No. 2021-1131
(consolidated with other case numbers listed on inside cover)

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.

Appeals from the United States Court of Federal Claims
No. 1:17-cv-01189-LAS (Hon. Loren A. Smith)
(and other case numbers listed on inside cover)

CORRECTED RESPONSE BRIEF FOR THE UNITED STATES

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Appeals from the United States Court of Federal Claims in case numbers:

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STATEMENT OF RELATED CASES

The following cases pending before this Court are appeals from individual judgments based on the same underlying opinion at issue in the present appeals: *Olsen v. United States*, No. 21-2034 (consolidated with Nos. 21-2042, 21-2043, 21-2044, 21-2045, 21-2047, 21-2052, 21-2054, 21-2055, 21-2056, 21-2058).

Ideker Farms, Inc. v. United States, No. 21-1849 (Fed. Cir.), may directly affect or be directly affected by this Court's decision in the pending appeal because it is an appeal from a trial court decision on which Plaintiffs rely. *See infra* (pp. 37-38 (responding to plaintiffs' arguments)).

In Re Upstream Addicks & Barker Reservoirs, No. 1:17-cv-9001 (Fed. Cl.) could be directly affected by this Court's decision in the pending appeal because it includes consolidated claims for the taking of private properties located upstream from the government project at issue here (where downstream properties alone are at issue). *See infra* (pp. 2-3 n.1, 30-31).

INTRODUCTION

Plaintiffs appeal from judgments of the United States Court of Federal Claims (CFC) dismissing their claims that the United States is responsible for a Fifth Amendment taking due to flooding of their properties during Hurricane Harvey in August 2017. Plaintiffs' properties are located downstream of the Addicks and Barker Dams and Reservoirs (Project), a project built by the United States Army Corps of Engineers (Corps) at the direction of Congress for the sole purpose of controlling flood waters after several catastrophic floods devastated the Houston area in the early 1900s. More than half a century of vast residential and commercial growth in the Houston area was enabled by the Project.

In August 2017, Hurricane Harvey dropped a record amount of rainfall on the Houston area—about three-and-a-half feet over five days. The Project reservoirs were empty when the storm made landfall. Following direction in its operating manual, the Corps closed the reservoir gates. The reservoir pools rose rapidly due to the extent of the rainfall and resulting runoff. About 48 hours after closing the gates, with the pools still rising rapidly toward record heights, the Corps started releasing the flood water through the gates, as the manual directed. In the aftermath of the storm, hundreds of property owners filed takings claims seeking damages for property losses allegedly caused by the Corps' operation of

the reservoirs. The claims were assigned to different judges based on whether plaintiffs' properties were located upstream or downstream of the Project.

These appeals all concern downstream properties for which takings claims were asserted against the United States. On February 18, 2020, the CFC granted the government's summary judgment motion and dismissed the claims with respect to 13 "test properties" that the parties had selected for conducting discovery and litigation. Other "non-test" plaintiffs' cases had then been stayed. The CFC held that Plaintiffs sought compensation for a "right" that is not included in the "bundle of sticks" composing their property interests: perfect flood protection from a flood control project in the wake of an unprecedented natural disaster, or "Act of God."

The CFC entered an order to show cause why judgment should not be entered for the claims regarding *all* of the downstream properties. Some of the non-test plaintiffs filed responses to the show cause order. On September 9, 2020, the CFC directed the entry of judgments for the United States in the 13 test properties and the cases in which the plaintiffs did not file responses to the show-cause order. The vast majority of these 177 appeals were filed from those judgments.[1]

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[1] Other pending appeals are discussed below (p. 13). In separate proceedings, another CFC judge issued an opinion after trial holding the United States liable

As explained below, the CFC correctly held that the Plaintiffs failed to identify a cognizable property interest that was taken and for which they are entitled to compensation. The property interests that Plaintiffs do possess must be construed against background principles of state and federal law that permit the government to exercise its police power to protect public safety in the face of an unprecedented natural disaster. The CFC's judgments also may be upheld on two other grounds: (1) Plaintiffs failed to demonstrate (or even allege) that under the proper legal standard the Corps' Project, which mitigated flooding at downstream properties, caused the damages on Plaintiffs' properties; and (2) even if the Corps' Project were construed to be the cause of flooding on Plaintiffs' properties, that flooding was unintentional and transient and thus in the nature of a trespass rather than a compensable taking. For these reasons, the CFC's judgments should be affirmed.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the U.S. Court of Federal Claims (CFC) under 28 U.S.C. § 1491(a)(1) regarding claims alleging Fifth Amendment takings of property. As discussed below (Part III.B), the CFC lacked jurisdiction over Plaintiffs' claims. The CFC granted the government's motion to dismiss

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for the taking of a flowage easement on bellwether properties *upstream* of the Project. *In Re Upstream Addicks & Barker Reservoirs*, 146 Fed. Cl. 219, 228 (2019). A trial on just compensation is scheduled for December 2021.

and motion for summary judgment, Appx1-19, and directed the entry of final judgment in 142 separate cases between September 10, 2020 and September 11, 2020. Appx22-23; *see, e.g.,* SAppx25, SAppx36. One hundred seventy-one notices of appeal were filed between October 23, 2020 and November 10, 2020. *See*, *e.g.*, SAppx26-SAppx28, SAppx1824-SAppx1826. The Court has jurisdiction under 28 U.S.C. § 1295(a)(3) to review the CFC's final judgments.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs lack a cognizable property interest, subject to the Fifth Amendment's takings clause, in obtaining perfect flood control on their properties; or, alternatively,

2. Whether the CFC's judgment should be affirmed because Plaintiffs do not allege and cannot prove that the Corps' actions, rather than Hurricane Harvey, were the but-for cause of flood damage on Plaintiffs' properties; or, alternatively,

3. Whether the CFC's judgment should be affirmed because the flooding allegedly caused by the Corps' actions, at most, amounts to a trespass, rather than the taking of private property for which compensation is owed under the Fifth Amendment.

STATEMENT OF THE CASE

A. Factual background

1. Buffalo Bayou and Tributaries Project

The Houston area has a long history of flooding recorded from the late nineteenth and early twentieth centuries. Appx4416. The City's main waterway, Buffalo Bayou, lies within the Gulf Coast Prairie. That broad plain slopes gently southeastward toward the coast and features poorly drained soils that do not allow much surface water percolation. Appx4443-4444 (Project report). As a consequence of the area's topography and geology, streams that have little-to-no flow throughout much of the year are subject to flooding from runoff during storms. Appx4444. Particularly devastating floods occurred along Buffalo Bayou in 1929 and 1935, resulting in extensive property damage and loss of life. *See* Appx1137, Appx4416, Appx4445.

Congress enacted the first nationwide flood control program through the Flood Control Act of 1936 (1936 Act), which directed the Corps to study flood control for Buffalo Bayou. Pub. L. No. 74-738, ch. 688, § 6, 49 Stat. 1570, 1593; *see also* H. Doc. No. 456, 75th Cong., at 2-3 (1937). Two years later, Congress authorized the Buffalo Bayou and Tributaries Project for the sole purpose of reducing flood risk. Pub. L. No. 75-685, 52 Stat. 802, 804 (1938); *see also* Appx992, Appx1141. The Corps developed the Project jointly with the Harris

County Flood Control District, a Texas agency established in 1937 to assist with flood control. *See* Appx4425, Appx4441-4442, Appx4611.

The Project consists of Addicks Dam and Reservoir, Barker Dam and Reservoir, their associated outlet works, and several miles of downstream improvements to the stream channel. Appx992-993; *see also* Appx976-979 (photographs). The two dams are similarly sized earthen embankments, about 12-14 miles long and 100-120 feet high. Appx992-993. The dams detain flood water in two separate reservoirs that are normally dry, except during heavy rainfall when they store water temporarily to manage and reduce flooding. Appx1018, Appx1025, Appx1031. The dams were built between 1942 and 1948 and are federally owned and operated. Appx996-997, Appx1034.

At the time of Hurricane Harvey, each dam's outlet works consisted of five rectangular conduits, about 8 feet long by 6 feet wide, opening to a spillway and stilling pool that flows through a riprap-lined channel downstream. Appx992-993; *see also* Appx977, Appx979 (photographs). As originally designed, only one of the five conduits on each dam included a gate. Appx997. The dams thus detained water in the reservoirs to reduce the possibility of downstream flooding only if inflows exceeded the uncontrolled, combined outfall (through the four ungated conduits) of 15,000 cubic feet per second (cfs). *See id.* Two more gates were added to each dam in 1948, reducing the

uncontrolled flow to 7,900 cfs, the estimated capacity of the channel at that time. *Id*. The Corps built gates on the remaining conduits in 1963 to reduce the possibility of flooding on the residential development increasingly encroaching on the channel. *Id.* By the late 1970s, outflows over 3,000 cfs could reach the first floor of some downstream residences. *Id*.

