**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| IN RE DOWNSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS | ) | Sub-Master Docket No. 17-cv-9002L |
| THIS DOCUMENT RELATES TO:<br><br>ALL DOWNSTREAM CASES | ) | Chief Judge Susan G. Braden |

**UNITED STATES' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

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## INTRODUCTION

Hurricane Harvey was the greatest single rainfall event in United States history. The National Weather Service has concluded that the storm was a 1000-year event. Ex. 1, National Weather Service National Hurricane Center Tropical Cyclone Report, Hurricane Harvey at NOAA0000007. The storm made landfall as a Category 4 hurricane on August 25, 2017, and over the next several days dumped an estimated one trillion gallons of water in the Greater Houston area. Harris County estimates that the storm produced enough rain to cover a 1,800 square-mile area with thirty-three inches of water.[1] According to Harris County, more than 120,000 structures flooded, including around Buffalo Bayou. *Id.* *See also* Consol. & Am. Downstream Master Complaint ¶¶ 59, 61-66, ECF No. 23 ("Compl."). The people of Houston suffered substantial losses in this storm.

The Greater Houston area has long been subject to devastating floods. After severe flooding in the early twentieth century, the United States constructed flood-control projects in and around the City of Houston, including two flood-control dams: the Addicks and Barker dams. These dams were constructed in the 1940s, are located about seventeen miles west of downtown Houston, and have substantially reduced flooding risks for the past 70 years. Indeed, their presence has facilitated the growth and development of modern-day Houston, now the fourth largest city in the United States.

Before, during and after Hurricane Harvey, the United States sought to prevent loss of life and ameliorate the damage to private property that is inevitable when such an extraordinary Act of God strikes. After the storm made landfall, but while it still raged, military and civilian personnel in the United States Army Corps of Engineers ("Corps") monitored water levels at the

[1] *See generally* https://www.hcfcd.org/hurricane-harvey

Addicks and Barker dams and observed unprecedented inflows. Rain continued to fall hour after hour, and at the Addicks and Barker dams, flood waters continued to rise higher and higher. The District Commander in charge of the reservoirs announced on August 28, 2017: "If we don't begin releasing now, the volume of uncontrolled water around the dams will be higher and have a greater impact on the surrounding communities." Ex. 2, Corps Press Release (Aug. 28, 2017) (internal quotation marks omitted). The Corps took action in order to deal with the emergency.

As soon as storm waters began to recede, countless Americans mobilized to provide essential support to those impacted by Harvey. For its part, the United States, through the Corps, the Federal Emergency Management Agency ("FEMA"), the Small Business Administration ("SBA"), the Department of Housing and Urban Development ("HUD"), and other government agencies, brought aid to the hurricane's victims and began facilitating recovery efforts. Those efforts are ongoing; the United States has thus far allocated billions to those affected by Hurricane Harvey. *See* Additional Supplemental Appropriations for Disaster Relief Requirements Act, Pub. L. No. 115-72, 131 Stat. 1224 (2017); Reinforcing Education Accountability in Development Act, Pub. L. No. 115-56, 131 Stat. 1129 (2017); Hurricanes Harvey, Irma & Maria Education Relief Act of 2017, Pub. L. No. 115-64, 131 Stat. 1187; Disaster Tax Relief & Airport & Airway Extension Act of 2017, Pub. L. No. 115-63, 131 Stat. 1168 (collectively providing tax relief, education relief, and other assistance to disaster victims). Additionally, two weeks ago, Congress appropriated another $90 billion to further promote recovery efforts in areas throughout the United States affected by major disasters in 2017. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64. A significant portion of these funds is intended for individuals and businesses harmed by Hurricane Harvey. Specifically, each qualifying property owner affected by Hurricane Harvey can seek individual assistance from

FEMA in an amount up to $33,300 to cover home repairs, serious needs, or expenses associated with the hurricane.[2] In addition to this aid, each qualifying property owner may be eligible to receive low-interest SBA loans (up to $200,000 for residential property and up to $2 million for business property, including rental properties).[3] That aid has been flowing and continues to flow to property owners, such as Plaintiffs, who are residents of the hurricane-ravaged counties.

The United States has been sued by more than 1,500 plaintiffs, who contend that the Corps' emergency response to Hurricane Harvey constitutes a Fifth Amendment taking because their properties were damaged by flooding and floodwaters that flood control improvements could not prevent. These constitutional claims are unprecedented. Never in the history of the Republic has the Supreme Court or an appellate court found the Fifth Amendment to require the United States to pay compensation to persons damaged by catastrophic flooding caused by a major hurricane. Couched as tort suits, such claims would clearly fail. *See, e.g., Katrina Canal Breaches Consol. Litig.*, 696 F.3d 436 (5th Cir. 2012). Plaintiffs should fare no differently under a constitutional taking theory.

First, Plaintiffs fail to identify in their Complaint a way that the Corps could have operated the Addicks and Barker dams that would have protected privately-owned property both above and below the dams. Plaintiffs do not even contend that such protection was possible. Instead, Plaintiffs implicitly maintain that the Corps should have directed floodwaters elsewhere—elsewhere being on to some other person's private property—in order to protect

[2] Temporary housing or permanent housing construction repair, whereby FEMA performs direct repairs to fix homes—instead of giving money—may also be available to eligible property owners.

[3] *See* https://disasterloan.sba.gov/ela/Declarations/DeclarationDetails?declNumber=1008079&members=false.

Plaintiffs' own property. Plaintiffs themselves assert the "water pools in the reservoirs rose faster than expected," leaving the Corps with only two options: "release water from the dams and flood the downstream properties, or risk exceeding the reservoir system's capacity and flooding other communities." Compl. ¶ 64. But the Fifth Amendment is not a constitutional flood insurance policy. No taking arises where, as here, the government is merely acting to mitigate or minimize an inevitable harm to the public. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 279-80 (1928).

Second, under both Texas and long-standing federal law, Plaintiffs lack a protected interest in the property purportedly taken. Texas law does not recognize a property right to keep land downstream of a flood-control dam free from floodwaters during an extreme storm, especially when the dam was neither built nor modified after the property was acquired. And the Flood Control Act of 1928, which was in place long before Plaintiffs purchased their property, establishes as a background principle that protection from floodwaters such as those produced by Harvey is not a stick in the bundle of rights possessed by Plaintiffs. *See* 33 U.S.C. § 702c.

Third, Plaintiffs' claims should be dismissed for lack of jurisdiction. Plaintiffs do not allege facts that, if proven, would establish a pattern of severe and recurrent flooding that was intended and effected by the United States. Consequently, their allegations do not rise to the level of a compensable taking, but constitute, at most, a tort claim for which this Court lacks jurisdiction. *See, e.g., Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-330 (1922); *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003). Both the government actions alleged and the flooding claimed resulted from a Category 4 hurricane—not an intentional act by the United States.

Fundamentally, Plaintiffs ask this Court to transform the United States into an "insurer that the evil of floods be stamped out universally[,]" in contravention of longstanding Fifth Amendment jurisprudence. *United States v. Sponenbarger*, 308 U.S. 256, 266 (1939). Accordingly, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the United States moves to dismiss Plaintiffs' Consolidated and Amended Downstream Master Complaint for lack of subject matter jurisdiction or in the alternative for failure to state a claim upon which relief can be granted.

