IN THE UNITED STATES COURT OF FEDERAL CLAIMS

IN RE UPSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS	)	Sub-Master Docket No. 17-cv-9001L
	)	Judge Charles F. Lettow
THIS DOCUMENT RELATES TO:	)	
ALL UPSTREAM CASES	)	

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

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INTRODUCTION

Hurricane Harvey was an extraordinary 1000-year storm for which the federal government has expended billions via Congressionally-appropriated hurricane relief.[1] Plaintiffs do not contend that any government actions could have extended flood protection to all citizens of the Greater Houston area. This means Plaintiffs must rest their claim either on government inaction, which is non-compensable under taking jurisprudence, or concede that Harvey's floodwaters inevitably affected private property belonging to Plaintiffs and others and, moreover, that only no-win choices about how to attempt to mitigate private losses were available to the U.S. Army Corps of Engineers (the "Corps"). This is far from the situation where a "classic taking" arises.

The United States did not "impound water" on private property for a public purpose such as power generation, irrigation, navigation, water supply, or recreation, as was the situation in the cases Plaintiffs rely on, but instead addressed an emergency where so much rain fell that the flooding of private property was inevitable. It was Hurricane Harvey—not the United States—that set in motion the events that caused the flooding about which Plaintiffs complain. Plaintiffs cannot state a taking claim merely by alleging that the United States should have bought some unspecified amount of land decades ago in order to contain this historic storm, which at bottom is all Plaintiffs contend in this action. Nor are Plaintiffs entitled to Fifth Amendment

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[1] Plaintiffs do not dispute the information in our opening brief about the aid the United States has provided to Plaintiffs and others in Texas who were impacted by Hurricane Harvey. *See* USA's Mot. to Dismiss for Lack of Jurisdiction & for Failure to State a Claim Upon Which Relief Can be Granted2-3, ECF No. 59 ("USA's Mot. to Dismiss"). Since January, the Small Business Administration has approved and funded more aid.

compensation for damages they believe could have been avoided had the Corps designed a different project or made different operational choices during Hurricane Harvey, because such claims would be classic tort allegations of negligence for which this Court lacks jurisdiction. And not surprisingly, Plaintiffs identify no final judicial decision in which the United States has been held responsible under the Fifth Amendment for damages from a hurricane or similar Act of God.

Evincing an ambiguity as to whether the government action they are contesting is the 1940s construction of the dams or the operation of that project during the 2017 flood, Plaintiffs attempt, unsuccessfully, to re-characterize legal defenses that bar their claims. The government action that Plaintiffs allege actually invaded their properties is the Corps' attempt to limit the damage to private property from Harvey's floodwaters. Actions of such character are a classic exercise of police power and imbue no liability under longstanding Supreme Court precedent. *See, e.g., Miller v. Schoene*, 276 U.S. 272 (1928).

Nor can the Court properly find a taking simply because federal projects were unable to cope with the full volume of floodwaters resulting from Hurricane Harvey's unprecedented rainfall. Plaintiffs have no protected property interest under either Texas or federal law in keeping their properties free of diversions or emergency retentions from pre-existing structures such as the Addicks and Barker dams. Indeed, the police power and the Flood Control Act of 1928 provide inherent constraints on Plaintiffs' real property rights and establish the background principle that the United States does not take on the role of insurer merely by engaging in flood control activity. To conclude otherwise would be to endow Plaintiffs with a property right to perfect flood control and to oblige the federal government to serve as guarantor of that right. No court has recognized the former, and Congress has expressly disclaimed the latter.

Plaintiffs' endeavor to characterize allegations sounding in tort law as takings are equally unsound. Plaintiffs attempt to distract from the elements in *Ridge Line*, upheld in numerous cases since, by addressing fact-specific considerations discussed in *Arkansas Game & Fish* that may bear on the ultimate question of liability.[2] At this pleadings stage, Plaintiffs must plausibly allege as a threshold matter (1) that they possessed a protected property interest, (2) that the flood at issue was the direct, natural, or probable result of Government action, and (3) that the flooding was "substantial and frequent enough to rise to the level of a taking." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356-57 (Fed. Cir. 2003). While *Arkansas Game & Fish Comm'n v. United States* clarified that claims alleging government-induced, recurring flooding are not automatically exempt from takings analysis, 568 U.S. 23, 38 (2012), it did not relieve claimants from the requirement to plausibly allege these threshold elements from *Ridge Line*, which Plaintiffs have failed to do. Rather, here, Plaintiffs allege only one instance of flooding during the 70-year life of the Addicks and Barker projects, which itself occurred during an unprecedented, 1000-year storm event. Plaintiffs have therefore failed to state a claim.

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[2] Although Plaintiffs attempt to litigate in this motion to dismiss many of the factors the Court must ultimately consider with respect to liability, the United States has raised only those that the Court can and should decide at this juncture of the case without the benefit of any factual findings. The United States has therefore not asked the Court to consider in the context of this motion to dismiss many of the factual questions relevant to liability that the Supreme Court articulated in *Arkansas Game & Fish*. The Court should decline Plaintiffs' invitation to engage in premature fact-finding. Furthermore, though the United States disagrees with many of the assertions of fact Plaintiffs set forth in their response brief, none of those facts are pertinent to the resolution of the instant motion. The United States disputes many of the alleged facts and characterizations, including but not limited to Plaintiffs' assertions that: policies required the Corps to purchase more land than it did for construction of the project; the intent of the dams is to store water on private lands; or Hurricane Harvey was anticipated. Pls.' Opp'n to USA's Mot. to Dismiss 6-8, ECF No. 99 ("Pls.' Br."). The United States does not detail every dispute it has with Sections I-III because the content of these Sections is unnecessary to the resolution of this motion.