2. Project operations

The Corps operates the Project according to direction in a 2012 Water Control Manual (Manual). Appx974-1131. An earlier version of the manual was adopted in 1962. Appx1166-1253. Generally, the reservoirs are operated to use available storage "to the maximum extent possible" to protect areas downstream of the dams from damaging floods. Appx1022. There are two modes of flood control regulation: "Normal" and "Induced Surcharge." Appx1022-1023.

During normal operations, when downstream flooding is not expected, the gates are opened to heights that allow low flows (100-250 cfs) to pass through the outlet works. Appx1022. If an inch of rain falls within a 24-hour period or if downstream flooding is expected, the gates on both reservoirs are closed and kept under surveillance as long as necessary to avoid flooding below the dams. *Id*. If the water in the reservoirs reaches set heights (101 feet in Addicks or 95.7 feet in Barker) and is expected to keep rising, the surcharge regulation then applies. Appx1022-1023.

During surcharge operations, the Corps monitors the reservoirs for whether inflow is causing pool elevation to keep rising. Appx1023. "If inflow and pool elevation conditions dictate, reservoir releases will be made" according to preset schedules in the Manual. *Id.* (referencing Appx1119-1120). The gates stay open until the reservoir levels fall below the heights that first triggered the surcharge regulation. *Id.* Then, if the flow downstream is greater than the channel's capacity, the gates are adjusted to reduce the flow, and the reservoirs return to normal operations and are gradually emptied. Appx1022-1023. In general, surcharge releases help maximize reservoir storage for better flood protection, and they prevent uncontrolled flow around the ends of the dams that could create structural damage. *See* Appx4655-4656.

Until Hurricane Harvey, the Corps had never released water from the dams under surcharge conditions. Appx4656.

3. Hurricane Harvey

After making landfall along the Texas Coast as a Category 4 hurricane on August 25, 2017, Hurricane Harvey weakened into a tropical storm and stalled over Houston for several days before leaving Texas on August 30, 2017. Appx936. Harvey dropped record amounts of rain on the region, including more than two-and-a-half feet (32-35 inches) on the Project area over four days. Appx936 (Plaintiffs' undisputed facts), Appx2138; *see also* Appx4789 (discussing

historical context), Appx4811 (stream gage data). Throughout the region the storm flooded around 150,000 homes and businesses, caused $125 billion in damages (including $80 million sustained by Harris County Flood Control District), and led to 36 deaths. Appx4492. Both the President and the Governor of Texas declared the State of Texas a major disaster area. *See* 82 Fed. Reg. 42,691 (Sep. 11, 2017); Appx5130-5132; Appx5126-5128.

Before Harvey's landfall, the Corps was operating the Project reservoirs under the Water Control Manual's normal regulation, discussed above (p. 7). In that mode, both reservoirs were empty on the afternoon of Friday, August 25, 2017, and the gates were set at a standard height that allows inflow to the reservoirs to pass downstream. Appx4661, Appx5194-5196; *see also* Appx1022 (Manual § 7-05.a(1)). That evening, the Corps closed the gates on the dams to reduce the risk of downstream flooding. Appx5201-5202, Appx5207, Appx5362, Appx4652-4653; *see also* Appx1022 (Manual § 7-05.a(2)). The pools behind the dams then rose quickly, exceeding the government-owned land behind Addicks Dam on August 27, and behind Barker Dam by August 28. Appx5225, Appx5239.

The gates on both dams were kept closed until the pool heights and the amount and speed of water flowing into the reservoirs reached the levels requiring the Corps to release water under the Manual's "Induced Surcharge"

regulation. Appx4657. The Corps began releasing water from behind both dams after midnight on Monday, August 28, 2017. Appx4657, Appx5208. The record-breaking volume of rainfall nonetheless caused water behind the dams to continue rising. *See* Appx5225, Appx5239. Water even began flowing around the north end of Addicks Dam on August 29. Appx5239. The Corps gradually increased the amount of water released from about 8,000 cfs to 13,000 cfs on August 30, a few hours after reservoir pool heights had peaked. Appx5208-5211. For comparison to the amounts released, the peak inflows to the reservoirs recorded on August 27 were approximately 70,000 cfs into Addicks and 77,000 cfs into Barker. Appx4167-4168.

A few days later, the Corps began reducing releases from the reservoirs (Barker on September 3, and Addicks on September 7). Appx5212-5213. The uncontrolled flows around Addicks Dam ceased around September 2. Appx5247. Although the outlets returned to normal operations (3,000 cfs) on September 16, *see id.*, the reservoirs were not completely drained until mid-October 2017. Appx4801.

In response to Hurricane Harvey, Congress appropriated over a hundred billion dollars in aid to the storm's victims. Appx5130, Appx5137, Appx5164-5167; *see also*, *e.g.*, Pub. L. No. 115-56, Div. B, 131 Stat. 1129, 1136-38 (2017) (appropriating $15.25 billion for emergency, small business, and housing

assistance); Pub. L. No. 115-63, Title V, 131 Stat. 1168, 1173-86 (2017) (providing tax relief); Pub. L. No. 115-72, Div. A, Title I, 131 Stat. 1224, 1224-26 (2017) ($18.6 billion in aid for declared disasters); Pub. L. No. 115-123, Div. B, 132 Stat. 64, 65-122 (2018) (over $80 billion in disaster relief).

B. Proceedings below

Hundreds of claims were filed in the CFC alleging government takings of property from flooding during Harvey. The court sorted the claims into two dockets—upstream and downstream—based on the location of the claimants' properties in relation to the Project. *See* J.A. 69 (consolidating downstream cases for pretrial management). As mentioned above (pp. 2-3 n.1), a different CFC judge held a trial on claims by certain upstream landowners and held the government liable for takings. This appeal concerns cases on the downstream docket. In these downstream cases, the CFC directed the Plaintiffs to file a single "Master Complaint" from which the parties identified 13 "test properties" for the initial litigation. Appx770-771; *see also* Appx2855 (map). Other plaintiffs' cases were administratively stayed. Appx499.

The United States filed a motion to dismiss the Complaint on the grounds that: (1) Plaintiffs challenge an exercise of the United States' sovereign police power for which no compensation is owed, Appx531-535; (2) Plaintiffs fail to identify a property interest in perfect flood control under Texas law or

background principles of federal law, Appx535-543; and (3) Plaintiffs allege a tort over which the CFC lacks jurisdiction, Appx547-554. At first, the CFC deferred ruling on the motion until the record was more developed. Appx803, Appx836.

The case was reassigned *sua sponte* to Judge Loren A. Smith, who, after hearing oral argument on the government's motion to dismiss, directed the parties to file summary judgment motions about: (1) whether a protected property interest exists under Texas law where flooding occurs from flood control actions during an Act of God, and (2) and whether the Flood Control Act of 1928 or successor acts apply. Appx915. The United States moved for summary judgment, renewing the arguments in its motion to dismiss and also arguing that Plaintiffs could not meet their burden to prove that the United States (rather than excessive rain from Hurricane Harvey) was the but-for cause of flooding on Plaintiffs' properties. Appx5410-5422.

After hearing oral argument on the parties' summary judgment motions, the CFC issued an opinion and order granting judgment for the government and dismissing the takings claims for the 13 test properties. Appx1-19. The CFC held that Plaintiffs' takings claims could not succeed because neither Texas law nor federal law creates a protected property interest in "perfect flood control" during and after a natural disaster. Appx10.

The CFC ordered the remaining plaintiffs to show cause why judgment should not be entered for all of the downstream properties. Appx20-21. Some of the non-test plaintiffs filed responses to the show cause order. On September 9, 2020, the CFC directed the entry of judgment for the 13 test-property cases and the cases in which the plaintiffs did not file responses to the show-cause order. Appx22-23. Plaintiffs filed 171 notices of appeal between October 23, 2020 and November 10, 2020, and those appeals were consolidated.

On April 8, 2021, the CFC entered judgment in the cases in which non-test plaintiffs responded to the show cause order, and also in some cases filed after the issuance of that order. U.S. Motion for Abeyance, Exhibit 4 (ECF 40-5). Those plaintiffs have now also appealed. *See supra* (p. xi). Some of them filed an amicus brief in the present appeal in support of neither side. ECF 36. This Court declined to stay the present proceedings while the new appeals were filed and docketed. ECF 44. On July 9, 2021, the Court granted a motion to consolidate six of the newly filed appeals with the present case and allowed those plaintiffs to adopt one of the opening briefs already on file. ECF 62. Eleven remaining appeals are consolidated separately (No. 21-2034). *See supra* (p. xi).

SUMMARY OF ARGUMENT

The CFC correctly dismissed Plaintiffs' claims for a taking of their properties due to flooding from Hurricane Harvey downstream of the Project.

1. First, the CFC correctly ruled that Plaintiffs' ownership of real property does not include an entitlement to perfect flood control in the wake of the unprecedented natural disaster that was Hurricane Harvey. Texas courts have long recognized that real property ownership is subject to the "ancient" police power to control flooding. Furthermore, Texas courts have repeatedly held that there can be no taking of property due to reservoir releases that do not exceed the incoming flow of storm water to the reservoir. The "Act of God" defense in tort law provides a helpful analogy, and it cannot reasonably be disputed that Hurricane Harvey's unprecedented volume of rain—the largest five-day total in the Nation's history—was such a force of nature.