## FACTUAL BACKGROUND [4]

The City of Houston has long been subject to severe flooding because of its flat terrain and clay-like soils. *See generally* Jim Blackburn & Larry Dunbar, *Houston's High Water Problems*, 46-DEC Hous. Law. 18, at *19 (2008) (noting that "flooding and drainage have always been problems in Houston."); Ex. 3, H. R. Doc. No. 75-456, at 2(1937) (describing how floods in the area "result from the rapid run-off of heavy precipitation . . ." that inundate areas in and above Houston). Following a severe flood in 1935, Congress directed the Chief of Engineers to study flood protection along Buffalo Bayou, a waterway flowing through Houston to the Houston Ship Channel and ultimately the Gulf of Mexico. Rivers and Harbors Act of June 20, 1938, Pub. L. No. 75-684, 52 Stat. 802, 804 (codified at 33 U.S.C. § 540 (2017)). That investigation showed that hurricanes had caused flooding of up to 40 feet at Main Street in Houston, Texas and that flood control structures were necessary to protect life and property.

[4] The United States has cited throughout this motion background facts concerning Hurricane Harvey and the Houston area. The Court has discretion to take judicial notice of these facts. *E.g. Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 988 n.12 (D.N.M.) (taking judicial notice of weather conditions readily determinable), *vacated on other grounds by* 601 F.3d 1096 (10th Cir. 2002). But, judicial notice is not necessary in this circumstance because the background facts do not control the outcome of any of the legal arguments supporting dismissal of Plaintiffs' claims.

> The loss of life, heavy property damage, and disruption to the commerce of the city and port of Houston occasioned by the flood of 1935 have demonstrated the urgent need for the prosecution of comprehensive and effective measures for the control of future floods in Buffalo Bayou.

Ex. 3 at USACE000004.[5] Congress and Harris County then approved a plan by the Corps for the construction of the Addicks and Barker dams, which were completed in 1948 and 1945, respectively. Compl. ¶¶ 56, 38; 52 Stat. 802, 804.

The Addicks and Barker reservoirs were built to provide flood control downstream, including in areas where Plaintiffs are located, and had been in place for decades before Plaintiffs acquired their properties between 1975 and 2017.[6] *See* Compl. ¶¶ 35, 42, 52. Since the dams were constructed, the city of Houston has grown to 2.3 million residents.[7] Neither the Corps nor the federal government authorized or permitted the downstream development nearby to Buffalo Bayou. The dam projects were successful and indeed, the majority of Plaintiffs allege that their properties had never flooded prior to Hurricane Harvey. Compl. ¶¶ 7-8, 10-33; 35-42; 44-46. During Hurricane Harvey, the dams withstood tremendous inflows and remained intact.

Hurricane Harvey was the first Category 4 hurricane to make landfall on the continental United States since 2004. From August 25 to 29, 2017, Hurricane Harvey inundated Houston with rains that shattered local records and caused widespread flooding in the Houston metropolitan area. Compl. ¶¶ 59-60. The hurricane's flooding led Texas's Governor to declare

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[5] The 1935 flood resulted from a 3-day rainfall total of between twelve and fifteen inches. Ex. 3 at USACE000003.

[6] Some plaintiffs alleged in their original complaints that they acquired their properties before 1989, but none are named in the master complaint. None alleged they acquired their properties before the dams were constructed.

[7] *See* https://www.census.gov/quickfacts/fact/table/houstoncitytexas,harriscountytexas/PST045216

emergencies in sixty counties.[8] The President of the United States, likewise, declared the hurricane a major disaster.[9]

During Hurricane Harvey, consistent with the flood-control purposes for which the dams were constructed, the Corps operated the dams to attempt to prevent loss of life and ameliorate harm to the general public.[10] As in any heavy rain event, the Corps initially closed the floodgates to detain water in the reservoirs and protect downstream communities from flooding. *See* Compl. ¶ 59. But as water levels in the Addicks and Barker reservoirs rose from the unprecedented rains and water began to flow around the end of one dam, the Corps was forced to begin releasing water in the early morning of August 28, 2017.[11] Even with the releases, because of the storm's record-setting rains, inflows into both reservoirs greatly exceeded outflows and water levels in the reservoirs continued to rise.

As floodwaters from Hurricane Harvey receded, the Corps deployed hundreds of employees from its Texas and other offices to work with local governments to protect the life, health, and safety of those affected by the hurricane.[12] The Corps helped FEMA provide temporary power and housing, and otherwise worked to make sure critical public facilities were operational. *Id.* FEMA deployed more than 21,000 personnel in support of Hurricane Harvey

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[8] *See* https://gov.texas.gov/news/post/diaster-proc

[9] *See* https://www.fema.gov/disaster/4332

[10] *See* http://www.swg.usace.army.mil/Media/News-Releases/Article/1346048/addicks-and-barker-reservoirs-floodwaters-discharged-ready-for-next-rain-event/

[11] *See* http://www.swg.usace.army.mil/Media/News-Releases/Article/1291369/corps-releases-at-addicks-and-barker-dams-to-begin/

[12] *See* http://www.usace.army.mil/Hurricane-Harvey-Response/. Countless private citizens, too, bravely came to the heroic rescue and aid of thousands of Texans harmed by Harvey.

response, including search and rescue teams to help those stranded, and transporting medical supplies and equipment including meals and water. The United States expects to expend billions of dollars to provide aid and facilitate the recovery of persons affected by the storm. Thus far, for Harvey related damage, FEMA has received more than 370,000 requests for assistance and has approved $1.55 billion pursuant to the Individual and Households Program.[13] The October 26, 2017 Additional Supplemental Appropriations for Disaster Relief Requirements Act, Pub. L. No. 115-72, appropriated $18.67 billion to FEMA, including funding that can be issued as direct loans to local governments providing essential services as a result of Hurricane Harvey and other natural disasters. The SBA has already awarded more than $3.2 billion in Hurricane Harvey-related aid. HUD also expects to issue additional hurricane aid to those eligible.[14]

Plaintiffs can apply for many of the various types of federal aid available to them and to the tens of thousands of other property owners whose properties flooded during the hurricane. This is the traditional Congressionally-approved method by which landowners harmed by an extraordinary natural disaster like Hurricane Harvey receive federal assistance.

[13] *See* note 9. The Individual and Households Program provides aid to those affected by a disaster who have uninsured or underinsured expenses and serious needs, and can include rental assistance for temporary housing or home repair or replacement assistance. *See https://www.fema.gov/media-library-data/1502371943459-711a17671708a7ded53f0b22315f2597/FACTSHEETIndividualsandHouseholdIHP.pdf*

[14] In addition to the agencies listed here, the Corporation for National and Community Service, Department of Health and Human Services, Department of Homeland Security National Protection and Programs Directorate, U.S. Coast Guard, Defense Logistics Agency, U.S. Department of Agriculture, National Guard Bureau and other agencies have provided extensive additional assistance and aid.