ARGUMENT

I. Efforts to Ameliorate Flooding And Damage to Private Property During A Hurricane Emergency Do Not Constitute A Taking.

A. The Police Powers Doctrine Applies Here.

Plaintiffs shy away from focusing their allegations on the Corps' operation of the Addicks and Barker dams during the emergency presented by Hurricane Harvey because doing so reveals why their claims fail. The dams' operation during the hurricane, and the heroic work of Corps employees in the midst of the storm, were focused on protecting lives and, secondarily, private property. This is a core governmental police power and courts have rightly held that governments are not liable for damages that occur when they act to prevent even greater damage. Plaintiffs cite no authority suggesting that established police power jurisprudence does not apply, relying instead on cases that address far different scenarios rather that do not concern emergency flood control or a hurricane—an unprecedented scenario for which no appellate court has found a taking.

Plaintiffs simply disregard as irrelevant the long line of cases finding no taking in the context of the United States' exercise of its police powers. They argue that the government action they are challenging, "the building of the Addicks and Barker dams . . . was hardly a measure taken 'during the emergency of a hurricane.'" Pls.' Br. 12. However, as explained below, any claim predicated on the construction of the Addicks and Barker dams in the 1940s is time-barred. The proper focus for the Court is on the operation of the dams in the midst of Hurricane Harvey. Master Am. Compl. for Upstream Pls. ¶ 73, ECF No. 18 ("Pls.' Am. Compl.").

The Texas Supreme Court has defined the exercise of police power as "a grant of authority from the people to their governmental agents for the protection of the health, the safety,

the comfort and the welfare of the public. In its nature it is broad and comprehensive." *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921). It requires no immediate exigency. Furthermore, it is clear that the exercise of police powers resulting in mere diminution of property value does not constitute a taking, particularly when the damage is common or public. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922).[3] But whatever the outer dimensions of the police power, the protection of life or property by government during an emergency are plainly at its heart. *See, e.g., Miller v. Schoene*, 276 U.S. 272 (1928) (diseased plants); *TrinCo. Inv. Co. v. United States*, 722 F.3d 1375 (Fed. Cir. 2013) (a forest fire), *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85 (1969) (a rioting mob); *Bowditch v. City of Boston*, 101 U.S. 16 (1879) (an urban conflagration); *Bachmann v. United States*, 134 Fed. Cl. 694 (2017) (criminal mischief).

Congress authorized the Corps to design and build the Addicks and Barker Dams to prevent the loss of life, property and commerce that resulted from storms in 1927 and 1935. Pls.' Am. Compl. ¶¶ 26-27. The Addicks and Barker dams have operated for decades and annually prevent millions of dollars in property damage from the sort of storms common to the Houston area. *Id.* ¶ 5. And Plaintiffs' properties have never before flooded.

Plaintiffs mischaracterize the United States' argument as sweeping in "any structure with a public-safety purpose, be it a dam, a road, or a police station" and then proceed to find no case to support "this far-reaching exemption" to the Fifth Amendment. Pls.' Br. 15. The United States has not argued that there exists a broad "health and safety" exception to the Fifth

[3] Texas law similarly recognizes no valid claim for injuries to property where the damage claimed is common, such as that Plaintiffs allege here. *See Felts v. Harris Cty.*, 915 S.W.2d 482, 484 (Tex. 1996); *Aaron v. Port of Houston Auth. of Harris Cty.*, No. 01-12-00640-CV, 2013 WL 4779716, at *3 (Tex. App. Sept. 5, 2013).

Amendment. *Id.* But Plaintiffs fail to come to terms with the fact that in numerous contexts, government efforts to protect the public from imminent harm do not constitute a taking.

The Supreme Court decision in *Miller v. Schoene* parallels this action in important respects. 276 U.S. 272. The decision concerned an alleged physical taking; that is, the destruction of "a large number of ornamental red cedar trees" by order of the Virginia State entomologist. *Id.* at 277. The Cedar Rust Act of Virginia declared it unlawful to have red cedar trees with cedar rust, a heteroecious fungus,[4] within a two-mile radius of any apple orchard. The Act did not call for the wholesale annihilation of red cedars, but authorized the State entomologist to order the destruction of cedars "upon the request in writing of ten or more reputable freeholders . . . ." *Id.* at 277-78 (citation omitted).

The initial action in *Miller*—passage of the Cedar Rust Act—left the owners of red cedars at risk that their trees would need to be cut down and destroyed. When destruction of plaintiff's trees was ordered by the State entomologist, and plaintiff sued, the Supreme Court held that the state-ordered destruction of private property (pursuant to the State's police power) did not result in a taking:

> It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

Id. at 279-80 (citations omitted).

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[4] A heteroecious fungus spends part of its life cycle on one plant and the rest on a completely unrelated plant. Cedar rust travels from red cedar to apple trees and back again.