The CFC's conclusion that Plaintiffs do not have a right to perfect flood control in the wake of an Act of God is reinforced by federal statutes and decisional law. In particular, Section 3 of the Flood Control Act of 1928 established 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." That statutory provision was affirmed by Congress in 1936 when it enacted the statute commencing the first nationwide flood control program, including direction to study flood control at Buffalo Bayou, ultimately resulting in the design and construction of the Project here at issue. Were it not for the common understanding that the government would not be liable for imperfect flood

control, Congress would not have authorized the Corps to construct and operate beneficial projects that have successfully mitigated against flooding for many decades, enabling regions such as Houston to experience vast economic and residential growth. Additionally, federal precedent confirms that the Corps' exercise of police power over public safety and welfare does not make the United States a guarantor against all flooding, particularly that resulting from catastrophic storms, and that such flooding does not result in a taking.

2. In the alternative, the CFC's judgment may be affirmed on the ground that Plaintiffs cannot demonstrate that the Corps' management of the Project during Hurricane Harvey was the but-for cause of flooding on their properties. To determine whether government action is a cause of property loss from natural forces, this Court looks to the relevant government action in its entirety. Here, the Corps constructed and operated the Project, including during Hurricane Harvey, to mitigate downstream flooding by impounding flood waters behind the dams and then releasing them at a rate many times below natural levels. It is undisputed that the maximum combined inflow to both reservoirs during the storm was about ten times the maximum flow that the Corps released below the dams. But for the reservoirs and reservoir operations, Plaintiffs would have indisputably experienced greater flooding on their properties. None of the Plaintiffs' experts even attempted to address what

flooding would have occurred in the absence of the Corps' Project. One of their experts agreed that Plaintiffs would have experienced greater flooding had the Corps left the reservoir gates open. Had the Corps kept the reservoir gates closed during the entire storm—contrary to the operations manual and in disregard of substantially greater upstream flooding and risks to the structural integrity of the reservoirs—the Corps possibly could have further mitigated downstream flooding. But the Corps' failure to mitigate *all* downstream flooding from the Hurricane (at the expense of upstream property owners and the integrity of the dams) does not prove that the Corps' actions were the but-for cause of that flooding.

3. Finally, even if the Corps' action can be seen to be a "cause" of downstream flooding (on the erroneous view that, contrary to precedent, the Corps' decision to release some water during Hurricane Harvey is the only relevant action for causation purposes), the CFC's judgment still must be affirmed on the ground that the flooding was unintentional and transitory and thus in the nature of a tort rather than a taking for which compensation is owed under the Fifth Amendment. To distinguish torts from takings claims, the Court employs a two-part test, asking (1) whether the complained of injury is the natural, direct, or probable consequences of the government's action, and (2) whether the nature and magnitude of the alleged invasion is sufficiently

substantial. The flooding here satisfies neither requirement. On the first part, flooding is not a natural or probable consequence of the Project's normal operations. It was only due to the unprecedented volume of rainfall from Hurricane Harvey that the Corps operated the Project under the surcharge regulation. That intervening storm broke the chain of causation, compelling a conclusion that flooding downstream properties is not a natural or direct consequence of the Project's operations. On the second part of the test, the flooding during Hurricane Harvey was a singular natural disaster due to its record-shattering rainfall. Such an extraordinary weather event is too anomalous and ad hoc to constitute anything more than an isolated invasion, not a taking.

For all of these reasons, the CFC's judgment should be affirmed.

ARGUMENT

I. Standard of review

The district court's order granting dismissal and summary judgment on Plaintiffs' takings claims is reviewed de novo. *See Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005). The order may be affirmed on any ground supported by the record. *See*, *e.g.*, *id.* at 1346 (affirming dismissal for lack of jurisdiction on the ground that plaintiffs failed to establish that their property was "the direct, natural, or probable result" of the government's action).

II. Plaintiffs do not have a cognizable property interest in avoiding flooding on their properties from an unprecedented storm.

Whether government action effects a taking of property under the Fifth Amendment is a question of federal law. *Seiber v. United States*, 364 F.3d 1356, 1369 (Fed. Cir. 2004). However, state law has a "significant role in defining the property interests that may be afforded constitutional protection under the Takings Clause." *Id*. In all takings cases, courts must first determine whether the claimant has a "cognizable property interest." *Sharifi v. United States*, 987 F.3d 1063, 1068 (Fed. Cir. 2021) (cleaned up), *petition for cert. pending*, No. 20-1746 (filed June 11, 2021). Because the Constitution does not define such property interests, courts look to "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law," to determine whether a property interest exists. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)); *accord Colvin Cattle Co., Inc. v. United States*, 468 F.3d 803, 806-807 (Fed. Cir. 2006).

Even if the Corps' actions in operating the Project could be seen as a contributing cause of the flooding on Plaintiffs' properties, emergency flood control is within the government's traditional police powers in relation to public protection. Both Texas law and federal law recognize that private property in

Texas is held subject to this inherent authority. That the Corps might have operated the reservoirs in a manner to afford downstream owners greater flood protection (at the risk to upstream owners and the physical integrity of the dams themselves) does not provide the downstream owners a cognizable property right to such maximum protection. Because of this, the CFC correctly held that Plaintiffs' takings claims fail.

A. Background principles of state law confirm that Plaintiffs are not entitled to maximum flood protection.

Texas law recognizes that "all property is held subject to the valid exercise of the police power" by the government to provide for public health and safety. *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012); *see also Severance v. Patterson*, 370 SW.3d 705, 710 (Tex. 2012) (counting the government's police power as among the "pre-existing limitations" on real property ownership "since time immemorial" (cleaned up)); *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478-79 (Tex. 1934) ("All property is held subject to the valid exercise of the police power." (internal quotation marks omitted)). That limitation includes the "public right and duty" to control flood water. *Motl v. Boyd*, 286 S.W. 458, 470-71 (Tex. 1926) (holding that riparian ownership is subject to the state's "ancient rights of the police power" to control and store flood water); *see also Cummins v. Travis County Water Control & Improvement District No. 17*, 175 S.W.3d 34, 48

(Tex. App. Austin 2005) (holding that littoral rights "are subject to the State's police powers").

Consistent with these principles, Texas courts have repeatedly rejected claims for takings from the controlled release of water from reservoirs in response to unprecedented rainfall. *See*, *e.g.*, *Sabine River Authority v. Hughes*, 92 S.W.3d 640, 642 (Tex. App. Beaumont 2002); *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876, 883 (Tex. App. Beaumont 1998); *accord Waller v. Sabine River Auth. of Texas*, No. 09-18-00040-CV, 2018 WL 6378510, at *5 (Tex. App. Beaumont Dec. 6, 2018). In those cases, it was determinative that the rainfall entering a reservoir exceeded its outflow. *Id*. That same circumstance occurred following Hurricane Harvey. As discussed above (p. 10), during Hurricane Harvey the greatest outflow below the dams (13,000 cfs) was far less than the combined flow *into* the two reservoirs (147,000 cfs). Appx14 n.5.

Relatedly, Texas courts have rejected the theory that a government's failure to safeguard property against Acts of God gives rise to property damage claims under Texas law. In *Harris County Flood Control District v. Kerr*, the Texas Supreme Court declined to extend takings law "in a manner that makes the government an insurer for all manner of natural disasters . . . ." 499 S.W.3d 793, 810 (Tex. 2016). 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." *Id.* at 804. In *McWilliams v. Masterson*, the Texas Court of Appeals 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, 320 (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.); *Waller*, 2018 WL 6378510, at *5 (Tex. App. Beaumont Dec. 6, 2018) (distinguishing *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012) (*Arkansas*), in part, because "the facts in this case involve areas around and downstream of the Project which experienced flooding due to a historic weather event").

Here, the Corps was operating the Project to control flooding in the face of the extraordinary volume of rainfall from Hurricane Harvey, an "Act of God" under Texas law. *See Kerr*, 499 S.W.3d at 795, 807 & n. 59, 809 (Tex. 2016) (in an inverse condemnation case, describing three tropical storms occurring between 1998-2002 as Acts of God that contributed to flooding); *cf. Landgraf v. Natural Resource Conservation Service,* No. 6:18-CV-0061, 2019 WL 1540643, at

*2 (S.D. Tex. Apr. 9, 2019) (characterizing Hurricane Harvey as an "act of God" that defeated liability for property damages).

