brief, they provided several reasons why Texas law recognizes Plaintiffs possessed a property interest that could be taken by Defendant -- 1) property rights are broadly defined, 2) property rights are elevated to the highest degree (as they pre-exist constitutions), and 3) the fee simple ownership of property is an interest that can be taken by the government. In its Response Brief, Defendant addresses none of these reasons.

The final reason is especially critical, and bears repeating here. It is undisputed that each of the Plaintiffs owned their property in fee simple at the time of the underlying flood event. [Appx3014-3175: Collected Ownership Documents] [Appx1436-1470: Deposition Excerpts re: Property Acquisition]. Texas courts have unequivocally found that fee simple property interests can be taken:

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

City of Houston v Wynne, 279 S.W. 916, 920 (Tex. App. - Galveston 1925)(underscoring added). *See also McCammon & Lang Lumber Co. v Trinity*, 133 S.W. 247, 249 (Tex. 1911). Judge Lettow correctly reached the same conclusion in the Upstream litigation, holding the fee simple ownership of private properties, not subject to a flowage easement, is sufficient to satisfy the first step of the takings test. *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 146 Fed. Cl. 219, 248-249 (2019)(hereinafter referred to as "*In re Upstream Claims*").[2]

By itself, this is dispositive regarding the first element of the takings test. The legal equation is simple:

> Fee simple property interests can be taken + Plaintiffs possessed fee simple interests in their property = Plaintiffs possessed property interests that can be taken.

By holding otherwise, the Trial Court unquestionably erred.

Beyond this, there is very recent Texas authority refuting the Trial Court's proposition that Plaintiffs possessed no protected interest "in perfect flood control in the face of an act of God." That is *San Jacinto River Authority v Burney*, 570 S.W.3d 820 (Tex. App. - Houston [1st Dist.] 2018), *aff'd San Jacinto River Authority v Medina*, ___ S.W.3d ___ (Tex. 4/16/21)(2021 W.L. 1432227), discussed in great detail in the Subrogated Insurers' Opening Brief. Since that Opening Brief was filed,

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[2] In a recent takings case, the U.S. Supreme Court also recognized fee simple ownership is a vested property interest. *Cedar Point Nursery v Hassid*, 141 S. Ct. 2063, 2076 (2021).

the Texas Supreme Court affirmed the Court of Appeals' *San Jacinto River Authority* decision.

Just as in the instant case, during Hurricane Harvey the River Authority released rising water from a dam into the San Jacinto River, causing or exacerbating the downstream flooding of the plaintiffs' homes. *San Jacinto River Authority* held the plaintiffs had alleged a viable taking claim. 570 S.W.3d at 837-838. It never said, nor did it come even close to saying that, despite the plaintiffs' fee simple property interests, they have no cognizable property interest in perfect flood control in the face of an act of God. Indeed, the *San Jacinto River Authority* court obviously reached the opposite conclusion.

Aside from blithely dismissing *San Jacinto River Authority* in a footnote in its Response Brief, Defendant does not address this on point decision. Instead, it cites to a number of other Texas cases which it contends support its argument that Plaintiffs' possessed no property interest that could be taken. In their Opening Brief, the Subrogated Insurers established how two of these decisions -- *Harris County Flood Control District v Kerr*, 499 S.W.3d 793 (Tex. 2016) and *Sabine River Authority of Texas v Hughes*, 92 S.W.3d 640 (Tex. App. - Beaumont 2002) -- in no way support Defendant's argument (or the Trial Court's decision). They will not repeat that discussion here.