Plaintiffs' attempt to distinguish *Miller* as applying only to the "'use of its 'police powers' to enjoin a property owner from activities akin to public nuisances'" is unavailing. Pls.' Br. 16 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022 (1992)). "For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process." *Miller*, 276 U.S. at 280. When Hurricane Harvey struck, the Corps was faced with a no-win situation where some private landowners would necessarily be affected by floodwaters. And as in *Miller*, the government's action in the exercise of its police powers is not a taking. *See also Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (noting, in a physical taking case, that a "loss due to an exercise of the police power is properly treated as part of the burden of common citizenship"); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 509-10 (1923) (noting that the Fifth Amendment taking clause refers "only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power," and that if property is merely "injured or destroyed by lawful action, without a taking, the government is not liable").[5]

B. The Corps' Actions During Hurricane Harvey Constituted a Non-Compensable Exercise of the Police Power

The cases Plaintiffs rely on where a taking was found present far different factual scenarios involving creations of man-made lakes or redirections of watercourses, and are wholly inapplicable to this scenario where the dams are only used during excessive rain events to minimize flooding. Plaintiffs first argue that their properties were taken by dam construction

[5] Texas authorities embrace a similar principle in recognizing that injuries from public works that are common to the community require no compensation. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647-48 (Tex. 2004); *Felts v. Harris Cty.*, 915 S.W.2d 482, 485 (Tex. 1996).

seventy years ago. To make their legal argument in this factual scenario appear "straightforward," or comparable to inapposite authorities, Plaintiffs repeatedly refer to Addicks and Barker as "reservoirs" and cite cases in which the court found a taking "where real estate is actually invaded by superinduced additions of water . . . so as to effectively destroy or impair its usefulness" as the result of dams placed on streams that created or altered permanent water bodies.[6] *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 181 (1871) (finding a taking where a dam built on the Fox River allowed for the construction of a mill that resulted in raising the level of Lake Winnebago and overflowing 640 acres of private property). *See also United States v. Cress*, 243 U.S. 316, 330-31 (1917) (finding a taking where a lock and dams built on the Kentucky and Cumberland Rivers raised pool levels to aid navigation, but also subjected 6.6 acres to frequent overflows, destroyed ford across stream, and made mill on tributary inoperable); *Dickinson v. United States*, 331 U.S. 745, 751 (1947) (finding a taking where construction of a lock and dam raised the Kanawha River's pool level to improve navigation, but also inundated portion of land and causing erosion over additional acreage); *Stockton v. United States*, 214 Ct. Cl. 506, 515 (1977) (finding a taking where a dam built on the Canadian River to improve navigation, add electric power, control flooding and creating the Eufaula Reservoir in Oklahoma, also eroded embankment that damaged home). But unlike public works created for

[6] Addicks and Barker are not "reservoirs" in the common definition of that term. *See* www.Merriam-Webster.com (defining reservoir as "a place where something is kept in store: such as (a) an artificial lake where water is collected and kept in quantity for use") (last visited Apr. 11, 2018). In contrast, Addicks and Barker do not store or alter the flow of Buffalo Bayou in any way, except temporarily when its flow increases due to heavy rains and runoff. Thus, Addicks and Barker are "reservoirs" only in the sense that they temporarily store excess rainfall and runoff that may threaten downtown Houston. While temporary storage of some waters does recur, impoundment of waters to the extent that occurred during Hurricane Harvey was unprecedented, just as Hurricane Harvey itself was a record-breaking 1000-year storm event.

power generation, irrigation, navigation, or recreation, the Addicks and Barker dams were not designed to store water; their function is akin to a levee that provides flood-control benefits only when there is excess precipitation. Their "reservoirs" are ordinarily dry. Plaintiffs' analogy of the government action here to purposeful long-term processes or plans intended to permanently or repeatedly impound water is not sound. Plaintiffs offer no authority for the proposition that property riverward (or upstream) of a levee is taken either upon levee construction or during a flood the government does not cause.[7] Plaintiffs allege only that floodwaters occupied their land during Hurricane Harvey's extraordinary 1000-year flood, so a comparison to cases concerning construction of water-storage reservoirs is inapt.

As is often quoted, "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Cress*, 243 U.S. at 328. "Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment." *Id.* (quoting *United States v. Lynah*, 188 U.S. 445, 470 (1903) (finding taking where dams, and other improvements made to the Savannah River to aid navigation, raised river level by 18 inches and turned a valuable rice plantation into an "irreclaimable bog"), *overruled in part by United States v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592 (1941)). The "character of the invasion" caused by the construction of the Addicks and Barker Dams in the 1940s was non-existent. No reservoirs were filled upon construction of the dams. Plaintiffs rely instead on the hypothetical possibility of intermittent

[7] The more analogous situation to Plaintiffs' claims would be where a landowner buys property riverward of an existing levee, then cries foul when the levee does exactly what it was intended to do during extreme precipitation events.

flooding in an extraordinary event, a possibility that decreases based on topography and distance from the dams, but presumably extends to the entire Addicks and Barker watersheds. This allegation of a taking based on an increased risk of higher water levels during potential floods in the future has no authority in takings law.[8] Finding a taking in this instance would be unprecedented and could subject the United States to untold liability whenever flood-control structures are unable to contain floodwaters.

Plaintiffs compound their error by seeking to premise takings liability on hurricane-induced flooding that was, according to their own allegations, predictable when they purchased their properties. Plaintiffs concede that "the dams were in place before plaintiffs acquired their property." Pls.' Br. 22. And they assert that the flooding they experienced during Hurricane Harvey "was a predictable (and oft-predicted) consequence of the dams themselves," *Id.* at 1. Thus, even if hurricane-induced flooding could ever be deemed a Fifth Amendment taking, Plaintiffs' own allegations shows that they had no reasonable investment-backed expectations that their properties would not flood during a catastrophic hurricane.