Although the Corps arguably might have further mitigated downstream flooding from Hurricane Harvey, it does not follow that the mere existence of the flood control structures gives Plaintiffs a private property right to any flood control, much less a private property right to maximum flood control at the expense of other property owners and at risk of the Project's structural integrity. Reducing the risk from flood water has long been recognized as part of the government's police power to protect public safety. That authority limits the scope of Plaintiffs' property interests and thereby defeats their takings claims, which are based solely on flooding from water that, although mostly contained behind the dams temporarily before it was released, constitutes "waters that [flood-control] projects cannot control." *Central Green Co. v. United States*, 531 U.S. 425, 430 (2001) (*quoting United States v. James*, 478 U.S. 597, 605 (1986)); *cf. Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546, 550, 554 (Tex. 2005), *cited in* Beck Redden Brief (ECF 48) 26-27 (concerning the taking of a flowage easement due to a "large number of floods" that would not have occurred had a water-supply reservoir "not been constructed").

Additionally, Texas courts have recognized that property interests are limited by the owners' expectations as of the date they acquired their properties.

See, *e.g.*, *City of Tyler v. Likes*, 962 S.W.2d 489, 504-05 (Tex. 1997) (rejecting takings claims related to flooding from culvert system that was installed ten years before plaintiff acquired her property); *City of Dallas v. Winans*, 262 S.W.2d 256, 259 (Tex. Civ. App. Dallas 1953) (holding that a claim that concrete culvert caused flooding on plaintiff's property "was in favor of the owner of the property at the time the [construction] occurred," not a "subsequent purchaser"). Here, Plaintiffs purchased their properties between 1976 and 2015. Appx4, Appx935 (citing Appx1436-1470); *accord* Beck Redden Brief 7. Those dates occur after the Project was constructed and the first Water Control Manual adopted. *See supra* (pp. 5-7). Plaintiffs' property interests were thus acquired subject to the Project's flood control operations. *Cf. Brazos River Authority v. City of Graham*, 354 S.W.2d 99, 104 (1961), *cited in* Beck Redden Brief 27-28 (concerning a taking by flooding due to a reservoir constructed *after* claimant's water treatment plant was built).[2]

[2] *San Jacinto River Authority v. Medina*, published after the opening briefs were filed, is not dispositive. 2021 WL 1432227, at *11 (Tex. Apr. 16, 2021). At issue was Texas courts' statutory jurisdiction to entertain physical takings claims related to a water authority's release of water from a reservoir during Hurricane Harvey. The decision did not consider the merits of the takings claims or the scope of the asserted property interests. *See id*.

B. Federal law provides no private property rights in relation to the Project.

1. Section 3 of the Flood Control Act of 1928 expressly disclaims the creation of any private property interests in federal flood control structures.

There is no constitutional right to government protection from flooding. *See United States v. Sponenbarger*, 308 U.S. 256, 266-68 (1939). Plaintiffs presume a private property right to the maximum flood control that can be afforded by the dams and reservoirs merely because their properties are located downstream of the Project. But when Congress authorized the construction of federal flood control projects, it expressly disclaimed any intent to create private property rights in those structures. Specifically, when Congress authorized the construction of federal flood control works for the Mississippi Valley following the catastrophic Mississippi floods of 1927, *see James*, 478 U.S. at 606, Congress specified 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." Flood Control Act of 1928, ch. 569, § 3, 45 Stat. 536 (codified as 33 U.S.C. § 702c ("Section 702c")). That provision "safeguard[s] the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *James*, 478 U.S. at 608 (citation omitted); *see id.* at 604, 612.

The 1928 Act displayed "a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of [flood-control] projects." *James*, 478 U.S. at 606-07. Section 702c, which was critical to the Act's passage, reflects Congress's intent "to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* "Undoubtedly that absolute freedom of the government from liability for flood damages is and has been a factor of the greatest importance in the extent to which Congress has been and is willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damage." *National Manufacturing Co. v. United States*, 210 F.2d 263, 271 (8th Cir. 1954).

Congress's authorization of the Nation's flood control projects—including the Buffalo Bayou Project—has been premised on an understanding, reflected in Supreme Court precedents, that incidental consequences of such projects' operations would not lead to government liability except to the extent that the United States has waived its sovereign immunity for tort actions. Congress authorized the Buffalo Bayou Project based on a study prepared under the 1936 Act, which affirmed Section 702c's validity. Pub. L. No. 74-738, ch. 688, § 6, 49 Stat. 1570, 1593; *see also id.* at 1596. Accordingly, Plaintiffs' asserted property interests must be understood against the backdrop of Section 702c.

In enacting Section 702c, Congress understood that "[d]amages to land by flooding" that are "consequential * * * do not constitute a taking of the land flooded." 69 Cong. Rec. 7,106 (1928) (remarks of Rep. Cox) (quoting headnote to *Bedford v. United States*, 192 U.S. 217, 217 (1904)). As President Coolidge observed when the 1928 Act was passed: "it would be very unwise for the United States * * * to render itself liable for consequential damages" from such projects. *Id.* at 7,126. Thus, the Fifth Amendment's prohibition on uncompensated takings "was kept in view" during the 1928 Act's enactment. *National Manufacturing Co.*, 210 F.2d at 270-71.

Moreover, recognizing takings liability for hurricane-induced flooding would substantially impede the government's willingness to undertake beneficial flood control projects. Congress has appropriated to the Corps almost $45 billion in response to flood disasters since 2005, of which almost $24 billion was for constructing flood-control projects. Carter, Nicole T., *Army Corps of Engineers Annual and Supplemental Appropriations: Issues for Congress*, Congressional Research Service Report No. R45326, 4 (2018), https://crsreports.congress.gov/product/pdf/R/R45326/2. Indeed, the Corps manages over 700 dams and more than 14,000 miles of levees across the Nation. U.S. Army Corps of Engineers & U.S. Bureau of Land Management, *State of the Infrastructure*, 6, 13 (2019), https://www.usbr.gov/infrastructure/docs/

jointinfrastructurereport.pdf; *accord* 33 C.F.R. 222.5 Appx. E. The Bureau of Reclamation also manages hundreds of dams across the arid West. *Id.* at 6. Those federal works could not function if project decisions were made in the shadow of potential takings liability to numerous landowners for consequential damages from downstream flooding during hurricanes and other natural disasters. *Cf. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002) (warning against an interpretation of the Takings Clause that "would transform government regulation into a luxury few governments could afford").

Nor may Plaintiffs properly rely for their takings claims on the Supreme Court's recognition that the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960), *quoted in* Banes Brief (ECF 49) 25, 59; Beck Redden Brief 3, 55; Cecere Brief (ECF 51) 5, 47. It does not follow from that statement of general principle that when the United States chooses to build flood control projects, the benefitting landowners thereby acquire a private property interest in flood control that can be asserted against the government, if and when such projects fail to provide protection, or if and when such projects

are operated in a manner, consistent with other public interests, that fails to provide the landowners maximum protection against flooding.

2. Plaintiffs' property rights are subject to the Corps' police power to protect public safety and welfare.

The Takings Clause has no role to play "if the logically antecedent inquiry into the nature of the owner's estate shows" that the asserted property rights "were not part of his title to begin with." *Lucas*, 505 U.S. at 1027-1028. *Lucas* explained that restrictions that background principles of state law "already place upon land ownership" "inhere in the title itself." *Id.* at 1029. Where government action reflects such a "pre-existing limitation" on the landowner's title, no compensation is owed, even for a *permanent* physical occupation. *Id.* at 1028. For example, the government may be absolved of liability "for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." *Id.* at 1029 n.16 (quoting *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880)); *see also National Board of YMCA v. United States*, 395 U.S. 85, 93 (1969) (holding that the "temporary, unplanned occupation of petitioners' buildings" due to military necessity was not a taking).

Additionally, all property is held subject to certain core exercises of the police power. *See*, *e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (holding, in a forfeiture case, that "[t]he government may not be required to compensate an

owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain"); *Lech v. Jackson*, 791 Fed. Appx. 711, 715-19 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020); *cf. Hurtado v. United States*, 410 U.S. 578, 588-589 (1973) (ruling that the detention of material witnesses was not a taking because the government need not "pay for the performance of a public duty it is already owed"). Traditional police power is defined as "the authority to provide for the public health, safety, and morals." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

Although other constitutional provisions may constrain that power, *see, e.g.*, *Lambert v. California*, 355 U.S. 225, 228 (1957) (regarding due process), the Just Compensation Clause does not impose such limitations. *See Chicago, Burlington & Quincy Railway Co. v. Illinois*, 200 U.S. 561, 593-94 (1906); *Mugler v. Kansas*, 123 U.S. 623, 667-70 (1887) (statute restricting the sale of beer without a permit was not a taking), *cited in Bachmann v. United States*, 134 Fed. Cl. 694 (2017) (identifying the "distinction on the one hand between the exercise of the police power to enforce the law . . . and, on the other hand the government 'taking property for public use.' "). So, for example, in *Monongahela Bridge Co. v. United States*, it was not a taking for the United States to require a private company, upon pain of criminal penalty, to modify a bridge that was obstructing navigation. 216 U.S. 177, 193 (1910). And in *Miller v. Shoene*, it was held

constitutional for a State to destroy diseased cedars without compensating their owner because they were located near an apple orchard to which it was feared the disease would spread. 276 U.S. 272, 277-79 (1928).