The same is true regarding the other two primary cases cited by Defendant. The first is *Waller v Sabine River Authority of Texas*, No. 09-18-00040-CV (Tex. App. - Beaumont 12/6/18)(2018 W.L. 6378510). There, water was released from the Toledo Bend Dam during a period of heavy rains. The plaintiffs alleged their properties downstream of the Dam flooded as a result. The court engaged in no discussion of whether the plaintiffs possessed a property interest that could be taken, let alone any discussion of "perfect flood control in the face of an act of God." Rather, the existence of a protected property interest was essentially treated as a given. Instead, the court dismissed the plaintiffs' claims because they could not establish the water that flooded their properties primarily came from the Toledo Bend Dam. 2018 W.L. 6378510, at *5.[3]

The other case is *Wickham v San Jacinto River Authority*, 979 S.W.2d 876 (Tex. App. - Beaumont 1998)(also involving the release of water from a reservoir during a period of heavy rains that allegedly flooded the plaintiffs' properties). Like *Waller*, there was no discussion of whether the plaintiffs possessed an interest in their properties that could be taken (it was assumed they did). Rather, just as in

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[3] That was not the case here. The period of maximum release of water from the Reservoirs was between 5 PM on August 29, 2017 and 10 PM on August 31, 2017. During this period, there was little (if any) rain falling, and the flooding waters in the Buffalo Bayou were primarily a consequence of the Reservoir releases. [Appx2238: Nairn Report]. In other words, the water released from the Reservoirs was more than sufficient on its own to flood Plaintiffs' properties. [Appx2315: Nairn Report (summary of modeling)].

Waller, the plaintiffs could not establish waters released from the reservoir flooded their properties ("more water was still entering the River via rainfall than was being released into it [from the reservoir]"). 979 S.W.3d at 883. Once again, that is not case here.

On many levels, Texas law does not support the Trial Court's decision. Rather, it directly supports Plaintiffs' position that they possessed property interests that could be taken. The first step of the takings test is satisfied.

2. Defendant's reliance on Texas cases addressing whether a taking of a property interest occurred (as opposed to whether a property interest exists that can be taken) is misplaced

Defendant's Response Brief is devoid of any discussion of Texas law that actually addresses the nature of property rights, and whether these rights can be taken. Rather, Defendant treats Texas law as a "legal buffet." Defendant picks and chooses Texas cases addressing whether a taking has occurred, places them on its "no property interest that can be taken" plate," and calls it a day.

The Subrogated Insurers have already addressed the fatal flaw with this approach in their Opening Brief. None of these cases addressed whether a property interest existed that could be taken. Rather, they analyzed the next step of the takings inquiry -- whether a taking occurred. That step (which the Trial Court never got to) is also governed by federal, not Texas, law. In short, none of these Texas cases are relevant to the "cognizable property interest issue" before this Court.

In addition, Defendant's discussion of the legal principles underlying these cases is inaccurate. This has also been extensively addressed in the Subrogated Insurers' Opening Brief. Simply as a point of emphasis, the Subrogated Insurers will again discuss one of these principles -- police power.

Defendant treats police power as some form of uncheckable governmental power over property rights. Texas law does not support this interpretation. Rather, police power supersedes property rights only when a property owner's use of its property will endanger public health, safety, comfort or welfare:

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

Lombardo v City of Dallas, 73 S.W.2d 475, 478-479 (Tex. 1934)(underscoring and emphasis added). *See also Spann v City of Dallas*, 235 S.W. 513, 515 (Tex. 1921).[4]

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[4] As a result, it comes as no surprise that many of the cases cited by Defendant regarding police power address the abatement of nuisances. *Severance v Patterson*, 370 S.W.3d 705, 710 (Tex. 2012); *City of Dallas v Stewart*, 361 S.W.3d 562, 569 (Tex. 2012)("the government commits no taking when it abates what is, in fact, a public nuisance").

Plaintiffs were doing nothing at their properties which endangered anyone, let alone the public health, safety, comfort or welfare. Rather, they were peaceably using and enjoying their downstream properties when Defendant decided to flood/destroy them in order to (among other things) preserve upstream properties. Police power does not justify such a blatant taking of private property.

B. Defendant's Alternate Grounds To Affirm The Trial Court's Decision Have No Merit

Possibly realizing the Trial Court's decision regarding the first step of the takings test (the existence of a property interest) will not withstand appellate scrutiny, Defendant asserts there are several alternate grounds to affirm that decision (all concerning the second step -- whether a taking has occurred). The Subrogated Insurers will establish none of these have any merit.