Plaintiffs characterize the United States' motion as presenting the dams as if they "were natural phenomena that appeared unbidden on the landscape in 2017." *Id.* at 14. In response to this inaccurate characterization, Plaintiffs then focus the Court's attention on the government's construction of this "massive infrastructure project." *Id.* at 12. But if Plaintiffs seek compensation for a "deliberate choice . . . made by the government – to sacrifice Plaintiffs' property for the public good," *id.* at 14, it is unclear when this sacrifice was made. While the

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[8] Plaintiffs make much of the improvements to the Addicks and Barker dams in the 1980s, but based solely on the allegations of the Amended Complaint, the original configurations of the dams were high enough to contain the peak pool level reached during Hurricane Harvey. *See* Pls.' Am. Compl. ¶¶ 41, 70, 71.

dams are certainly not natural phenomena, when they were built in the 1940s Plaintiffs did not own property upstream of them. To address this disconnect, Plaintiffs inaccurately accuse the government of "having dragged bystanders into the path of harm." *Id.* Given the overt existence and purpose of the dams—which, as Plaintiffs themselves concede, did not "appear[] unbidden on the landscape in 2017"—Plaintiffs cannot credibly allege that the government "dragged" anyone into the path of harm. *Id.* The Constitution has never required compensation when the exercise of the police power results in a decrease in property value, absent a taking, even if some landowners bear an economic loss. *See e.g., Bowles v. Willingham*, 321 U.S. 503, 518 (1944). It should not here.

II. Plaintiffs Identify No Authority Recognizing the Property Interests They Claim.

A. State Law Defines What Property Rights Can be Recognized in a Taking Claim.

Although federal law defines whether a property right has been taken, the Court must look to state or common law principles of property to determine whether a particular protected right exists at all. Plaintiffs confuse the United States' argument and incorrectly suggest that the United States seeks to supplant federal takings jurisprudence with that from the state. Rather, the United States asks the Court to consider state law to determine whether Plaintiffs have any property right to prevent extreme rainfall from a record-breaking hurricane from escaping onto their land—floodwaters that they allege a pre-existing landowner (the United States) could not contain on its land. If Plaintiffs have no right to keep such floodwaters off their property, they cannot show that any protected property right was taken, even if their allegations are proven. Plaintiffs identify no cases or statute recognizing such a right, and Texas law has never recognized such a right, so their claims here must fail.

Plaintiffs must establish first that they have a property right to prevent floodwaters from occupying their properties. Whether a property right exists is a threshold question. *Wyatt v.*

United States, 271 F.3d 1090, 1096-97 (Fed. Cir. 2001); *Conti v. United States*, 291 F.3d 1334, 1341-43 (Fed. Cir. 2002) (finding a license to fish was not a protectable property interest, but a boat was). To determine whether such a right exists, the Court can look to state or federal common law because the Constitution does not create property rights. *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (considering first whether the plaintiff had a "protected property interest" in barges before considering whether the interest was taken); *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 857 (Fed. Cir. 2009). Plaintiffs rely on cases and circumstances that are inapposite either because property rights were not challenged, or the property interest allegedly taken was not a flowage easement, as alleged here. Plaintiffs here do not allege that the United States seized ownership or now possesses their property, as was as the case in *Horne*. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015) (describing the government seizure of raisin crops). Indeed, the United States has not seized Plaintiffs' real or personal property. So, cases such as *Horne* that require a plaintiff to establish only ownership of property are inapplicable.[9] More applicable here are instances where a plaintiff alleges a taking of a right incident to property ownership, as was the case in *Air Pegasus, Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005). There, because the claimant alleged a taking of a property right—navigable airspace—incident to property ownership, the court first had to consider whether the plaintiff possessed such a right. *Id.* at 1217-18 (finding no such right existed under the circumstances claimed). The Supreme Court's jurisprudence in cases alleging a taking of property rights appurtenant to the land—as opposed to the land itself—clearly establishes that a plaintiff must prove the property interest exists in the first place. *See United States v. Willow*

[9] The United States did not challenge whether the plaintiff had a property right in the raisins, and the Supreme Court did not address the issue in its opinion. *Id.*

River Power Co., 324 U.S. 499, 504 (1945) (describing the appurtenant property interest asserted as a right to unobstructed water flows and noting that the damage may pass to the United States only if the interest "is a legally protected one"). *See also Mildenberger v. United States*, 643 F.3d 938, 948 (Fed. Cir. 2011) (finding that state recognized no property rights in the riparian interests asserted). This preliminary examination of property rights is particularly important when a landowner claims an interest that is limited by law by the property interests of other landowners. *See, e.g.*, *United States v. Twin City Power Co.*, 350 U.S. 222, 225-28 (1956) (limiting riparian rights because of the government's dominant navigational servitude).

Plaintiffs next wrongly suggest that *Arkansas Game & Fish* subsumed the Court's determination of whether a property right exists within its consideration of whether the plaintiff possessed reasonable investment-backed expectations that the property rights would be free from invasion. Pls.' Br. 20. But neither the Supreme Court nor the Federal Circuit so held. Instead, both courts explicitly declined to consider state property rights arguments raised by the United States or amici because those issues were raised for the first time on appeal. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 & n.1 (2012); *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1375 (Fed. Cir. 2013). Plaintiffs have provided neither law nor principle explaining why the Court should depart from an analysis requiring it to determine, as a threshold matter, whether Plaintiffs had a recognized right for their properties to be free from floodwaters, even if redirected there by fixed government structures that pre-dated their acquisition of the land. Plaintiffs cannot establish they have such a right.