As discussed above (pp. 8-9), Hurricane Harvey was a disastrous storm of historic dimensions. *See, e.g.*, Appx4787-4790. As that catastrophe unfolded, the Corps operated the Project according to the Water Control Manual. *See* Appx5362 (Corps employee's deposition testimony that the Corps followed the Manual from August 25-30, 2017). The sole purpose of the Project is flood control, and the reservoirs were empty before Hurricane Harvey began. Appx4661, Appx5194-5196. All of the water filling the reservoir came from the storm. Hour by hour, the Corps evaluated weather conditions in consultation with other federal, state, and local responders, and responded to those changing conditions by operating the Project in accordance with the Manual to protect human lives, Project infrastructure, and private property. *See supra* (pp. 9-10).

The Corps' operation of the gates during a hurricane—whether to close them and allow water to accrue so high as to flow around the dam and undermine its structure, or to open them to allow flood water to pass downstream—is a traditional exercise of protecting public safety, a pre-existing limitation on property ownership that "inhere[s] in the title itself." *Lucas*, 505 U.S. at 1029. Had the Corps not released ever-increasing flood water from

behind the dams, it would have further accumulated, almost necessarily flooding additional properties elsewhere and possibly undermining the structure of the dams, creating catastrophically worse flooding downstream.

To illustrate the dilemma accompanying the takings claims brought against the United States following Hurricane Harvey, another CFC judge has issued an interlocutory ruling holding the Corps liable for a taking of property located upstream from the dams as a result of the detention of floodwater from Project operations during Harvey. *In re Upstream Addicks & Barker Reservoirs*, 146 Fed. Cl. at 228. Whatever choice the Corps made, the volume of rainfall meant that flood water would have ended up on *someone*'s property. This circumstance presents precisely a situation where background principles of the Corps' police power obviate any possible taking. *See*, *e.g.*, *Miller*, 276 U.S. at 279 ("It will not do to say that . . . the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property.").

The Corps' choice of how to exercise its discretion necessarily impacted private property. To the extent that Plaintiffs suffered property losses greater than they would have suffered had the Project been operated differently, those losses were incidental to the Corps' decisions to control flooding and protect the public during a natural disaster, a storm of historic dimensions. That exercise of

emergency police power is a pre-existing limitation that "inhere[s] in the title itself," *Lucas*, 505 U.S. at 1029, and cannot effect the taking of property interests.

III. The CFC's judgment may be upheld on alternative grounds.

Alternatively, the Court may affirm the CFC's dismissal on the ground that: (1) Plaintiffs did not attempt to prove, and cannot prove, that the Corps' actions caused the alleged property losses, or (2) if causation is presumed, the unintended and transitory losses that occurred amount, at most, to a trespass sounding in tort, rather than a taking of private property.

A. Undisputed evidence demonstrates that the Corps was not the cause-in-fact of the flooding on Plaintiffs' properties.

The correct legal standard for causation requires Plaintiffs to prove "that in the ordinary course of events, absent government action, plaintiffs would not have suffered the injury." *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019). Critically, "the causation analysis must consider the impact of the *entirety* of government actions that address the relevant risk." *Id.* at 1364 (emphasis added). *St. Bernard* concerned a claim that the Corps' construction of a navigation outlet near the mouth of the Mississippi River had exacerbated the risk of flooding of land near New Orleans so as to represent a taking when federally authorized flood-control levees breached during Hurricane Katrina. The Court rejected that claim on the grounds that "plaintiffs failed to establish that government action, including *both*

the construction of the [outlet] *and* the levees, caused their injury." *Id.* at 1367 (emphasis added). The plaintiffs there relied on the incorrect premise that their injury would not have occurred absent the navigation outlet, "without taking account of the impact of the [federal] flood control project." *Id.* at 1363. As a result, they "failed to take account of other government actions," i.e., the levees, "that mitigated the impact of" the outlet, and that "may well have placed the plaintiffs in a better position than if the government had taken no action at all." *Id*. In so doing, the plaintiffs incorrectly focused on whether "isolated" actions, rather than the "whole of the government action," caused their injury. *Id.* at 1363-64.

Although the levees in *St. Bernard* reduced flooding, the plaintiffs argued that the levees' benefits could not be considered in the causation analysis because the levees and the outlet were separate projects. The Court rejected that argument: "When the government takes actions that are directly related to preventing the same type of injury on the same property where the damage occurred, such action must be taken into account even if the two actions were not the result of the same project." *Id.* at 1366. Furthermore, when "government action mitigates the type of adverse impact that is alleged to be a taking, it must be considered in the causation analysis, regardless of whether it was formally related to the government project that contributed to the harm." *Id.* at 1367.

Applying the correct causation standard as set forth in *St. Bernard*, Plaintiffs cannot point to any record evidence demonstrating that the *entirety* of the government action related to flood risk on Plaintiffs' properties was the cause of a taking. Indeed, this case is more straightforward than *St. Bernard* because Plaintiffs' claims concern a single Project, rather than two. Had the Project here not been constructed and operated according to the Manual, Plaintiffs' properties would have experienced significantly greater flooding during Hurricane Harvey than actually occurred. Appx2193 (report for Dr. Robert Nairn, the government's coastal engineering expert); Appx5303, Appx5305 (government's cross-examination of Dr. Bedient, expert for plaintiffs in the upstream trial). That is so because, as already discussed (pp. 9-10), the Corps closed the gates at the storm's onset, when both reservoirs were empty. The Corps released water incrementally, and it allowed remaining water in the reservoirs to be drawn down over the course of several weeks rather than all of a sudden. In that way, the Corps' release of the storm water was part of an overall effort to mitigate the risk of downstream flooding impacts.

Plaintiffs premise their claims on the assumption that keeping the gates closed for the entire duration of Hurricane Harvey might have further reduced flooding downstream. But such efforts would have made flooding on upstream properties worse and could have compromised the structural integrity of the

dams. The government's coastal engineering expert, Dr. Nairn, testified in the upstream litigation about a gates-closed hypothetical that he modeled for that case. He concluded that if the gates had been kept closed, the depth of flooding on the *upstream* trial properties would have been 0.6 to 0.7 feet higher in the Addicks area, and 1.1 to 1.2 feet higher in the Barker area, and the increased risk to flooding would have lasted longer. Appx5365-5367; *see also* Appx5304 (Bedient's testimony at upstream trial). Plaintiffs agree that the Corps managed the operation of the reservoirs to mitigate the effects of flooding not only on their downstream properties but also on properties upstream of or adjacent to the dams. *See* Appx938-939 (statement of undisputed material facts). More to the point, the possibility that the Corps might have further mitigated the risk of downstream flooding—by causing greater upstream flooding and disregarding structural risks to the dams—does not make the Corps a cause of the downstream flooding that actually occurred. At bottom, it is undisputed that the Plaintiffs are better off with the Corps' construction and management of the reservoirs than without. The Corps' activities in providing flood control protection from natural disasters do not effect a taking of private property.

Plaintiffs' experts have not attempted to demonstrate causation under the correct legal standard. Their first expert, Dr. Phillip B. Bedient, prepared a report that did not model or develop an opinion about the area, depth, or duration of

any flooding that would have occurred without the Project. *See generally* Appx5253-5290. However, Dr. Bedient testified in the upstream cases that if the two reservoirs had not been present, the damage to downstream properties would have been far more significant. Appx5297-5298, Appx5303; *see also* Appx5299 (testifying that there "there's no question that there were significant downstream benefits" from the Project).

Plaintiffs' other experts, Geosyntec Consultants, Inc., prepared a report using hydraulic modeling to estimate the depth and duration of flooding on each test property during Hurricane Harvey based on the Corps' actual operation of the Project. *See* Appx2776-2787. Geosyntec did not model or develop any opinion as to whether any of the properties would have flooded during Hurricane Harvey absent the Project. *See generally* Appx2737-2827.

Plaintiffs argue that there is an exception to the causation standard based on dicta from *John B. Hardwicke Co. v. United States*, 467 F.2d 488 (Ct. Cl. 1972), which concerned a taking based on the completion of a dam that diverted water onto the plaintiffs' property. *Id.* at 489. A second dam, however, benefitted the plaintiffs. *Id*. But even though the first dam increased the risk of flooding compared to the second dam alone, the expectation of flooding was less than "if there had been no flood control program at all." *Id*. at 489-90. *Hardwicke* thus

held the government not liable for a taking after taking into account the relative benefits and detriments from both dams. *Id.* at 491.

Plaintiffs rely on dicta in a footnote from *St. Bernard* stating that *Hardwicke* "suggested" that if the government takes an action that reduces flooding risk before taking a second action that increases flooding risk, "the risk-reducing action would only be considered in assessing causation if the risk-increasing action was 'contemplated' at the time of the risk-reducing action." 887 F.3d at 1367 n.14. In Plaintiffs' view, the "prior risk-reducing activities" in constructing the dams and the Project are "irrelevant to but-for causation." Beck Redden Brief 55 (citing *Ideker Farms, Inc. v. United States*, 142 Fed. Cl. 222, 231-33 (2019), *appeal docketed*, No. 21-1849 (Fed. Cir. Apr. 14, 2021)).