## LEGAL BACKGROUND

### I. Standard of Review

With respect to a motion to dismiss for failure to state a claim upon which relief may be granted, a court must accept as true all the factual allegations in the complaint, but not the legal allegations. *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). In opposing such a motion, the plaintiff must demonstrate that the complaint contains sufficient facts to "state a claim to relief that is plausible on its face," and that the court may "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quotations and citations omitted). Moreover, the allegations must set forth facts that demonstrate the plaintiff is plausibly entitled to the relief sought, rather than mere legal conclusions absent supporting facts. *Id.*

Federal courts are courts of limited jurisdiction and they are presumed to lack jurisdiction in a particular case unless jurisdiction is established by the plaintiff. *See Renne v. Geary*, 501 U.S. 312, 316 (1991). On a motion to dismiss, the plaintiff bears the burden of proving that subject matter jurisdiction is appropriate by a preponderance of evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). Under RCFC 12(b)(1), a defendant can seek dismissal for lack of subject matter jurisdiction by making a facial attack, in which the allegations of the complaint are taken as true. *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (citation omitted); *Cedars- Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993). However, with respect to subject matter jurisdiction, a court does not need to presume the truthfulness of the plaintiff's allegations. *Reynolds*, 846 F.2d at 747; *Cedars-Sinai*, 11 F.3d at 1583. Rather, the court may consider matters outside of the plaintiff's complaint in assessing its jurisdiction, without converting the motion into one for summary judgment. *See Engage Learning, Inc. v.*

*Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)).

**II. Fifth Amendment Takings**

The plaintiff in an inverse condemnation action bears the burden of pleading the facts that ultimately bear on whether a taking has occurred. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (citation omitted). First, Plaintiffs must identify the precise government action that is the basis of the claim. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 855 (Fed. Cir. 2009) (an alleged taking "consisting of several distinct [government] actions viewed in concert" is too broad of a characterization because it does not pinpoint what step in the order of events constituted conduct that would be a taking). Once plaintiffs identify the precise government action, they "must establish that treatment under takings law, as opposed to tort law, is appropriate under the circumstances." *Ridge Line,* 346 F.3d at 1355 (citation omitted). *See also Acceptance*, 583 F.3d at 855. That is because "not every 'invasion' of private property resulting from government activity amounts to an appropriation," and "[o]nly under limited circumstances may the property-owner be compensated for a taking." *Ridge Line*, 346 F.3d at 1355; *Nicholson v. United States*, 77 Fed. Cl. 605, 616 (2007).

**ARGUMENT**

**I. Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted.**

A. Sovereign Actions Undertaken to Minimize or Mitigate an Inevitable Public Harm Do Not Constitute a Taking of Private Property.

Plaintiffs do not present a cognizable taking claim because the Corps' actions were an exercise of governmental power to prevent loss of life and mitigate inevitable damages to private property as part of the emergency response to Hurricane Harvey, an extraordinary natural disaster. The Supreme Court has long maintained a distinction between the exercise of police

power and the taking of private property for public use. All property rights are held subject to "a fair exercise" of the police power. *Chi. & Alton R.R. v. Tranbarger*, 238 U.S. 67, 77 (1915). Consequently, even the destruction or seizure of property is not generally viewed as a compensable taking so long as the government is acting to protect public health or safety. *See, e.g., Mugler v. Kansas,* 123 U.S. 623 (1887). And where, as here, the government action is part of an effort to reduce or mitigate inevitable harms to the public, no viable taking claim exists. *See, e.g., Miller*, 276 U.S. at 279. *See also Bowditch v. City of Boston,* 101 U.S. 16, 18-19 (1879) (government not liable for a taking where firefighters destroyed a home to arrest the spread of fire in the protection of other private properties). The application of that well-established principle of takings law is particularly appropriate where, as here, the government is confronted with an extraordinary natural event like Hurricane Harvey.

A long line of cases holds that no taking occurs when the government's action incidentally results in damage to private property as the government seeks to protect the public from harm. The seminal case in this line of authority is *Miller*, where the Supreme Court affirmed a Virginia Supreme Court decision upholding the destruction of a large number of ornamental red cedar trees, without compensation, in accordance with a state law designed to protect neighboring apple orchards. 276 U.S. at 277.

In *Miller*, legislation gave the Virginia State Entomologist the authority and discretion to order the destruction of red cedars found growing within a two-mile radius of any apple orchards because of the destructive nature of a fungus that spreads between red cedars and apple trees. *Id.* This order necessitated damage to private property where red cedar trees were growing. But failure to issue such an order would result in damage to apple orchards. The state had to decide how to address an inevitable harm to private property—the loss of red cedars or damages to the

local apple industry. In finding no compensable taking, the Supreme Court recognized the unenviable dilemma governments face when they must choose between the preservation of two types of property in dangerous proximity, stating:

> It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.

*Miller*, 276 U.S. at 279.

In a recent case involving "the most traditional function of the police power: entering property to arrest" a criminal suspect, this Court held that there was no taking of real property. *Bachmann v. United States*, 134 Fed. Cl. 694, 697 (2017). "When private property is damaged incident to the exercise of the police power, such damage is not a taking for the public use, because the property has not been altered or turned over for public benefit. Instead, both the owner of the property and the public can be said to be benefited by the enforcement of criminal laws and cessation of the criminal activity." *Id.* at 696 (citing *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 92–93 (1969) ("temporary, unplanned occupation" of building by troops under exigent circumstances is not a taking). *Bachmann* confirms the continuing vitality of the principle that the Fifth Amendment does not invariably require compensation for government-caused damage to private property.

The *Miller* doctrine plainly applies here. Plaintiffs allege that their property rights were taken as the result of the Corps' operation of the Addicks and Barker dams before, during, and after Hurricane Harvey. Compl. ¶¶ 59-66. Hurricane Harvey was a record-setting storm—unprecedented not only for Houston, but in the entire history of the United States—in which severe flooding was inevitable. Plaintiffs fail to identify in their complaint an approach that the

Corps could have adopted to protect all privately-owned property—above and below the dams—from flooding. Nor do Plaintiffs allege that such widespread protection was possible. Instead, Plaintiffs necessarily maintain that the Corps is liable for a taking, even when it faced only "two options," to release floodwaters on downstream properties or to risk dam failure and "flooding other communities." Compl. ¶ 64. At the same time, upstream landowners are asserting a version of the same claim in the opposite direction—they assert that the government should have prevented too much water from being impounded by the reservoirs. *See* Master Am. Complaint for Upstream Plaintiffs ¶¶ 1, 9, No. 17-9001L (Fed. Cl.), ECF No. 18. Those conflicting claims vividly illustrate that Hurricane Harvey created a no-win situation for the Corps akin to the one confronting the State of Virginia in *Miller*. Like Virginia, "the Corps was left with two options: release water from the dams and flood the downstream properties, or risk exceeding the reservoir system's capacity and flooding other communities[,]" where both actions would inevitably result in some harm to some property owners. Compl. ¶ 64. Caught between a rock and a hard place, the Corps followed procedures aimed at preserving the dams and mitigating flood damages. That is not a taking. The Fifth Amendment has not created a constitutional flood insurance policy. No taking arises where, as here, the United States is simply acting to mitigate or minimize the inevitable harm to the public caused by an extraordinary Act of God.