B. Property Rights Are Defined in Relation to Other Owners' Rights.

"Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them." *Willow River*, 324 U.S. at 510. Property law has long recognized that individual property rights are often limited and defined based on the property

rights of other landowners. As a simple example, a landowner who purchases property subsequent to an upstream landowner may not be entitled to withdraw as much drinking water as she would have had her acquisition predated that of the upstream landowner. Easements can similarly be superior or inferior. Plaintiffs would have the Court ignore these long-standing tenets of property law and instead treat their properties as if they exist in a vacuum. Plaintiffs' position is not supported by law.

Plaintiffs' property rights are necessarily bounded by pre-existing rights of the United States and other landowners.[10] Texas law recognizes that property rights incident to the ownership of land (such as those pertaining to waters thereon) are determined by the law in effect at the time title is transferred, and subsequent changes in the law do not affect those rights that have already vested. *Manry v. Robison*, 56 S.W.2d 438, 444 (Tex. 1932). So too, as both federal and state authorities recognize, are Plaintiffs' property rights constrained by the exercise of the police power.[11] *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478-79 (Tex. 1934) (noting that "compensation is not required to be made for such loss as is occasioned by the proper exercise of the police power"). Because of these background principles that define and constrain

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[10] Plaintiffs falsely claim that the United States "believes that if the Corps built a new dam in Texas tomorrow, it would have no obligation to pay for even the land *immediately* behind the dam – land that could be inundated permanently." Pls.' Br. 19. Plaintiffs again confuse or misstate our argument. Plaintiffs possess no rights to repel floodwaters pushed there by the Addicks and Barker dams because state law limits rights of subsequent purchasers based on pre-existing flood-control structures. The United States routinely acquires land to be permanently inundated upstream of newly-constructed flood-control structures, and did acquire land that it expected to be flooded relatively frequently and predictably, though temporarily, when it constructed the Addicks and Barker dams.

[11] The police powers have been recognized to constrain property rights in myriad circumstances such as the enactment of zoning regulations, *Lombardo*, 73 S.W.2d at 486, and the limitations on placement of oil and gas wells on private property. *See, e.g., Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935, 942 (Tex. 1935).

property rights, the Plaintiffs here have no more right to prevent, or receive compensation for, waters that exceeded the United States' storage capacity than they would be to stop the intrusion, or receive compensation, when the police intrude into their homes in pursuit of a criminal fugitive. *See* discussion *supra* § I.

Plaintiffs cite cases with vastly different fact patterns to suggest that because other plaintiffs have, in other circumstances, proved the state took their property by flooding, then a property interest must necessarily exist here as well, simply because this is a case concerning floodwaters. Pls.' Br. 20. But, here again, we do not argue that no plaintiff can ever state a claim for flooding; the question is whether these Plaintiffs have a protected interest in preventing occupation of their property by waters allegedly present because of a project that pre-dated Plaintiffs' acquisition of land, particularly when they concede the Corps operated the project in the same manner long-prescribed for operation. Stated differently, Plaintiffs must show they have a right to require the United States to contain on government land all floodwaters falling upstream of the Addicks and Barker reservoirs, and to pay landowners upstream who chose to buy land after the dams were constructed, if the government-owned storage space is overwhelmed. This Court has long looked to state law to determine the extent and nature of property rights subject to a plaintiff's Fifth Amendment claim and must do so here. Furthermore, there is no basis to limit that consideration of state law only to state takings cases, as Plaintiffs suggest, when the Supreme Court has elsewhere looked to state nuisance and other laws to determine the scope of property rights protected. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992) (considering state nuisance law to determine how "background principles" of state law constrain property rights); *Appolo Fuels, Inc. v. United*

States, 381 F.3d 1338, 1347 (Fed. Cir. 2004) (describing the applicability of state nuisance law to takings jurisprudence).

C. The Texas Code Indicates Plaintiffs Have No Protected Property Rights Here.

In our opening brief, we described how the Texas Water Code generally provides a cause of action based on diversions of surface waters, but specifically exempts diversions or impoundments of the nature Plaintiffs allege here. USA's Mot. to Dismiss 16 (citing TEXAS WATER CODE ANN. § 11.086 (a), (b), and (c) (West 2017)). The statute informs the question of what property rights are protected under Texas law, and demonstrates that landowners have no protection against the type of impoundment allegedly caused by the Addicks and Barker dams. There is no dispute that the Texas Water Code provision applies only to diffuse surface waters—*i.e.*, waters diffused over the ground from falling rain that do not follow a defined course or gather into a body of water.[12] *Dietrich v. Goodman*, 123 S.W.3d 413, 419 (Tex. Civ. App. 2003); *Dalon v. City of DeSoto*, 852 S.W.2d 530, 538 (Tex. Civ. App. 1992). The plain language of the statute provides there can be no cause of action based on diversions from a flood-control project. *See* TEX. WATER CODE ANN. § 11.086(c). In describing the import of that law, the court noted that a landowner would also have no cause of action if a neighbor diverted an established water course onto his property. *Id.* Critically, this means landowners have no protected property right to prevent diversions or impoundments of surface or other waters, unless the state has

[12] Plaintiffs argue that Section 11.086 does not apply to the diversions alleged here. But it is immaterial whether the waters that occupied Plaintiffs' properties constitute surface water, or water within a watercourse. As described herein, state law does not recognize an interest in protecting property from either type of flooding, when the water was diverted or impounded by a government flood-control dam.

elsewhere recognized such a property right. Plaintiffs identify no other source recognizing a property right to protect land from diversions or impoundments of the nature alleged here.