Plaintiffs' reliance on *Hardwicke* is misplaced. Notably, *St. Bernard* expressly declined to consider whether the dicta in *Hardwicke* was correct or the circumstances where it might apply. 887 F.3d at 1367 n.14. More importantly, the *Hardwicke* dicta does not apply here, even on its own terms. First, there is only one flood control Project at issue here, not two, simplifying the task of identifying the entire government action at issue. But the Court need not decide whether to incorporate the initial construction of the dams in its analysis, because even focusing only on the operation of the Project during Hurricane Harvey, the Court should rule in the United States' favor. The Project's dams

were originally constructed without gates on most of the conduits, *see supra* (pp. 6-7), and thus would not have prevented Plaintiffs' losses. And while the government added gates to all conduits by 1963, the addition of the gates did not guarantee that the gates would be operated in any particular way in response to Hurricane Harvey or any other natural disaster. Rather, when installing the gates, the Corps contemplated that they would be opened or closed as warranted by circumstances and consistent with applicable guidance.

It is undisputed that the Corps operated the gates during Hurricane Harvey in a manner that mitigated the risk of downstream flooding. Had the Corps simply left the gates open throughout the whole storm, there undeniably would have been even greater downstream flooding. *See supra* (p. 36). In other words, the Corps' operation of the Project during Hurricane Harvey was a "risk-reducing activity," even if the prior risk-reducing activity (construction of the dams) is taken as a given. The possibility that the Corps could have done even more to reduce downstream flooding—e.g., by keeping the gates closed for a longer period of time—does not change the nature of the Project operation.

Even if Plaintiffs' interpretation of *Hardwicke* were correct, Plaintiffs do not come within the scope of that dicta. The purported "risk-increasing" activity, opening the gates when the reservoirs rose dangerously high, was "contemplated" by the Corps when it undertook the "risk-decreasing" activity

of constructing the last of the reservoirs' gates in 1963. *See* Appx3, Appx3221. That is so because the 1962 Water Control Manual contains provisions for "Emergency Regulation" comparable to the provision on surcharge releases at issue here, *see* Appx1202-1203, adjusted for changes in the dam's elevation over time. *See* Appx1415 (Robert Thomas deposition, p. 137 lines 4-6). Thus, *Hardwicke* does not allow Plaintiffs to circumvent ordinary causation standards.

Finally, the government's alleged *inaction*, in failing to take steps that Plaintiffs might believe could have been taken to prevent flood damage, is not the taking of property for a public purpose: "On a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government." *St. Bernard Parish*, 887 F.3d at 1360 (collecting cases); *see also Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1341 (Fed. Cir. 2018) (applying the rule to both physical and regulatory takings). Nor does "[t]he government's liability for a taking . . . turn, as it would in tort, on its level of care." *Moden*, 404 F.3d at 1345. Plaintiffs therefore may not premise their takings claim upon the Corps' failure to keep the Project's gates closed during the whole storm or its decision about how much water to release from the dams and when. Whether characterized as inaction or negligence, such an argument cannot establish a taking.

B. The one-time downstream flooding at issue is at most an alleged trespass, sounding in tort, and does not rise to the level of the taking of private property

Even if the downstream flooding that occurred in this case somehow can be attributed to the Corps' operation of the Project, the flooding was unintentional, unanticipated, and transitory and thus does not arise to taking of private property. Not every physical invasion of private property resulting from government activity is a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982); *accord Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). This Court carefully distinguishes between repetitive invasions that constitute "physical takings" and transient intrusions that, at most, are "possible torts." *Id*.

To ascertain whether temporary, government-induced flooding constitutes the taking of a real property interest rather than a lesser tort like a trespass, courts consider: (1) the "duration" of the restriction, (2) the "degree to which the invasion is intended or is the foreseeable result of authorized government action," (3) the "character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use," and (4) the "[s]everity of the interference." *Arkansas*, 568 U.S. at 38-39 (cleaned up); *accord Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) (stating that *Arkansas*

reflects "an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding").

That distinction is critical because the Tucker Act's waiver of the United States' immunity to suit for takings has always been limited to "cases not sounding in tort." 28 U.S.C. 1491(a)(1); *see also Gibbons v. United States*, 75 U.S. 269, 275 (1868) (same as to Tucker Act's precursor). Asserted torts by the government "are compensable only to the extent the Federal Tort Claims Act [FTCA] permits." *In re Chicago, Milwaukee, St. Paul, & Pacific Railway Co.*, 799 F.2d 317, 326 (7th Cir. 1986) (*In re Chicago*). And the Supreme Court "has never treated limitations on liability in tort as mere pleading obstacles, to be surmounted by shifting ground to the Tucker Act" under a takings theory. *Id.*; *cf. Brazos Elec. Power Co-op., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998) (CFC's jurisdiction "cannot be circumvented" by "artful pleading").

As this Court has previously explained, to establish that "treatment under takings law, as opposed to tort law, is appropriate," a plaintiff must establish, at minimum, that (1) "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 (2) the "nature and magnitude" of the invasion are such as to constitute a taking rather than merely inflicting an injury to property for which recovery might be available in tort. *Ridge Line*, 346 F.3d at 1355-56.

Those requirements align with the second and fourth factors set forth in *Arkansas*, which cited *Ridge Line* with approval. 568 U.S. at 39. Neither requirement is satisfied here.

1. Flooding damage from a singular, unprecedented hurricane was not the direct, natural, or probable result of the Corps' actions as a whole.

It is well-settled that "[a]ccidental, unintended injuries inflicted by governmental actors are treated as torts, not takings." *In re Chicago*, 799 F.2d at 326 (cited with approval in *Arkansas*, 568 U.S. at 39). This Court has implemented that principle by holding that a physical taking occurs only 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." *Ridge Line*, 346 F.3d at 1355-56. That fundamental requirement forecloses Plaintiffs' claim, because the flooding of their properties was the "direct, natural, or probable" result of unprecedented flooding due to a hurricane—not of the government's operation of a flood control Project that for 70 years has protected downstream properties from flooding.

Flooding damages to Plaintiffs' properties from the Corps' surcharge releases during Hurricane Harvey are "incidental or consequential injur[ies]" that are compensable, if at all, only in tort. *Ridge Line*, 346 F.3d at 1355. Numerous cases have made clear that damages suffered through similarly

attenuated chains of events do not constitute a taking. In *Keokuk & Hamilton Bridge Co. v. United States*, for example, the Supreme Court rejected a takings claim brought by the owner of a pier that was unintentionally destroyed by the government's blasting activity. 260 U.S. 125, 126 (1922) (Holmes, J.). The plaintiff's injury was "incidental damage which if inflicted by a private individual might be a tort but which could be nothing else." *Id.* at 127; *see also Bedford*, 192 U.S. at 224-25 (holding that flooding from a revetment built by the government was at most "an incidental consequence" of the government action, not a taking). As early as 1913, the Supreme Court described the government's power to construct navigation works "without liability, for remote or consequential damages" as "so often decided as to cause the subject not to be open." *Jackson v. United States*, 230 U.S. 1, 23 (1913).

A determination that a taking occurred is particularly inappropriate here because the damage about which plaintiffs complain was caused by a natural disaster of historic dimensions. As discussed above (pp. 8-9), Hurricane Harvey dropped record amounts of rainfall, flooding homes and businesses, resulting in the loss of life and more than a hundred billion dollars in damage throughout the region. But property damage caused by a natural disaster is not the result of a taking by the government for which the Fifth Amendment requires all taxpayers to pay. For instance, the Supreme Court rejected a takings claim

associated with flooding from a government-constructed canal where, after the canal's construction, "there was a flood of unprecedented severity" followed by "recurrent floods of less magnitude in subsequent years." *Sanguinetti v. United States*, 264 U.S. 146, 147 (1924). And the Court of Claims long ago ruled that a taking cannot arise from "simply a random [flood] event induced more by an extraordinary natural phenomenon than by Government interference." *Wilfong v. United States*, 480 F.2d 1326, 1329 (Ct. Cl. 1973). Likewise, the Court of Claims repeatedly rejected flooding-related takings claims where the flooding would not have occurred except for extreme acts of nature such as "unprecedented rainfall." *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955)); *see also Bartz v. United States*, 633 F.2d 571, 577 (Ct. Cl. 1980) ("Excessive precipitation was the root cause of the flooding . . . . The government's [action] played only a secondary role.").

That it was foreseeable at the moment the Corps made the surcharge releases that downstream properties would be flooded does not mean that such flooding was the "direct, natural, and probable result" of the Corps' actions. The challenged government action must be viewed as a whole—i.e., the existence and operation of the Project throughout the duration of the storm. Plaintiffs do not dispute that the purpose of the Project is to protect downstream areas from flooding. Appx929 (statement of undisputed facts, citing, *inter alia*, Appx1141).