The Texas Supreme Court, addressing what it likewise perceived to be a no-win scenario in a taking case that involved flooding in Harris County, has held that this is exactly the scenario in which a taking does <u>not</u> occur:

> [T]he homeowners' theory of takings would place governments in an unending dilemma of requiring extreme flood-control measures and facing a regulatory takings claim from the owners directly subjected to such measures, or requiring less extensive measures and facing a takings claim when downstream property owners experience flooding.

*Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 810 (Tex. 2016). The Court cautioned against reducing "flood control decisions . . . to picking your plaintiff rather than responsible flood control management." *Id.* Like the Texas Supreme Court in *Kerr*, this Court should "decline to extend takings liability vastly beyond the extant jurisprudence, in a manner that makes the government an insurer for all manner of natural disaster." *Id.*

Flooding from Hurricane Harvey was inevitable given the amount, duration and location of rainfall. Plaintiffs' claim of a taking must fail in this circumstance where the Corps acted to protect the general public during the emergency of a hurricane.

B. Under Texas Law and the Flood Control Act, Plaintiffs Do Not Possess the Property Interest Purportedly Taken.

The plaintiff in any Fifth Amendment taking action must establish, as a threshold matter, that they possess the property right purportedly taken. *See, e.g., Colvin Cattle Co. v. United States,* 468 F.3d 803, 806 (Fed. Cir. 2006). As the Federal Circuit has explained, the first step is for the Court to determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, *i.e.*, whether the plaintiff possessed [the pertinent] 'stick in the bundle of property rights.'" *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002) (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000)). Plaintiffs here do not possess the "stick" that was purportedly taken from their bundle of real property rights. The convergence of state law, longstanding federal law, and inherent limitations on the United States' obligation to protect all private property in emergency situations cabin a property owner's right to compensation when flooded by an act of God.

Plaintiffs allege a deprivation of "real and personal property interests," including the "use, occupancy, and enjoyment" of their property and a "temporary and/or permanent" flowage

easement. Compl. ¶¶ 105, 106, 109, 111, 112, 117. As a prerequisite to their taking claims, Plaintiffs must therefore establish that they have a right to property free of floodwaters resulting from a catastrophic hurricane like Harvey. They cannot do so because their rights were constrained by inherent limitations in use, because their property rights are limited by the government's exercise of the police power during an emergency under Texas law. Simply put, Plaintiffs cannot show they have a protected property right under Texas law to avoid releases of water from existing dams.

The Flood Control Act, which Congress enacted both before the dams were constructed and before Plaintiffs acquired their real property, is likewise fatal to their claim. Plaintiffs do not possess a protected property right at odds with this unambiguous background principle, which provides that no liability "of any kind" shall be imposed "upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. For these reasons, Plaintiffs fail to state a claim for relief under the Fifth Amendment.

***1. Background Principles of Property Law Limit Cognizable Property Rights.***

The Constitution itself does not create or define property rights. Consequently, courts look to "background principles" derived from "an independent source such as state, federal, or common law" to determine whether a plaintiff has a cognizable property interest. *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)); *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972); *see also Ridge Line*, 346 F.3d at 1357 (assessing existence vel non of property interest according to West Virginia reasonable use law). Indeed, there is no taking if common law nuisance and property principles prohibit the desired land use or place an existing restriction on the property right claimed. *Lucas*, 505 U.S. at 1029.

### *2. Texas Law Recognizes No Right to Use and Enjoyment of Their Property Free From an Act of God.*

Texas law affords Plaintiffs no right to keep floodwaters from their properties, and no guarantee to the free use and enjoyment of their property during and after a Category 4 hurricane or "Act of God." *See Benavides v. Gonzalez*, 396 S.W.2d 512, 514 (Tex. App. 1965) (finding that "[u]nprecedented rainfall or Act of God is uniformly recognized" as a defense for allegedly unlawful diversions of water); *Ford Motor Co. v. Dallas Power & Light Co.*, 499 F.2d 400, 413 (5th Cir. 1974) (noting that a reservoir operator "did not create the flood" that caused the damage, and finding liability only for a failure to warn downstream owners). *Benavides* and other Texas authorities recognizing no liability based on flooding prompted by extreme precipitation or rainfall evidence no state recognition of their rights to keep property free from government-released floodwaters during and after a hurricane. *Id.*; *E.g. Sabine River Auth. of Texas v. Hughes*, 92 S.W.3d 640, 642 (Tex. App. 2002) (finding no intentional act of the government from extreme precipitation); *Wickham v. San Jacinto River Auth.*, 979 S.W.2d 876, 880-81 (Tex. App. 1998) (describing an allegation of flooding based on a rainfall event exceeding the 100-year frequency) (citing *DuPuy v. City of Waco*, 396 S.W.2d 103, 108-09 (Tex. 1965)). With respect to the alleged physical invasion, Plaintiffs suggest that their property was occupied by floodwaters only from August 28, 2017 to no later than September 9, 2017.[15] Compl. ¶¶ 6-46. Plaintiffs concede that over a five-day period, "approximately 50 inches of rain fell on Houston," that the Corps "feared it would lose its ability to control the water within the two reservoirs," and that there was a "risk [of] exceeding the reservoir system's capacity . . . ." Compl. ¶¶ 60, 62, 64. Plaintiffs must do more than assert the legal conclusion that they have a

[15] Plaintiffs allege various dates when floodwaters left the properties.

protected property right. They must show that the alleged property right has been recognized in circumstances similar to those presented here, a devastating natural disaster. *See e.g.*, *Severance v. Patterson*, 370 S.W.3d 705, 709-10 (Tex. 2012) (describing several limitations on property rights including the exercise of the police power). Plaintiffs cannot demonstrate a cognizable right to keep floodwaters from their properties given excessive record precipitation.

Plaintiffs also allege the Corps' release of Hurricane Harvey floodwaters constituted an interference with their rights to use and enjoy their property. Compl. ¶ 112. But, here again, Plaintiffs have no property right to free use and enjoyment of property during and after flooding prompted by a hurricane. This limitation on property rights is reflected in cases interpreting the Texas Constitution to recognize a taking only for a "physical appropriation or invasion," or "*unreasonable* interference with a landowner's right to use and enjoy the property." *Wickham*, 979 S.W.2d at 880 (emphasis added). The United States' alleged interference with a claimed right of use and enjoyment is only cognizable if unreasonable. *E.g. Strother v. City of Rockwall*, 358 S.W.3d 462, 472 (Tex. App. 2012). Plaintiffs do not plead, nor do the facts show that any interference with Plaintiffs' rights of enjoyment during a hurricane are unreasonable. Plaintiffs cannot show any protected property right in the free use and enjoyment of their property during a Category 4 hurricane and flooding that resulted therefrom. Absent such a cognizable property interest, Plaintiffs cannot state a viable claim for relief here.