D. Plaintiffs Have No Property Interest in Preventing the Intrusion of Floodwaters Another Estate Could Not Contain.

Ignoring myriad precedent to the contrary, Plaintiffs argue that only federal law defines the property rights they can assert. However, even if they were correct, that would not help their cause. Neither Texas nor federal law recognizes a protected property right for floodwaters lawfully diverted or impounded when the flood-control project was constructed before the acquisition or use of land allegedly taken. Turning first to Texas law, Plaintiffs seek to distinguish the facts and details of cases the United States cited, but themselves cite no authority or precedent establishing any protected property right to prevent non-negligent flooding from pre-existing structures. Pls.' Br. 25-27. These state authorities establish several principles: (a) Plaintiffs have no property interest based on the mere construction of the dams, (b) Plaintiffs have no protected interest in preventing floodwaters impounded subsequently from entering their lands, and (c) Plaintiffs have no protected interest where the United States has done nothing to increase the amount of water flowing within the watercourse. USA's Mot. to Dismiss § I.B.3. Of the many authorities we cited recognizing no property rights in instances such as those here, *Bunch v. Thomas* is perhaps most instructive. 49 S.W.2d 421 (Tex. 1932). The Supreme Court of Texas there considered whether a landowner could maintain a levee constructed on his land, and be free from liability for damages the levee may cause; it concluded that because the waters had percolated to the levee based on ditches, artificial water courses and improvements upstream, the pre-existing levee could remain and continue to divert waters onto lands adjacent. *Id.* at 424. Here, Plaintiffs do not allege that the United States pushed rainwater onto Plaintiffs' land that had fallen elsewhere on the United States' land, or that the United States somehow

increased the amount of water behind the dams. They allege instead that the volume of floodwaters was such that the United States—despite its best efforts—could not contain on government-owned land waters originating elsewhere within flood-control structures. Pls.' Am. Compl. ¶¶ 70-71. Plaintiffs identify no precedent or authority recognizing a right to prevent diversions or impoundments in such an instance, particularly where the dams were fixed and established long before Plaintiffs acquired any property nearby.

Under federal law, Plaintiffs' claims fare no better. Plaintiffs rely principally on *Dickinson v. United States*, a case concerning when a cause of action for flooding accrues, not whether a property right exists. 331 U.S. 745 (1947). In *Dickinson*, the sole question before the Court was "when a suit must be brought on a claim in respect to land taken by the United States." *Id.* at 750. Furthermore, *Dickinson* involved land permanently submerged or submerged intermittently pursuant to expected processes. *Id.* Under such circumstances, it is appropriate to consider when the submergence "stabilized" for purposes of claim accrual because the waters are "continuing" in their nature. *Id.* at 749. But the concept of stabilization of a continuous physical process does not apply here because the dams are usually dry. The Court in *Cooper v. United States* similarly constrained its holding to instances "when a taking is caused by a continuous process." 827 F.2d 762, 764 (Fed. Cir. 1987). Plaintiffs have not alleged a taking by a continuous physical process whereby a claim could theoretically accrue years after construction, and the facts do not support such a contention. Plaintiffs allege flooding from a one-time hurricane that dumped tremendous, unprecedented amounts of rainfall in Houston. The facts here vary from those in cases concerning the stabilization of physical processes such as bank erosion on which Plaintiffs rely. So too should the legal analysis.

Plaintiffs' reliance on concepts not applicable in the context of the appurtenant rights they assert is similarly unavailing. Plaintiffs rely on *Palazzolo v. Rhode Island* in disputing that Plaintiffs have no property rights to prevent diversions of floodwaters from long-standing structures. Pls.' Br. 23-24 (citing 533 U.S. 606 (2001)). *Palazzolo* concerned a land-use regulation prohibiting development on coastal wetlands. 533 U.S. 606. The Court in *Palazzolo* allowed the claim of a purchaser who acquired title after the regulation was enacted by reasoning that an enactment may become unreasonable over the passage of time.[13] *Id.* at 627-28 In so doing, the Court noted that its holding, which it explicitly limited to a regulatory takings claim, applied to "a challenge to the application of a land-use regulation, . . . [that] does not mature until ripeness requirements have been satisfied." *Id.* at 628. Reason suggests the *Palazzolo* holding should apply only in the context of a regulation that applies to all citizens, whereas the appurtenant property rights Plaintiffs assert here exist only in relation to, and subject to, rights of other landowners as Texas law establishes. Neither Plaintiffs, nor their predecessors in interest, have any right to prevent the diversion of excessive floodwaters from the dams. The few federal cases Plaintiffs cite, if even instructive on whether a property right exists under Texas or federal common law, do not support their contention that they have a right to property free from all floodwaters during an extreme hurricane that overwhelmed government flood-control structures.