However, at the outset, the Subrogated Insurers must emphasize the context in which Defendant's various arguments should be evaluated. A little over a month ago the, U.S. Supreme Court reiterated the critical importance of property rights, as well as the critical importance of protecting those rights from being taken by the government without due compensation:

> The right to exclude is "one of the most treasured" rights of property ownership. According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks

> in the bundle of rights that are commonly characterized as property."... Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement.

Cedar Point Nursery v Hassid, 141 S. Ct. 2063, 2072-2073 (2021)(citations omitted).

1. <u>This Court should not consider any alternate ground to affirm</u>

Due to the often factually intensive nature of the claims asserted against the government, courts should avoid precipitous grants of summary judgment in takings cases. *Moden v United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005); *Yuba Goldfields, Inc. v United States*, 723 F.2d 884, 887 (Fed. Cir. 1983). This is particularly true regarding takings claims involving (as is the case here) temporary government-induced flooding, as they "can present complex questions of causation . . .[requiring courts to] consider a range of factors including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue." *Cedar Point Nursery v Hassid*, 141 S. Ct. at 2078; *Arkansas Game and Fish Commission v United States*, 578 U.S. 23, 38-39 (2012).

Many of these factors are something Defendant now wants this Court to resolve as an alternate ground to affirm. The Subrogated Insurers respectfully suggest this Court decline to do so. These issues should first be completely analyzed

by the Trial Court (most likely in the context of a trial). After that, this Court will then have a full and complete record upon which to base any appellate review.

In this regard, the Subrogated Insurers realize they are in a unique position among the parties to this appeal. The other Plaintiffs seek summary judgment regarding issues the Trial Court did not address. So does Defendant. If any party is entitled to summary judgment at this time, it probably is Plaintiffs. Nevertheless, the Subrogated Insurers continue to believe a proper resolution of this significant and complex matter should be through "regular order" -- the Trial Court rules on issues first, followed by (if necessary) appellate review by this Court.

2. Genuine issues of material fact remain regarding causation

Defendant's first alternate ground to affirm is that Plaintiffs allegedly are incapable of establishing causation. This Court has held that causation "focuses on comparing the plaintiff's property interest in the presence of the challenged government action and the property interest the plaintiff would have had in its absence." *Caquelin v United States*, 959 F.3d 1360, 1371 (Fed. Cir. 2020) (underscoring added).

At the very least, genuine issues of fact remain regarding the connection between the challenged governmental action (Defendant opening the Reservoirs'

gates) and the flooding of Plaintiffs' properties.[5] According to Defendant's own expert, for at least eight of the Plaintiff Test Properties, flooding would not have occurred but for the Corps' releasing water from the Reservoirs. [Appx2223-2224, Appx2570-2571, Appx2636, Appx2726: Nairn Report]. Plaintiffs' expert agrees that Defendant's release of water from the Reservoirs was the sole cause of flooding for these eight properties. [Appx2804-2811: Bardol Report]. For three of the other five Test Properties, the parties' experts also concur that the flooding was substantially worse than what would have been experienced had the Reservoirs' gates remained closed. [Appx2726, Appx2315; Nairn Report (compare actual Harvey model with "gates closed" model)][Appx2828-2829: Bardol Affidavit].

In an effort to avoid these issues of fact, Defendant asserts a different standard of causation should be applied. Relying on *St. Bernard Parish Government v United States*, 887 F.3d 1354 (Fed. Cir. 2018), *cert den*, 139 S. Ct. 796 (2019), Defendant argues the totality of its flood control efforts (both before and during Hurricane Harvey) must be examined in determining causation. Specifically, Defendant contends Plaintiffs must (but cannot) establish the flooding of their properties was

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[5] In its Brief (p. 39), Defendant suggests Plaintiffs' taking claim as being based on the failure to keep the Reservoir gates closed (a form of inaction which typically is not a basis for a taking claim). This is of course untrue. Plaintiffs assert a taking occurred when Defendant chose to open the Reservoir gates, knowing it would flood Plaintiffs' properties. It is difficult to imagine a more affirmative act than that.

worse than would otherwise have been the case had the Reservoir gates never been closed in the first place.[6]

The Subrogated Insurers anticipated and addressed this argument in their Opening Brief, and they will do so again here. Defendant's argument fails for two reasons.