### *3. Texas Law Recognizes No Property Right to Protect Property From Invasions Caused by Pre-Existing Dams and Operations Thereof.*

Even if Plaintiffs were able to demonstrate a property right in keeping their properties free from emergency flood releases necessitated by a catastrophic hurricane, they cannot show that such right exists for any landowner who acquired property after the construction of the dams in the 1940s. Plaintiffs have identified no such claimant and indeed allege acquisitions of

properties downstream of the dams as recently as 2017—nearly seventy years after the last dam was completed. Compl. ¶ 26. Plaintiffs do not allege that the Corps changed operational protocol such that dam releases during Hurricane Harvey were any different than procedure dictated when they acquired their land. Thus, their property rights are constrained by water rights of dominant pre-existing estates such as that of the United States.

Background principles of state law limit an owner's rights to claims involving new construction or a new pattern of government operations. *See, e.g. Hansen v. United States*, 65 Fed. Cl. 76, 123-24 (2005) (analyzing what water rights had vested under South Dakota law). In *City of Tyler v. Likes*, the Texas Supreme Court rejected a taking and nuisance claim finding that there was no governmental activity that had increased the amount of water in the watershed *after* the culvert system was installed, more than ten years before the plaintiffs had acquired their home. 962 S.W.2d 489, 505 (1997). By contrast, in *Brazos River Authority v. City of Graham*, the Court found a taking where the property at issue was constructed *before* the dam at issue. 354 S.W.2d 99, 104 (1961) (describing how the water disposal plan was constructed before the dam and lake came into existence), *holding modified by Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014) (finding no taking because no recurrent flooding). These authorities demonstrate that Plaintiffs cannot claim a taking based on the established operation of the dams, which long predate by decades the acquisition of their properties.

Plaintiffs also cannot base a claim on continued operation of the dams. A public entity's continued operation of a public program, or its alleged failure to implement corrective measures, does not encroach upon a protected property interest. *AN Collision Ctr. of Addison, Inc. v. Town of Addison*, 310 S.W.3d 191, 195-96 (Tex. App. 2010). Plaintiffs possess no right to be free

from invasions from the operation of projects whose construction and operations pre-dated the acquisition of their properties.[16] *See Thomas v. Bunch*, 41 S.W.2d 359, 361 (Tex. App. 1931), *aff'd*, 49 S.W.2d 421 (Tex. 1932) (holding that a landowner erecting a dam to protect land acquired a vested right to maintain dam as originally constructed); *see also City of Dallas v. Winans*, 262 S.W.2d 256, 258 (Tex. App. 1953) (finding no liability where municipality's operation had not changed, and noting that "if a cause of action ever existed, it was in favor of some remote predecessor in title, not appellee."); *Meuth v. City of Seguin*, No. 04–16–00183–CV, 2017 WL 603646 , at *3 (Tex. App. Feb. 15, 2017) (finding no liability where municipality continued to operate drainage culvert that was built prior to plaintiff's acquisition of property). Because Plaintiffs allege no new or changed operation of the dams after their acquisition, they possess no cognizable property right that could be taken under Texas law, and their claims should therefore be dismissed. *Cf. Brinston v. Koppers Indus., Inc*., 538 F. Supp. 2d 969, 977 (W.D. Tex. 2008) (rejecting permanent nuisance claim because the plaintiffs did not own the property when the alleged nuisance originally commenced).[17]

Other cases suggest that a new government action could, in theory, constitute a taking, but the use of an existing structure could not. *E.g. Strother*, 358 S.W.3d at 471 (noting the city had not "created any physical structure"). *But cf. Gainesville, H. & W.R. Co. v. Hall*, 14 S.W.

[16] The concept of a subsequent purchaser having no property right to be free from diversions from an existing structure is reflected also within the requirement that Plaintiffs demonstrate that their reasonable investment-backed expectations have been frustrated by the government activity. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38-39 (2012). Here, Plaintiffs do not allege any facts that the Corps has altered long established operations of the dams.

[17] Nuisance law typically provides instructive guidance on what property rights are recognized by state law because taking law was not intended to make the state liable in circumstances where a private owner would not be liable based on nuisance or other law. *See Gainesville, H. & W.R. Co. v. Hall*, 14 S.W. 259, 260 (Tex. 1890).

259, 261 (Tex. 1890) (awarding damages based on operation of a subsequently-constructed railroad). In the instant litigation, Plaintiffs allege injury and damage to their properties, the loss of the right to possession, and the loss of rights to use and enjoy their properties. Compl. ¶ 84. Other than these generally articulated rights, Plaintiffs allege no specific right to keep their properties free from emergency floodwater released upstream. Plaintiffs do not allege that Addicks and Barker were constructed after they acquired their properties. Nor do they allege that the Corps has somehow altered its operation plans after plaintiffs acquired their properties. Rather, all Plaintiffs appear to have purchased their properties, with constructive knowledge that they are downstream of a dam, so their property rights are inherently constrained by the pre-existing dam. The Corps' continued operation of the dams, did not, therefore interfere with any of Plaintiffs' cognizable property interests.

#### *4. The Flood Control Act Is a Longstanding Background Principle That Shapes Plaintiffs' Property Rights.*

Even apart from these principles of Texas law, which are independently sufficient to foreclose Plaintiffs' claims, Plaintiffs' property rights are further shaped by background principles established in the Flood Control Act. The Act addresses rights and expectations with respect to floods and floodwaters, and which predates both the dams and Plaintiffs' ownership of their property. The Flood Control Act is clear and unequivocal: "[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."[18] 33 U.S.C. § 702c. The plain language and longstanding existence of Section 702c

[18] The broad and seemingly unequivocal language of Section 702c raises the question whether the statute has withdrawn, in relevant respects, the waiver of sovereign immunity that underlies this Court's subject matter jurisdiction. *See United States v. James*, 478 U.S. 597, 606-08 (1986) (opining that Section 702c "clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control"), *abrogated by Cent. Green*, 531 U.S. 425 (2001). The Federal Circuit has found no "unambiguous evidence in

defeat Plaintiffs' claims. *Cf. B. Amusement Co. v. United States*, 148 Ct. Cl. 337, 342 (1960) (finding that even if the policy of non-liability in Section 702c is based on public policy and not sovereign immunity, it is at any rate a withdrawal of consent to be sued).

In circumstances where the federal government has long exercised dominant control in an industry, private property rights are frequently limited by government action or regulation. *See Air Pegasus, Inc. Co. v. United States*, 424 F.3d 1206, 1217-18 (Fed. Cir. 2005) (discussing public transit regulations and finding no property right in navigable airspace); *United States v. Twin City Power Co.*, 350 U.S. 222, 225-28 (1956) (holding that riparian landowners took their interest in a stream subject to the government's dominant navigational servitude). Furthermore, where the federal government's regulatory authority can change or restrict the scope of a claimed property right, no private property right exists. *E.g.*, *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004). The federal government has exercised authority in the area of flood risk reduction since the nineteenth century. *See* Rivers and Harbor Act of 1888, codified at 33 U.S.C. § 601. This long-standing exercise of federal authority shapes what property rights are cognizable.