As discussed above (p. 9), the reservoirs were *empty* on the afternoon of Friday, August 25, 2017. The Corps closed the reservoir gates that evening, thereby detaining flood water behind the dams until the Corps began surcharge releases after midnight on Monday, August 28, 2017. *See* Appx4657, Appx5208. Indeed, even as the Corps increased the flow of the releases over the next several days, the reservoir pools were still *rising* behind the dams. *See* Appx5209, Appx5211, Appx5225, Appx5239. All of that water came from the storm. Uncontrolled water was also flowing around the north end of Addicks Dam for several days (August 29–September 2). *See* Appx5239, Appx5247; *see also* Appx2144 (photograph). And at its maximum, the combined flow of storm water into the two reservoirs was more than ten times the flow released below the dams. *See supra* (p. 10). Once the pools stopped rising, the Corps took six weeks to release all of the flood water from behind the dams. *See* Appx4801, Appx5212-5213. That temporary detention and gradual release of flood water saved Plaintiffs' properties from flooding far worse than they actually experienced. *See supra* (p. 36). The Corps' actions were not the cause of the floodwaters. The unprecedented volume of rain from Hurricane Harvey was the cause of the floodwaters.

Plaintiffs cannot establish a taking by selecting particular aspects of the government action that they dislike (e.g., the surcharge releases) and treating

them in isolation from the remainder of the government action (e.g., construction of the Project, closure of the gates, gradual release of flood water from the reservoirs). In *Cary v. United States*, this Court refused to allow plaintiffs to "cherry-pick parts of the [agency's] policy which they argue ha[d] increased the risk of wildfire" over the course of several decades "without acknowledging that much of the [agency's] policy over the last century has been devoted to reducing the risk of wildfire." 552 F.3d 1373, 1377 n.* (Fed. Cir. 2009).

So, too, for flooding risks in relation to the Project here. Flooding of the downstream properties during the Corps' operation of the reservoirs in response to Hurricane Harvey was not a "direct, natural, and probable" result of the government action. Indeed, the Corps' operation of the Project during Harvey must be viewed in light of the Manual's general direction to manage reservoir capacity to *reduce* downstream flooding, and yet to do so "within the limits placed by the constraints on project operations." Appx1022. The Corps operated the Project according to the Manual during the relevant time period. Appx5362. And when the Corps deviated from the Manual by drawing down the reservoirs more slowly after they peaked, it did so to protect dam stability and downstream properties. *Id.*; *see also* Appx5212-5213.

Where, as here, the government does not intend to invade a property interest, the takings inquiry requires courts to consider "the degree to which the

invasion is intended or is the foreseeable result of authorized government action." *Arkansas*, 568 U.S. at 39; *accord Arkansas Game & Fish Commission v. United States*, 736 F.3d 1364, 1372 (Fed. Cir. 2013) (invasion of property must be a "foreseeable and predictable result" of the government's actions). No taking occurs when an invasion of the plaintiff's property caused by the government's actions "could not have been foreseen or foretold" at the time the government acted, for "it would border on the extreme to say that the government intended a taking by that which no human knowledge could even predict." *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921).

But while "foreseeability" is necessary, it is not *sufficient* to satisfy the first prong of the *Ridge Line* test. "Foreseeability and causation are separate elements that must both be shown when intent is not alleged." *Cary*, 552 F.3d at 1379 (parentheses omitted). Accordingly, *Cary* rejected the argument that the first prong of the *Ridge Line* test is satisfied whenever an invasion of property is a foreseeable result of government conduct. *Cary* addressed a taking alleged to result when a fire arising on a national forest spread to private lands. The plaintiffs alleged, and this Court assumed, that the government's "fire suppression and recreational use policies" were "government authorized actions which caused the destruction of their property" because the government's fire-suppression policies allowed fuel to accumulate and its recreational use policies

allowed in the hunter who started the fire. *Cary*, 552 F.3d at 1380. This Court also assumed that "the destruction of the property was foreseeable" to the government. *Id.* But the Court nonetheless rejected the plaintiffs' takings claim because the fire—though foreseeable—was not the direct, natural, or probable consequence of the government's actions. Instead, the hunter's act of lighting the fire "was a clear intervening cause that broke the chain of causation between the authorized act and the injury." *Id.* The Court explained that even if "the government knew of or increased a risk" of a fire, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable" so as to effect a taking of an actual interest in property. *Id.*

Like the fire in *Cary*, Hurricane Harvey was an intervening cause that broke the chain of causation between the flood protection that the Project provides to upstream and downstream properties. As discussed more below (p. 50), the Corps had never released water from the dams under the Manual's "Induced Surcharge" regulation before Harvey. *See also supra* (p. 8). Nor had Plaintiffs previously experienced significant flooding on their properties. *See infra* (p. 51). Indeed, both reservoirs rose to record-breaking heights even as the Corps was releasing water from the dams. *See* Appx2138, Appx4167-4168, Appx5247.

Other decisions confirm that the "the Government's foreknowledge will not convert an otherwise insufficient injury into a taking. At most it could strengthen the plaintiff's case in a tort action." *National By-Products v. United States*, 405 F.2d 1256, 1275 (Ct. Cl. 1969); *see Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 753 (Fed. Cir. 2013) ("the [government's] apprehension of flooding does not constitute a taking").

Nor is the first prong of the *Ridge Line* test satisfied whenever government conduct foreseeably causes property damage, i.e., in the sense of such damage being conceivable rather than actually expected. If that were true, *Ridge Line*'s first prong would cease to be a tool for "distinguishing physical takings from possible torts." 346 F.3d at 1355. Even in tort law, parties are generally liable only for harms that are the result of reasonably foreseeable risks. *See Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (in the tort context, "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct"); *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 (2011) (negligence is "measured by what is reasonably foreseeable under the circumstances"); *cf.* Restatement Third of Torts §1 cmt. E (2009); Restatement Second of Torts §8A Ill. A (1965). Takings liability demands more: the invasion must have been the direct, natural, or probable result of the government's authorized actions, such that it is fair to conclude that an appropriation of an

interest in property was an intended feature of the government project as it would be used in the ordinary course of events. Because of the intervening Hurricane, Plaintiffs cannot make that showing.

2. Flooding damage from the Corps' emergency response to a singular, unprecedented hurricane is too isolated an occurrence to constitute a taking.

The second prong of the taking-tort inquiry examines the "nature and magnitude" of the alleged invasion to determine "whether the government's interference with any property rights of [Plaintiffs] was substantial and frequent enough to rise to the level of a taking." *Ridge Line*, 346 F.3d at 1356-57. "Isolated invasions, such as one or two floodings, do not make a taking." *Id.* at 1357 (cleaned up); *accord Cedar Point Nursery*, 141 S. Ct. at 2078 (isolated invasions "are properly assessed as individual torts rather than appropriations of a property right."); 1 P. Nichols, The Law of Eminent Domain §112, p. 311 (1917) ("[A] mere occasional trespass would not constitute a taking.").

Plaintiffs' claims focus on a singular event: the surcharge release of flood water from the dams for the first time in history during an unprecedented storm. As Plaintiffs acknowledge, the Corps had never made surcharge releases from the dams before Hurricane Harvey. Beck Redden Brief 9; Banes Brief 13; Cecere Brief; Subrogated Insurers' Brief (ECF 30) 9. Nor has it made them since. Faced with the imminent possibility that the rainwater would flow uncontrollably

around the dams and potentially undermine their stability, the Corps decided, in response to real-time events, to invoke the Manual's surcharge-release procedures. That one-time, situational response by the Corps is not "direct and substantial enough government involvement" to constitute a taking. *YMCA*, 395 U.S. at 93 (damage to a building used as a military command post during an insurrection in Panama was not a taking); *see also Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125 (1922) (same for damage to a bridge from government blasting); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) ("[W]hile a single act may not be enough, a continuance of them, in sufficient number and for a sufficient time may prove [a taking]."), *cited with approval in Cedar Point Nursery*, 141 S. Ct. at 2078.

Before Hurricane Harvey (but after the Project was built), Plaintiffs had never experienced any significant flooding on their properties. *See* Appx935-936 (citing, *inter alia*, Appx1471-1505). Plaintiffs would have experienced more flooding during the course of their ownership had the Project not been constructed (and had it not protected downstream properties so effectively during storms that have occurred more frequently). *See*, *e.g.*, Appx4789, Appx4801 (discussing significant storms in 1994, 2001, 2016). It is also far from clear that Plaintiffs will experience flooding to such a degree again. For instance, the United States' expert climatologist estimated that the return period for the

four-day rainfall experienced during Harvey ranges from 774 to 905 years for the three local watersheds (Addicks, Barker, and Buffalo Bayou). Appx4830; *accord* Appx5019, Appx5026, Appx5032, Appx5038. Harris County Flood Control District determined an even greater return period—several *thousand* years. Appx4788, Appx4815. A "return period" is the "average number of years that it is predicted will pass before an event of a given magnitude occurs." Appx4881. Whatever that precise number, the likely recurrence interval is large and does not support a conclusion that a storm carrying a similar amount of rainfall is anything other than a singular, unprecedented occurrence—therefore, not a taking. *See*, *e.g.*, *Fromme v. United States*, 412 F.2d 1192, 1197 (Ct. Cl. 1969) (rejecting takings claim for a flowage easement due to intercostal channel and levee causing flooding that was reasonably expected to recur every 15 years); *North Counties Hydro-Electric Co. v. United States*, 151 F. Supp. 322, 323 (Ct. Cl. 1957) ("Two floodings, one ten years after the pool behind the dam was completely full, and the other nineteen years after, do not constitute a taking.").