First, the causation standard in *St. Bernard Parish* is narrowly tailored to the governmental acts which allegedly constituted a taking in that case. Those acts were more passive or indirect. The plaintiffs did not claim the government intentionally released water on to their property. Rather, they asserted the construction and operation of a navigation channel over many years increased the risk that a storm surge would flood their properties. 887 F.3d at 1358. That risk came to pass during Hurricane Katrina.

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

This Court held the *St. Bernard Parish* plaintiffs had not established the construction and operation of the channel caused their injury, because they failed to account for a levee system the government also built to reduce the risk of flooding on their properties. 887 F.3d at 1358. Since the plaintiffs claimed a multi-decade course of government conduct increased their risk of flooding, causation could not be established without taking into account governmental flood-reducing actions over that same extended period of time, actions that may have placed them in a better position than if the government had done nothing at all. 887 F.3d at 1363.

The challenged governmental action is quite different here -- it is active and direct. Plaintiffs do not allege that the construction of the Reservoirs and Dams, nor their operation over the many decades since, exacerbated the risk of flooding on their properties. Rather, this case involves Defendant's deliberate release of water from the Reservoirs, knowing it would cause horrendous downstream flooding. Any causation analysis should be focused on that deliberate action by Defendant.

As such, to prove causation, Plaintiffs need not address risk-reducing actions Defendant may have taken, and show there has been a net increase in the risk their property might flood. In other words, the *St. Bernard Parish* test does not apply. Rather, using the standard test for causation discussed above, the only causation question is whether the opening of the Reservoir gates caused the flooding of Plaintiffs' properties. Under that standard, genuine issues of material fact remain.

Second, even if the *St. Bernard Parish* test is applied here, different genuine issues of material fact still preclude granting judgment to Defendant on appeal. In footnote 14 of its *St. Bernard Parish* decision (887 F.3d at 1367), this Court cited to *John B. Hardwicke Co. v United States*, 467 F.2d 488 (Ct. Cl. 1972). Based on that case, this Court created an exception to its test -- where a risk-reducing action precedes a risk-increasing action, the benefits of former need only be considered if (at that time) the possibility of the latter was contemplated.[7]

Applied to the instant case, Plaintiffs' benefit from the initial closing of the gates may only be considered if, when the gates were closed, it was contemplated the gates would subsequently be opened for Induced Surcharges. In other words, Defendant's "what would happen if the gates had never been closed in the first

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[7] Defendant asserts n.14 of this Court's opinion is *dicta*, so there really is no exception to the *St. Bernard Parish* test. Subsequent court decisions do not share Defendant's distain for this exception:

> The [Federal] Circuit specifically indicated that it was not addressing a situation where, like here, "the risk-reducing government action preceded the risk-increasing government action." It is precisely for this situation the [Federal] Circuit reference *Hardwicke* and the significance the *Hardwicke* court placed on considering what was contemplated for determining the appropriate "but for" world under *Sponenbarger*. As stated in the court's reconsideration decision, the circumstances of this case fit squarely within the situation described above by the Federal Circuit in *St. Bernard Parish* which referenced *Hardwicke*.

Ideker Farms, Inc. v United States, 146 Fed. Cl. 413, 421 (2020).

place" argument is valid only if, when those gates were initially closed, Defendant contemplated they would be reopened while the Reservoirs were still at capacity.

There is certainly an issue of fact as to whether, when Defendant closed the Reservoirs' gates in advance of Hurricane Harvey, it contemplated opening them for Induced Surcharges. To start, in the almost 60 years of the Addicks and Barker Reservoirs' existence, the gates had never been opened that way before. [Appx6: Opinion]. Moreover, the Corps' 2009 Operation Assessment of the Reservoirs anticipated keeping the gates closed, even if it might result in the flooding of Upstream Properties. [Appx1154: 2009 Army Corps of Engineers Draft Operational Assessment of the Addicks and Barker Reservoirs]. Finally, even when the gates were closed in response to Hurricane Harvey (and the torrential rain had begun to fall), the Corps did not anticipate opening the gates and flooding downstream properties. [Appx6: Opinion].