E. The Flood Control Act Further Restricts Plaintiffs' Property Interests.

Section 3 of the Flood Control Act of 1928, codified at 33 U.S.C. § 702c, informs the background principle of property law that the government, when engaging in flood control

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[13] The *Palazzolo* plaintiff did not actually exchange consideration and purchase the property; instead, he inherited title by law as the sole shareholder of a corporation that failed to pay taxes after having owned the property for a decade before the state law was enacted. 533 U.S. at 614.

projects, is not an insurer to protect against an extreme flood event, such as a 1000-year storm. *See United States v. Sponenbarger*, 308 U.S. 256, 266 (1939). As noted by the Eighth Circuit discussing Section 702,

> Undoubtedly floods which have traditionally been deemed "Acts of God" wreak the greatest property destruction of all natural catastrophes and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them.

Nat'l Mfg. Co. v. United States, 210 F.2d 263, 270 (8th Cir. 1954). This language suggests that Congress through Section 702c intended to safeguard the United States from liability for damage in situations like the instant case where floodwaters cause damage after flood control work has been done. Furthermore, the cases communicate to landowners that no compensation is available for flooding based on the government's exercise of its authority to operate flood control works such as the Addicks and Barker dams. Recognizing takings liability for extreme natural disaster-induced flooding would substantially impede the government's willingness to undertake beneficial civil works.

Plaintiffs rely on *Turner* and *Scranton* for the proposition that Congress cannot take away substantive liability under the just compensation clause, and use that proposition as a basis to argue that the Flood Control Act cannot act as a limiting background principle for Plaintiffs' property rights. Pls.' Br. 27-28 (citing *Turner v. United States*, 17 Cl. Ct. 832, 834-35 (1989), *rev'd on other grounds*, 901 F.2d 1093 (Fed. Cir. 1990), and *Scranton v. Wheeler*, 179 U.S. 141, 153 (1900)). Plaintiffs' point, which is not correct, [14] pertains to jurisdiction and not whether a

[14] Congress can retract the waiver of sovereign immunity for taking claims, without extinguishing substantive liability, as an aggrieved party could still seek a private bill from Congress. Indeed, for almost a century before the Tucker Act of 1887, 24 Stat. 505, codified at

long-standing doctrine can inform background principles of property law. Thus, this attempt by Plaintiffs to undercut the use of Flood Control Act as a background principle fails.

F. Plaintiffs' Identification of the Property Interests Allegedly Taken is Legally Deficient.

Plaintiffs' failure to adequately describe the personal property allegedly taken from each individual plaintiff, as well as Plaintiffs' pursuit of non-compensable consequential damages, are grounds for dismissal of those claims. *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"). First, Plaintiffs wrongly assert that the Court's rules do not require that Plaintiffs identify the specific personal property that they allege was taken. Pls.' Br. 28. Here, paragraphs 9 through 21, which set forth the claims for each individual Plaintiff, identify no specific personal property that the Plaintiff alleges to have been taken by the United States. Pls.' Am. Compl. ¶¶ 9-21. Plaintiffs wrongly assert that such specificity is unnecessary because, "the details the government requests have no bearing on the government's ability to raise and develop its defenses at this stage of the litigation." Pls.' Br. 29. Plaintiffs focus on the wrong question—personal property need not be addressed in a motion to dismiss that focuses only on legal

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28 U.S.C. § 1491(a)(1), there was no blanket waiver of sovereign immunity for claims for monetary compensation for takings, though one could seek a private bill from Congress obtain relief. *See, e.g., Langford v. United States*, 101 U.S. 341, 343-44 (1879) ("It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation."). Before then, plaintiffs whose property had allegedly been taken by the federal government without just compensation could pursue monetary relief from Congress through private bills. *Library of Congress v. Shaw*, 478 U.S. 310, 316 n.3 (1986). Congress may decline to waive the sovereign immunity of the United States altogether, or may withdraw consent to suit that was previously given, even if the underlying claim may be one of constitutional dimension. *See Lynch v. United States*, 292 U.S. 571, 581 (1934); *see also Maricopa Cty. v. Valley Nat'l Bank of Phoenix*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations.").

questions, but Plaintiffs must identify their property in order for the United States to be fully informed of the nature and extent of Plaintiffs' claims to carry out discovery and formulate a defense to Plaintiffs' allegations. The sufficiency of the Complaint is relevant to the whole of the litigation. Plaintiffs' failure to meet this basic pleading requirement renders their Complaint deficient and subject to dismissal.

Second, Plaintiffs seek non-compensable consequential damages such as "benefits and profits attendant to" a business that are not compensable as a matter of law. Pls.' Am. Compl. ¶¶ 10, 20. Plaintiffs' assertions they are entitled to lost profits ignores established case law. *See* Pls.' Br. 29. "It is a well settled principle of Fifth Amendment taking law . . . that the measure of just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking." *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990) (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949)) (rejecting claim for lost profits in physical taking case); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 380 (1945) ("[T]hat which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage." (footnote omitted)). For example, in *Kimball Laundry*, the United States temporarily condemned the defendant's laundry and took over the owner's business to provide laundry services for members of the armed forces during World War II. 338 U.S. at 3. The Supreme Court held that in addition to rental value for the period of the taking, the United States was also liable for compensation for the temporary use of laundry's trade routes, on account of the United States' temporary takeover and operation of the business itself, but it did not award lost profits. *Id*. at 16. Accordingly, the Court should dismiss Plaintiffs' claims for the taking of unidentified

"personal property" and for consequential damages for failure to state a claim upon which relief can be granted.