The Flood Control Act was enacted in 1928. *Nat'l Mfg. Co. v. United States*, 210 F.2d 263, 270 (1954). It had been in place nearly twenty years before the Addicks and Barker dams were complete. The dams were constructed pursuant to Flood Control Act authority and against

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the text or legislative history of § 702c that Congress had withdrawn the Tucker Act grant of jurisdiction." *California v. United States*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984)); *see also id.* (finding the legislative history discussed in *James* to be "an insufficient basis . . . upon which to presume an implied partial repeal of the Tucker Act"). *But see Horne v. Dep't of Agric.*, 569 U.S. 513, 527 (2013) (enunciating a different approach for "determin[ing] whether a statutory scheme displaces Tucker Act jurisdiction"). The United States does not seek dismissal of Plaintiffs' claims on this ground at this time. We identify the issue because it goes to this Court's subject matter jurisdiction.

the backdrop of Section 702c.[19] It was another thirty years (or more) before, according to the Complaint, Plaintiffs acquired their property. *See* Compl. ¶¶ 6-46. They did so against the backdrop of public facilities that had at that time been operated for generations, providing both benefits and burdens to the local community, and against the backdrop of an unequivocal provision that barred the recovery of damages relating to floods and floodwaters.[20] In other words, Section 702c constitutes an established background principle that has been in place for nearly 100 years.

Plaintiffs do not allege that the Addicks and Barker dams were constructed after they acquired their properties. Nor do they allege that after acquisition of their properties the Corps altered its operations to their detriment. Instead, Plaintiffs seek compensation for damages resulting from the floods or floodwaters of Hurricane Harvey. *See* Compl. ¶¶ 71-75. The character of the waters that allegedly caused the claimed damage and the purposes behind their release are determinative. *Cent. Green v. United States,* 531 U.S. 425, 436 (2001). A release of water from a flood control project that has reached flood stage, or of waters that such project cannot control, during a catastrophic storm are without question floodwaters within the meaning of the Flood Control Act. *See id.* at 436-37. And because Section 702c constitutes a background principle, it also acts as a bar to liability. Plaintiffs' claims should therefore be dismissed.

[19] The Addicks and Barker dams were authorized under the Rivers and Harbors Act of 1938, which resulted from the 1936 Flood Control Act, and which retained the immunity provision of the 1928 Flood Control Act. Pub. L. No. 75-685, 52 Stat. 802 (1938)

[20] The Corps alone is responsible for the operation of over 500 dam projects authorized by various Flood Control Acts and other statutes, including more than 300 of which that have flood-control as one of the authorized purposes. 33 C.F.R. § 222.5 App. E. Other government agencies operate additional federal projects, some of which have flood-control purposes as well.

C. Plaintiffs' Alleged Government Action, Taken as a Whole, Does Not Effect a Taking.

Plaintiffs' alleged government action, as described in the Complaint and accepted as true, does not constitute a taking. Plaintiffs claim that "[a]s a direct, natural, and probable result of the Corps' intentional decisions and conduct described above, water physically invaded Plaintiffs' real and personal property." Compl. ¶ 105. Plaintiffs focus on the Corps' response to unexpected rise of storm water in the reservoirs, claiming that the Corps took their property when it opened the Addicks and Barker floodgates on August 27, 2017, Compl. ¶¶ 65-66, 105-106. But Plaintiffs readily concede that the Corps could not have opened the gates had it not closed them two days earlier. *Id.* ¶ 59. The opening of the floodgates was not a discrete action; it was inextricably linked with the Corps' overall storm response to *minimize* downstream flooding by first closing the floodgates. Had the Corps done nothing, the floodgates would have remained open throughout the entire storm.

Plaintiffs improperly segregate the Corps' August 27, 2017 re-opening of the floodgates from the Corps' closure of the floodgates two days prior; these two actions were part of one integrated response to Hurricane Harvey. Because the Corps could not have released water had it not earlier closed the floodgates, the two acts must be viewed in tandem. Plaintiffs cannot "cherry-pick" government action, isolating the act complained of from the entirety of the government course of conduct. *See Cary v. United States*, 552 F.3d 1373, 1377 n.* (Fed. Cir. 2009) (criticizing landowners for cherry-picking the parts of the Forest Service's fire policy that allegedly harmed them, with no acknowledgment that much of the Forest Service policy reduced their risk of wildfire); *see also John B. Hardwicke Co. v. United States*, 467 F.2d 488, 491 (Ct. Cl. 1972) (plaintiffs could not have "reasonably supposed that [their land] could benefit from the

impoundment of water at [the primary dam in question], yet be free of the disadvantages that might arise from the diversion dam, when built and in use.").

The government action Plaintiffs have conclusory asserted does not correspond with the factual allegations that they have alleged and should not be accorded deference. *Iqbal*, 556 U.S. at 678. The Court is obligated to accept only factual allegations as true. Applying this rubric, it becomes apparent that the government action at issue is the United States' storm response, which includes both the Corps' closing and opening of the floodgates. Thus, Plaintiffs have failed to plead facts sufficient to allege an appropriately-defined government action was the "but-for" cause of the flooding of their properties.[21] Plaintiffs are located immediately downstream of the dams and acknowledge that some of their homes are within the designated 100-year or 500-year floodplain. Compl. ¶¶ 6-46, 83. Plaintiffs have not alleged that, had the Corps done nothing and left the gates open on August 25, 2017, that their property would not have flooded. Indeed, it is highly likely that Plaintiffs' properties would have flooded had the Corps done nothing. Because Plaintiffs fail to incorporate all of the government action and do not allege that flooding was either more severe or only occurred because of the government action, they cannot state a claim.

D. Plaintiffs' Claim That the United States Has Taken Unidentified "Other Property Interests" Is Legally Deficient.

For a complaint to state a valid claim under this Court's Rules, a plaintiff must include "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2). Moreover, for a Fifth Amendment taking claim, a plaintiff must plead with particularity

[21] The Court of Federal Claims has acknowledged that plaintiffs' burden under the *Ridge Line* "direct, natural, or probable result" requirement, *Ridge Line*, 346 F.3d at 1355, exceeds the threshold of demonstrating traditional but-for causation. In *Moden v. United States*, the Court adopted the position advocated by the government, which it described thus: "Simplified somewhat, the government's interpretation requires that the injury was the likely result of the act, whereas the Modens' interpretation requires only that the act was the likely cause of the injury." *Moden*, 404 F.3d 1335, 1343 (Fed. Cir. 2005).

the "specific property interest" allegedly taken by the United States. *See* RCFC 9(i). This pleading requirement applies equally to alleged takings of real, personal, intangible, or other property. The failure to meet these pleading requirements is grounds for dismissal. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. . .").