Beyond its *St. Bernard Parish* argument, Defendant peppers its Response Brief with assertions that Hurricane Harvey was an intervening cause, and (in essence) the flooding was a consequence of an act of God. This presumably is another basis for Defendant's alternate ground to affirm regarding causation.

An intervening cause can of course break the chain of causation between the government action and the plaintiff's injury. *Caquelin v United States*, 140 Fed. Cl. 564, 577 n. 19 (2018), *aff'd*, 959 F.3d 1360 (Fed. Cir. 2020). However, in this case

nothing broke the chain of causation between the opening of the Reservoir gates and the flooding of Plaintiffs' properties (or, at a minimum, genuine issues of material fact remain in this regard). Once again, the period of maximum release of water from the Reservoirs was between 5 PM on August 29, 2017 and 10 PM on August 31, 2017. During this period, Hurricane Harvey had moved away -- there was little (if any) rain falling, and the flooding waters in the Buffalo Bayou were due to the Reservoir releases. [Appx2238: Nairn Report].

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

3. Defendant's tort/taking argument is baseless

Defendant's other alternate ground to affirm is that Plaintiffs allegedly are asserting tort, not takings, claims. This is based on a two-part test first announced in *Ridge Line, Inc.*:

> The line distinguishing potential physical takings from possible torts is drawn by a two-part inquiry. First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.". . .Second, the nature and magnitude of the government action must be considered. . .[A]n invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners right to enjoy his property for an extended period of time. . .

346 F.3d at 1355-1356 (underscoring added). At a minimum, genuine issues of material fact remain as to both steps of this test. Defendant's alternate ground to affirm should be rejected, and the Trial Court's decision should be reversed.

a. Defendant intended to flood Plaintiffs' property

Under *Ridge Line*, the first step of its test is satisfied if the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity." This is one of those rare flood cases where intent is established, so the first step of the tort/takings test has been satisfied.

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

Reservoirs when the gates were opened here). [Appx1255: Corps Memorandum for Record re: Addicks and Barker Dams].

Furthermore, at the time of Hurricane Harvey, Defendant had the capacity to use its hydrologic models to know (in advance of opening the Reservoirs' gates) the full extent of downstream inundation that would likely occur by street, intersection and block. [Appx1426-1429: Thomas Deposition]. Therefore, based on its models, Defendant knew the opening of the Reservoirs' gates would inundate the downstream properties. [Appx2135: Long Deposition]. Defendant knew its actions would make "people hurt downstream" [Appx2128: Long Deposition], but it performed them anyway.

The presence of Defendants' intent to flood Plaintiffs' properties renders Defendants' discussion of the "direct, natural, or probable result" alternative moot. It also means the many associated cases cited by Defendant are all quite distinguishable, and of no relevance to this case.

A prime example is *Cary v United States*, 552 F.3d 1373 (Fed. Cir. 2009), heavily relied on by Defendant. There, the plaintiffs' properties were destroyed by a wildfire originating in the Cleveland National Forest (CNF). They claimed the United States Forest Service had instituted a policy of extinguishing smaller fires as quickly as possible within the CNF, rather than letting them run their natural course and consume thin flammable vegetation (thereby reducing the fuel load for

potentially catastrophic wildfires). As a result, this Forest Service policy enabled a wildfire that began within the CNF to spread beyond the CNF boundaries and consume the plaintiffs' properties. The plaintiffs claimed this constituted a taking of their property.

The lower court (and this Court) rejected Plaintiffs' taking claim. As this Court explained, the first element of the *Ridge Line* test was not satisfied:

> To prevail the landowners must first show that the government intended to invade a protected property interest. Clearly, the government did not intend to take the landowners' land by use of an uncontrolled wildfire. . . .At a minimum, they have not pleaded that the loss of property would be the likely, foreseeable result of a policy of fire suppression and recreational use, but merely that the government knew of or increased a risk. Taking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable.