Plaintiffs do not disagree that the flooding was unprecedented. *See*, *e.g.*, Cecere Brief 54 (flooding at issue was "orders of magnitude beyond [Plaintiffs'] prior flooding experience"); Beck Redden Brief 12 ("minor flooding" that some properties had previously experienced "paled in comparison to the flooding" now at issue); Banes Brief 18-19 (prior flooding was "brief," "insignificant," and

"nothing like" the flooding at issue); Subrogated Insurers' Brief 8 (noting that defendant had "never previously taken any action that resulted in the flooding of downstream properties"). Rather, Plaintiffs contend that *Ridge Line*'s inquiry into the substantiality of government action is no longer good law after *Arkansas*. Beck Redden Brief 49-50; Banes Brief 60-61. That argument is incorrect.

Arkansas involved not a hurricane, but temporarily recurring floods from annual deviations in the Corps' routine, scheduled releases from a dam for seven straight years. 568 U.S. at 28. Although the resulting overflow in that case was "flooding" of a sort, it was wholly different in character than the flooding caused by a catastrophic storm. Even in that quite different context of scheduled releases, *Arkansas* held "simply and only[] that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id.* at 38. Indeed, the Court did not hold that a taking had occurred, but rather remanded for further proceedings on that question. *Id.* at 40. And the Court emphasized that its "modest decision augurs no deluge of takings liability." *Id.* at 37.

Plaintiffs nevertheless contend that on remand, *Arkansas* eliminated any exception for flooding, even if it is not "inevitably recurring." Beck Redden Brief 49. That is incorrect. This Court considered the duration of the planned deviations from the water released from the dam and held that they were

"properly viewed as having lasted for seven years," which both this Court and the CFC agreed did not defeat the plaintiffs' takings claim. *Arkansas*, 736 F.3d at 1369-70. The Court also cited precedent that "[i]solated invasions, such as one or two floodings or sprayings, do not make a taking." *Id.* at 1370 (quoting *Eyherabide v. United States*, 345 F.2d 565, 569 (Ct. Cl. 1965)). Nowhere did *Arkansas* eliminate *Ridge Line*'s inquiry into the "nature and magnitude" of the government action, much less hold that singular, unprecedented storms must be considered takings. Rather, *Ridge Line*'s second prong is well encapsulated by the fourth *Arkansas* factor, the "[s]everity of the interference." 568 U.S. at 39.

Here, the character of the flooding from Hurricane Harvey was too singular to qualify as a taking, rather than a potential, isolated trespass, under *Ridge Line*'s second prong.

3. Plaintiffs' remaining arguments should be rejected.

For the reasons already explained (pp. 18-54), the Court should affirm the CFC's judgment in the government's favor. Rather than requesting a remand, Plaintiffs disagree and request this Court to direct the entry of summary judgment in their favor. Beck Redden Brief 35-48; Cecere Brief 41-56, Banes Brief 44-46. Plaintiffs, however, have not demonstrated that they are entitled to judgment as a matter of law on the theory that a categorical taking occurred.

Ordinarily, to determine "whether compensation is constitutionally due for a government restriction of property," courts "must engage in 'essentially ad hoc, factual inquiries.'" *Loretto*, 458 U.S. at 426 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)); *accord Arkansas*, 568 U.S. at 38-39. Plaintiffs, however, seek to take advantage of a narrow category of cases where courts hold that takings occurred per se, without undertaking that complex balancing analysis more commonly employed. Beck Redden Brief 36-38; Cecere Brief 48-49; Banes Brief 48-50.

Plaintiffs are mistaken. Temporary flooding caused by government conduct outside a property, even if recurrent, is not a per se taking. *See Cedar Point Nursery*, 141 S. Ct. at 2078 (discussing *Arkansas*, 568 U.S. at 38-39). The cases upon which Plaintiffs rely chiefly concern the government's granting of permanent access to third parties across property. *See Dolan v. City of Tigard*, 512 U.S. 374, 392-96 (1994) (examining city's requirement that landowner dedicate property to public greenway, pedestrian/bicycle path as condition of approving development permit); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (reviewing permit to rebuild beachfront home conditioned on providing easement for public access); *Loretto*, 458 U.S. at 438 (holding that state law requiring landlords to provide companies access to install cable resulted in a taking). Other cases on which Plaintiffs rely bear no resemblance to their own.

See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (reversing appellate court's conclusion that a regulation effected a taking because it failed to "substantially advance" legitimate government interests); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 (1992) (concerning per se takings where a regulation leaves an owner with "no economically viable use" of its property).

By contrast with those invasions, temporary flooding cases are subject to the multifactor analysis discussed above (pp. 40-41). *See Cedar Point Nursery*, 141 S. Ct. at 2078 (discussing *Arkansas*, 568 U.S. at 38-39); *Loretto*, 458 U.S. at 428 ("distinguish[ing] between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other"); *cf. Caquelin v. United States*, 959 F.3d 1360, 1369-70 (Fed. Cir. 2020), *cited in* Beck Redden Brief 37 (distinguishing regulatory notice of interim trail use subject to categorical approach from the more "flexible" inquiry for temporary flooding cases under *Arkansas*).

The Corps' Manual does not authorize "permanent physical occupation," *Loretto*, 458 U.S. at 434, or grant the general public any "permanent and continuous right" to cross Plaintiffs' properties, *Nollan*, 483 U.S. at 832. Rather, the surcharge releases contemplated by the Manual are "temporary and limited in nature." *Loretto*, 458 U.S. at 434. As Plaintiffs acknowledge, during the 70-

year existence of the Project, the Corps had never before made surcharge releases. Beck Redden Brief 9; Banes Brief 13; Cecere Brief; Subrogated Insurers' Brief 9. Nor is it certain that another flood of Hurricane Harvey's magnitude will occur in the foreseeable future. *See supra* (pp. 51-52). Because the surcharge releases lack the "permanence and absolute exclusivity of a physical occupation," they are subject to the above-discussed "balancing process." *Loretto*, 458 U.S. at 435 n.12; *see supra* (pp. 40-41, 56).

Plaintiffs contend that the weighing of all of the *Arkansas* factors may be resolved by this Court in the first instance, analogously to summary judgment, based on what they represent are undisputed facts. Beck Redden Brief 39-48; Cecere Brief 49-56, Banes Brief 50-56. However, as to the examination of the *Arkansas* factors that do not overlap with the two requirements of *Ridge Line*, discussed above (Part III.B), there are disputes of material fact that preclude ruling in Plaintiffs' favor.

For example, regarding timing, the first *Arkansas* factor, there are variations in the depth and duration of flooding on Plaintiffs' properties (ranging from days to weeks) and in the time that their properties were inaccessible (months to over a year). Beck Redden Brief 41; Banes Brief 54; *see also* Appx941-944. Some Plaintiffs even contend that the flooding was "effectively permanent." Cecere Brief 51. Plaintiffs also dispute that the government expert's

hydrological modeling accurately reflects the levels and duration of flooding on Plaintiffs' properties. Appx945 n.11. Some Plaintiffs also dispute whether the flooding they experienced before the Corps' releases was "substantial." Appx942 n.9.

Inquiries about the "character of the land" and reasonable investment-backed expectations (the third *Arkansas* factor) depend upon the specifics of each property and its owner. All of the test properties were purchased after the Corps finished constructing the last of the reservoir gates and adopted a Water Control Manual with an emergency regulation provision in the early 1960s. Appx932, Appx1202-1203. Yet the landowners' subjective expectations about the Corps' operations cannot be reduced to generalizations and should not be resolved absent a full record.

In sum, the judgments should be affirmed, but if the Court disagrees with all of the government's arguments for affirmance (pp. 18-54), it should remand for further proceedings before the CFC.[3]

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[3] An amicus brief has been submitted by 205 plaintiffs who do not own any of the test properties but who filed an opposition to the CFC's order to show cause why judgment should not be entered in their cases. *See supra* (p. 13). Amici urge the Court to allow them to present arguments and evidence in their own cases without being affected by a decision in this case. Amicus Brief 3-13. As noted above (p. 13), the CFC has since entered judgments in amici's cases, and their appeals are now pending before the Court. Because the CFC's judgments in amici's cases were based on the premise that those cases were *indistinguishable* as

CONCLUSION

The CFC's judgments should be affirmed.

Respectfully submitted,

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a legal matter from the test properties here at issue, the Court should resolve the correctness of that holding through amici's own appeals.

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