Here, Plaintiffs offer general allegations about the purported taking of unspecified property, without identifying the specific property purportedly taken. Paragraph 103 of the Complaint states generally that "[p]laintiffs have legally cognizable property interests in the real and personal property located at their residences, businesses, and other properties located near or downstream from the Addicks and Barker Reservoirs." However, paragraphs 6 through 46, which set forth the claims of each individual Plaintiff, identify no specific personal or other property that the Plaintiff alleges to have been taken by the United States. *Id.* ¶¶ 6-46. A catchall allegation in paragraph 69 mentions only "belongings." *Id.* ¶ 69. Rule 9(i) does not allow a plaintiff to seek compensation for a taking without specifically identifying the property and property interest allegedly taken. The identification of particular property is essential because each property interest purportedly taken—real, personal or otherwise—must be analyzed independently and just compensation is available only for the fair market value of a taking of property that is pled and proved, not for consequential damages. *Indep. Park Apartments v. United States*, 465 F.3d 1308, 1311 (Fed. Cir. 2006) (citations omitted).

Plaintiffs had the opportunity to cure these deficiencies after the United States explicitly identified them in its Motion for More Definite Statement, but Plaintiffs chose to reassert vague and legally insufficient allegations. Plaintiffs' failure to identify the specific personal property of

each Plaintiff violates RCFC 9(i) and prevents the United States from reasonably preparing a response and developing its defenses. The Court should dismiss Plaintiffs' claims for the taking of unidentified "personal property" for failure to state a claim upon which relief can be granted.

## II. Plaintiffs' Claims Should Be Dismissed For Lack of Subject Matter Jurisdiction Because The Flooding Here Is at Most a Tort; It Is Not a Compensable Taking.

### A. Plaintiffs Have the Burden To Prove Treatment as a Taking Is Appropriate Based on Facts Alleged.

The plaintiff in an inverse condemnation action bears the burden of pleading and proving the facts that ultimately bear on jurisdiction. *Ridge Line*, 346 F.3d at 1355. This means that, among other things, the plaintiff "must establish that treatment under takings law, as opposed to tort law, is appropriate under the circumstances." *Id.* at 1355 (citation omitted); *Acceptance*, 583 F.3d at 855. It is well-established that "not every 'invasion' of private property resulting from government activity amounts to an appropriation," and "[o]nly under limited circumstances may the property-owner be compensated for a taking." *Ridge Line*, 346 F.3d at 1355; *Nicholson*, 77 Fed. Cl. at 616 (citation omitted). Whether a claim is a tort or a taking "requires consideration" of the government's action and whether that action was "sufficiently substantial to justify a takings remedy." *Ridge Line*, 346 F.3d at 1355. The plaintiff must show either that the government intended to take its property or that such an intent can fairly be deemed to exist because a taking is the "direct, natural, or probable result" of the government action. *Id.* (quoting *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955)). The interference must also be "substantial and frequent enough to rise to the level of a taking." *Id.* at 1357 (citation omitted). This tort-taking distinction is a threshold question because tort claims are not within the Court's jurisdiction. *Id.* at 1355; 28 U.S.C. § 1491(a)(1).

Relatedly, long-standing precedent requires that the plaintiff establish that the government act that allegedly caused the taking was lawful and authorized, and either

"appropriate[d] a benefit to the government at the expense of the property owner, or at least preempt[ed] the owners[']' right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value." *Ridge Line*, 346 F.3d at 1356 (citation omitted).

Plaintiffs' claims should be dismissed because they have neither pled sufficient facts, nor can they prove, that their claims should be treated as takings, rather than torts. Plaintiffs offer only cursory and speculative allegations about the supposed permanence of the alleged taking. *See e.g.* Compl. ¶¶ 88, 117 (alleging that "future flooding will be more likely[,]" and that the Corps hasn't eliminated "the risk of future flooding.") Plaintiffs acknowledge that Hurricane Harvey was an extraordinary storm. Floodwaters receded soon after the hurricane ended. Plaintiffs do not allege that the Corps' operation of the Addicks and Barker dams flooded their properties before or since the hurricane. Put simply, according to their own allegations, flooding has not been permanent, frequent, recurrent, or even likely to recur in the future. Plaintiffs have not even adequately pled facts to show the government—as opposed to the hurricane—either caused the flooding in question, or that an identified government action set in motion a chain of events of which the flooding was a natural consequence. *Cf. Nicholson*, 77 Fed. Cl. at 618 (finding that Hurricane Katrina, not the installation of floodwalls, caused flooding); *Bartz v. United States*, 633 F.2d 571, 593 (Ct. Cl. 1980) (finding that "excessive precipitation," not dam releases caused flooding).

Moreover, a one-time hurricane-induced flood stemming from a 1000-year storm—rather than "government-induced" flooding from routine operations—is not "substantial and frequent enough to rise to the level of a taking." *Ridge Line*, 346 F.3d at 1357 (citation omitted). Numerous cases establish that even infrequently-recurring floods, let alone one-time floods, do

not constitute a taking.[22] This case is fundamentally distinguishable, even at the pleadings stage, from *Arkansas Game & Fish*. In that case, the flooding resulted from the routine operation of a government dam under "normal" circumstances not during an emergency resulting from a hurricane and an historic rain event. And the flooding, while temporary, recurred each year for several years. 568 U.S. 23. Here, Plaintiffs fail to plead facts plausibly establishing the severe and frequent invasion of a protected property right necessary to state a taking claim under controlling legal authority, including *Arkansas Game & Fish*. Plaintiffs' claims arise, if at all, in tort. Consequently, their claims should be dismissed.

B. Plaintiffs' Conclusory Allegations Are Not Entitled to a Presumption of Correctness.

Plaintiffs' conclusory allegations do not enjoy a presumption of correctness. Even at the motion to dismiss stage, Plaintiffs bear the burden of "alleg[ing] facts sufficient to establish the court's subject matter jurisdiction."[23] *The George Family Trust ex rel. George v. United States*, 91 Fed. Cl. 177, 189 (2009) (citing *Renne v. Geary*, 501 U.S. 312, 316 (1991)) (granting motion to dismiss in part and denying it in part, in government-induced flooding case). "Once the court's subject matter jurisdiction is [called] into question, . . . [the plaintiff] bears the

[22] Texas cases establish that, although recurrence is not an absolute requirement to prove a taking, "recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur." *City of El Paso v. Mazie's L.P.*, 408 S.W.3d 13, 24 (Tex. App. 2012) (quoting *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W. 3d 546, 555 (Tex. 2004)).

[23] The Federal Circuit has treated a motion to dismiss a flooding-related takings case based on the tort-taking distinction as a motion for failure to state a claim under RCFC 12(b)(6), converted to a motion for summary judgment under RCFC 56, rather than a dismissal for lack of subject matter jurisdiction under RCFC 12(b)(1). *See Moden*, 404 F.3d at 1339-42. However described, the *Ridge Line* elements clearly are subject to the pleading requirements of *Iqbal* and *Twombly*. *See George Family Trust*, 91 Fed. Cl. at 201 (citing *Iqbal*, 556 U.S. 662 and *Twombly*, 550 U.S. 544).

burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Id.* (additional citations omitted). When a motion to dismiss "controverts the plaintiff's jurisdictional allegations and challenges the factual basis of the court's jurisdiction, the plaintiff must demonstrate facts sufficient to support jurisdiction," and the Court is not limited to considering the allegations of the complaint. *Id.* at 190 (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993)).

Plaintiffs' master complaint fails to allege facts that, if proven, would demonstrate that the government caused flooding other than during Hurricane Harvey itself, and their bare recitation of various legal conclusions is insufficient to meet their burden to establish jurisdiction. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679.