552 F.3d at 1377-1378. Obviously, the intent that was so lacking in *Cary* is present here, so unlike that case the first element of the *Ridge* Line has been satisfied.

b. Defendant preempted Plaintiffs' right to enjoy their property for an extended period of time

The second step of the *Ridge* Line test requires that "the nature and magnitude of the government action must be considered. . .[to determine if it preempted] the owners right to enjoy his property for an extended period of time." 346 F.3d at 1355-1356. There is absolutely no doubt that, at the very least, genuine issues of material fact remain in this regard, so once again there is no alternate ground to affirm here.

The inundation of Plaintiffs' properties began hours after Defendant opened the Reservoirs' gates. [Appx2334-2347: Nairn Report (charts showing timing of inundation of Plaintiffs' property)]. For seven Plaintiffs, water levels at their properties eventually reached three feet or more above the first floor level (for two, maximum depths exceeded 8 feet above the first floor level). The other six Plaintiffs' properties experienced significant (albeit less) flooding. [Appx1639-1673: Plaintiffs' Deposition Excerpts re: Height of Floodwaters][Appx2015-2126: Plaintiffs' Fact Sheets (Question 5)].

This flooding had catastrophic consequences. Plaintiffs' properties were inundated for days, with some Plaintiffs unable to gain access to their property for weeks. [Appx1695-1720: Plaintiffs' Deposition Excerpts re: Inaccessibility]. In the end, the flooding substantially destroyed Plaintiffs' homes, businesses and personal property, and precluded some Plaintiffs from returning to their property for up to a year. [Appx1721-1861: Plaintiffs' Deposition Excerpts re: Damage to Test Properties][Appx1862-1945: Plaintiffs' Deposition Excerpts re: Exclusion From Ordinary Use]. This is a textbook example of government action preventing property owners from enjoying their property for an extended period of time.

Furthermore, this catastrophe could occur again. Defendant's Climatologist confirms a rain event similar to Hurricane Harvey will inevitably occur in the area of the Addicks and Barker Reservoirs. [Appx2728: Barry Keim Deposition]. If so,

Defendant will "inevitably" take the same action it did here. [Appx2132: Long Deposition]. Indeed, the fact that catastrophic storms could occur again was not lost on Judge Lettow in the upstream litigation.. As he cogently explained:

> The government's suggestion that this flooding is not a compensable taking because it was temporary and confined to a single flood event carries no water. Even if a single event of this nature were insufficient to rise to a taking, the sheer frequency of significant storms in the region both before and since construction of the dams -- the Hearne storm, the Taylor storm, the 1929 and 1935 storms, Tropical Storm Claudette in 1979, the 1992 series of storms, Tropical Storm Allison in 2001, and the Tax Day storm -- suggests that this was more than an isolated event, and that it is likely to recur.

In re Upstream Claims, 146 Fed. Cl. at 251.

c. Defendant's "single flood does not constitute a taking" argument fails as a matter of law

Recognizing the existence of problematic facts concerning its tort vs. taking argument, Defendant falls back on an old argument -- a single flood does not constitute a taking. This fails as a matter of law, as a single flood can result in a compensable temporary taking of property.

Both the United States Supreme Court and this Court have long recognized that a temporary taking of property is compensable under the U.S. Constitution. As the Supreme Court observed in *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304, 318 (1987), "temporary takings. . .are not different in kind from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. at 318. *See also United States v Pewee Coal Co.*, 341 U.S. 114, 116-117

(1951); *Kimball Laundry Co. v United States*, 338 U.S. 1, 6 (1949); *United States v General Motors Corp.*, 323 U.S. 373, 380 (1945); *Ladd v United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010), *reh'g and reh'g en banc den*, 646 F.3d 910 (Fed. Cir. 2011); *American Pelagic Fishing*, 379 F.3d at 1371 n. 11; *Hendler v United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991)(only a temporary taking that is transient and relatively inconsequential is not compensable -- such as a government truckdriver parking on someone's vacant lot to eat lunch). Indeed, a little over a month ago the U.S. Supreme Court reaffirmed these principles in *Cedar Point Nursery* 141 S. Ct. at 2074.

Despite this clear line of authority, some federal decisions (many cited in Defendant's Brief[8]) carved out an exception where flooding was concerned. They held there could be no taking arising out of one or two floods, or a single flood with no permanent consequences.

That exception was unequivocally rejected in *Arkansas Game and Fish Commission v United States*, 578 U.S. 23 (2012). As such, the aforementioned cases relied on by Defendant no longer represent good law on this particular point.

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[8] *Ridge Line*, 346 F.3d at 1357; *Bartz v United States*, 633 F.2d 571, 593 (Ct. Cl. 1980); *Wilfong v United States*, 480 F.2d 1326, 1329 (Ct. Cl. 1973); *Fromme v United States*, 412 F.2d 1192, 1196-1197 (Ct. Cl. 1969); *North Counties Hydro-Electric Company v United States*, 151 F. Supp. 322, 323 (Ct. Cl. 1957).

In *Arkansas Game and Fish*, from 1993-2000 the U.S. Army Corps of Engineers ("the Corps") released water from a dam that resulted in the flooding of the plaintiff's property. Starting in 2001, the Corps discontinued that practice. The plaintiff filed suit, arguing a taking of property occurred during that period of time where the flooding occurred.

While the Court of Federal Claims found there was a taking, this Court reversed. It acknowledged that, generally speaking, temporary government action may give rise to a takings claim if permanent action of the same character would constitute a taking. However, that rule did not apply to cases involving flooding -- for those cases the flooding must be permanent or inevitably reoccurring.

The U.S. Supreme Court reversed this Court. It found there was no basis to carve out a "flood" exception to the general rule that a temporary taking is actionable under the 5th Amendment:

> . . [W]e have rejected the argument that government action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. . . Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case. . .
>
> Flooding cases, like other takings cases, should be assessed with reference to the particular circumstances of each case, and not by

> blanket exclusionary rules. . .We rule today, simply and only, that government induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.

568 U.S. at 33-34, 37-38 (underscoring added).

There is nothing in this *Arkansas Game and Fish* holding that limits it (as Defendant suggests) to situations where flooding may or will reoccur in the future. Indeed, since the Corps had discontinued its practice of flooding the plaintiffs' property in 2001, *Arkansas Game and Fish* actually involved a situation where the complained of flooding certainly would not reoccur in the future. Nevertheless, the court clearly held a temporary taking could be compensable depending on the circumstances of a given case.

Since *Arkansas Game and Fish* was issued, federal courts have not hesitated to find it recognizes a temporary taking claim may be viable for even a single flooding event. *See St. Bernard Parish*, 887 F.3d at 1359 ("temporary, government-induced flooding may give rise to a claim for the taking of a flowage easement"); *In re Upstream Claims*, 146 Fed. Cl. at 250. As the court cogently observed in *Quebedeaux v United States*, 112 Fed. Cl. 317, 323-324 (2013):

> . . .[T]he cases in this area suggest that the distinction between tort and takings in the flooding cases is not as easy as saying one flood is a tort and any more than that a taking. . .These cases suggest that, depending upon a variety of other factors, a single flooding event can be evidence of an intent to appropriate an interest in property, that is, a takings. . . Counting floods is not the controlling consideration. The question, rather, is whether defendant has appropriated an interest for itself in the subject property -- and that inquiry requires an examination of multiple

factors, certainly beyond whether actual flooding has occurred once, twice, or even a dozen times.

Each "single flood" case must be examined, based on its particular facts, to determine whether a compensable temporary taking has occurred. All of the facts discussed above, as well as in the Subrogated Insurers' Opening Brief, create a genuine issue of fact as to whether there has been a compensable single flood taking.

III. CONCLUSION

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

Respectfully submitted,

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DATED: July 27, 2021

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. 32(g) and Fed. Cir. R. 32(b)(3). It was prepared using Microsoft Word 2016, and, according to that program's word-count function, it contains 6,894 words.

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

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2021, a copy of the foregoing document was filed electronically with the Clerk of the Court using the Court's CM/ECF System. By operation of the Court's electronic filing system, this filing was electronically served this same date on Brian C. Toth (United States Department of Justice), principal counsel for Defendant-Appellee, and on principal counsel for all other Plaintiffs-Appellants in these consolidated cases.

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