Here, Plaintiffs' bare allegations that the United States has a "commitment to the intermittent, but recurring, flooding of Plaintiffs' properties should flood events that necessitate the reservoirs' release occur again" or that "[e]ach time an extreme flood event occurs . . . the downstream properties will again be flooded"," *see* Compl. ¶¶ 117, are not entitled to a presumption of truth and are legally insufficient. These very allegations acknowledge that the true catalyst for any hypothesized future flooding would be an "extreme flood event" or "flood events that *necessitate* the reservoirs' release." Compl. ¶ 117 (emphasis added). Plaintiffs' allegations, taken as true, still require a natural disaster-induced floods, for any government

action to cause of damage to downstream properties. And Plaintiffs do not allege, much less plead facts that plausibly establish, the supposed frequency of hypothetical future flooding. Plaintiffs offer no more than the allegation that floods occurred when Texas was struck by an extraordinary 1000-year storm. Similarly, the conclusory allegation that "the Corps' decisions have also altered the course of Buffalo Bayou in such a manner that future flooding will be more likely in areas not previously subject to flooding," Compl. ¶ 87, is insufficient. There is no factual basis or reasonable inference that the 2017 action complained of by Plaintiffs—the opening of the Addicks and Barker floodgates—alters the course of Buffalo Bayou.

C. Plaintiffs' Allegations Are Insufficient to Establish a Taking, Rather Than a Tort.

Although *Arkansas Game & Fish* addressed the legal standards applicable where a plaintiff alleges a temporary, but recurring, physical taking, it did not disrupt the general *Ridge Line* test, and cited the decision approvingly. *Ark. Game & Fish*, 568 U.S. at 38. As the Supreme Court explained, it ruled, "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id.* The Court thus rejected a per se rule that a flood must be permanent or inevitably recurring for it to constitute a taking, and made clear that a taking could potentially be shown when "government-induced flood invasions, although repetitive, are temporary."[24] *Id.* at 26.

The tort-taking test in *Ridge Line* has two parts, both of which must be satisfied to demonstrate the Court has jurisdiction over a taking claim, and that the allegations do not instead sound in tort. A taking cannot occur through negligence or inadvertence. Consequently, under

[24] Significantly, the "government-induced flood invasions" in *Arkansas Game & Fish* resulted from purposeful releases from the dam where the Corps deviated from the existing operations manual, made recurrent and repeated over many years, and where the releases were scheduled and intentional. *Id.* The one-time flooding here was none of these things; the government acted in an emergency created by a hurricane, and Plaintiffs do not allege facts plausibly establishing when, if ever, flooding of their property will occur again.

*Ridge Line*'s first part, a plaintiff must establish that the government's action intended to invade and take a property interest or that the taking of property was so certain in the ordinary course that such intent should be deemed to exist. 346 F.3d at 1355-56. Additionally, under *Ridge Line*'s second part, a plaintiff must allege facts plausibly establishing that "the government's actions were sufficiently substantial to justify a takings remedy." *Id.* Both the "nature and magnitude of the government action must be considered." *Id. at* 1356. Importantly, the "government's interference with any property rights . . ." must be "substantial and frequent enough to rise to the level of a taking." *Id.* at 1357 (citation omitted). A single storm-induced flood is an "isolated invasion," and even "one or two floods" are unlikely to meet the standard of "substantial and frequent." *Id.* Isolated invasions contrast with "repeated invasions of the same type [that] have often been held to result in an involuntary servitude." *Id.* (quoting *Eyherabide v. United States*, 345 F.2d 565, 569 (Ct. Cl. 1965)). *See also Fromme v. United States*, 412 F.2d 1192, 1197 (Ct. Cl. 1969) (holding that a taking could not be found where flooding of land could "reasonably be expected to recur… once in every 15 years, on the average"); *N. Ctys. Hydro-Elect. Co. v. United States*, 151 F. Supp. 322, 323 (Ct. Cl. 1957) ("[t]wo floodings, one ten years after the pool behind the dam was completely full, and the other nineteen years after, do not constitute a taking…"); *accord Ark. Game & Fish*, 568 U.S. at 39 ("[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].") (quoting *Portsmouth Harbor*, 260 U.S. at 329-330 (finding that government acts occurring periodically over a period of decades may not be a taking, but instead "occasional torts" and remanding the case for consideration of that question)).

Plaintiffs likewise fail to plead facts sufficient to establish that any flooding has been recurrent or repeated. Only a handful of Plaintiffs allege prior-flooding on their properties, *see*

Compl. ¶¶ 6, 9, 34, 43, 83 (concerning only four of the properties), but, notably, Plaintiffs do *not* allege that any such previous flooding was in any way caused or connected to the Addicks and Barker reservoirs or to government action. Plaintiffs' unsupported and speculative allegation that Corps decisions have "altered the course of Buffalo Bayou in such a manner that future flooding will be more likely" and that the United States has "shown a commitment to the intermittent, but recurring, flooding of Plaintiffs' properties" is refuted by their own allegations, which identify no other instance in roughly 70 years of dam operation—a period during which other tropical storms and hurricanes hit the area—when flooding of their property could be attributable to the government.[25] Compl. ¶¶ 88, 117. It is also refuted by Plaintiffs' own concession that such flooding may only occur "should flood events . . . necessitate the reservoirs' release." *Id.* at ¶ 117. Neither the "apprehension of future flooding" nor the concern that some future government action may make flooding more likely suffice to state a taking claim. *Sponenbarger*, 308 U.S. at 267; *Danforth v. United States*, 308 US. 271, 286 (1939); *Stueve Bros. Farms, LLC v. United States*, 105 Fed. Cl. 760, 767–68 (2012), *aff'd*, 737 F.3d 750 (Fed. Cir. 2013) (finding that mere "apprehension of future flooding" does not impose a taking in the form of a flowage easement). Plaintiffs are unable to show that flooding is likely to recur because it was caused by an unpredictable and unforeseeable natural disaster, rather than as a result of purposeful government activity. The one-time flooding here as the result of an unprecedented hurricane is insufficient to state a taking claim under *Ridge Line*. *See, e.g.*

[25] Plaintiffs do not specify whether the Corps decisions they allege "altered the course of Buffalo Bayou" were the same actions—opening the gates—that they allege caused the flooding during Hurricane Harvey. Compl. ¶¶ 81, 87, 88. To the extent any of Plaintiffs' allegations are based on other unspecified Corps actions pursuant to the Buffalo Bayou and Tributaries Project that followed dam construction, such allegations took place decades ago and are barred by the six year statute of limitations applicable to claims under the Fifth Amendment. 28 U.S.C. § 2501.

*Nicholson*, 77 Fed. Cl. at 618 (rejecting taking claim based on Hurricane Katrina after rejecting the notion that the flooding was a "condition initially set in motion by the" government action as opposed to the hurricane).

## CONCLUSION

For these reasons, pursuant to RCFC 12(b)(1) and 12(b)(6), the United States respectfully requests that the Court dismiss the actions in the downstream sub-master docket.

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