III. Plaintiffs' Permanent Easement Claim is Founded on Addicks/Barker Design and Construction and is Untimely.

Plaintiffs allege the United States has imposed a permanent easement in that the government "previously intend[ed]" and intends in the future to store floodwaters. That claim, if valid, would have accrued to Plaintiffs' predecessors, so they cannot state a claim. Pls.' Am. Compl. ¶ 80. Plaintiffs argue that they have specified an affirmative government action, but do not identify when any permanent easement was allegedly first imposed. And their very statement demonstrates the uncertainty as to whether the action they are contesting is the 1940s construction or the 2017 flood: "[T]he government built the Addicks/Barker dams so that they would impound floodwaters on Plaintiffs' property. Then, consistent with their design and intent, and with longstanding Corps procedures, the dams did just that." Pls.' Br. 17 (internal citations omitted). Plaintiffs' permanent easement claim rests principally on the suggestion that their properties are subject to a permanent servitude because they are at a higher risk of flooding because they lie at elevations below the highest elevation of the dams. But, if a claim for a mere higher risk of flooding—in lieu of an actual permanent occupation—were sufficient to show a permanent taking, such a claim would have accrued in the 1940s to Plaintiffs' predecessors in interest when the government's action first caused the higher risk.

While actions decades ago are certainly relevant to what Plaintiffs should have expected would occur during a 1000-year rainfall and what benefits the United States' projects have provided for decades, Plaintiffs cite no support for the proposition that the design or construction of the dams themselves—or the government's alleged inaction since—constitutes a permanent taking. We do not dispute that the statute of limitations begins to run when a claim accrues, but

Plaintiffs allege that when "the government did nothing," that inaction somehow created a present cause of action for a permanent taking. Pls.' Am. Compl. ¶ 59. Although Plaintiffs suggest that cases concerning the stabilization doctrine support the timeliness of their Complaint, they do not suggest that any design or operational change, or buildup from decade-long processes caused the flooding, or that any claimed permanent servitude is now different than any purportedly imposed when the dams were built. Pls.' Br. 18-19 (citing *Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1290-91 (Fed. Cir. 2006) (describing damage that occurred gradually as water levels and invasive plant levels fluctuated)). Instead they suggest a servitude exists because properties have for decades been, and at the time they purchased them were, at some risk of flooding.[15] Plaintiffs do not explain why if nothing has changed, something purportedly needed to "stabilize." Plaintiffs' allegations do not support their claim that the United States took a permanent easement by operating the dams in 2017 exactly as designed. Plaintiffs' allegations of a permanent taking in Count IV of their Complaint is untimely, lacks merit, and should be dismissed.

IV. Plaintiffs Cannot Show the Facts, If Proven, Constitute a Taking Rather than a Tort.

A. Treatment under RCFC 12(b)(6) Does Not Lighten the Burden of Plausibly Alleging Facts to Meet the *Ridge Line* Test.

A claim that sounds in tort is properly dismissed under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims. However, even if the question of whether allegations

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[15] Even if subjecting property to a higher flood risk, absent any actual occupation, could form the basis for a compensable Fifth Amendment claim, Plaintiffs have not even alleged that the operation of the dams in 2017 now subjects their properties to a higher risk of flooding. It is difficult to conceive that such a claim could be supported by the evidence. More important, it could not form the basis for a cognizable Fifth Amendment claim. *See* discussion *supra* § I.B.

constitute a tort or a taking were properly adjudicated under Rule 12(b)(6)), Plaintiffs here have failed to allege facts that, if proven, constitute a taking and not a tort. Their claims should therefore be dismissed.

Plaintiffs expend significant effort discussing whether a dismissal for failure to allege facts sufficient to meet the *Ridge Line* requirements is a 12(b)(6)) or 12(b)(1)) dismissal. Pls.' Br. 30-31.[16] However, regardless of the answer to that question, Plaintiffs must still satisfy the pleading requirements articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007),[17] including the requirement that plaintiffs 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 . . . ." Plaintiffs do not meet this standard because they have alleged only one instance of government-induced flooding, which allegedly occurred during a 1000-year hurricane, despite the fact the Addicks and Barker dams have been in place providing flood risk reduction since the 1940s.

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[16] The plain language of 28 U.S.C. § 1491(a) (establishing jurisdiction in the Court of Federal Claims for certain claims including "liquidated or unliquidated damages in cases not sounding in tort") supports the position that this Court can only exercise jurisdiction over claims for compensation for takings, not torts. Plaintiffs suggest that the same operative facts may give rise to a claim for a taking and a tort, so any "nonfrivolous" pleading can meet the jurisdictional standard. That abstract position, even if true, does not mean that the facts alleged here give rise to a cognizable taking claim for which compensation is due. As described herein, the facts these Plaintiffs allege do not.

[17] The decision and analysis in *George Family Trust v. United States*, 91 Fed Cl. 177 (2009), contrary to Plaintiffs' assertions, remain germane to this motion. *George Family Trust* discusses the *Iqbal* and *Twombly* standards in the context of evaluating a dismissal under RCFC 12(b)(6). *See id.* at 201 (citing *Iqbal*, 556 U.S. at 678, and *Twombly*, 550 U.S. at 557).

B. *Arkansas Game & Fish* Did Not Displace *Ridge Line*.

Plaintiffs' discussion of factors potentially pertinent to an analysis of liability under *Arkansas Game & Fish* does not somehow cure deficiencies otherwise present in their claims. The Supreme Court's decision in *Arkansas Game & Fish* was narrow. As the Supreme Court itself explained: "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38. To be sure, *Arkansas Game & Fish* identified some factors that courts should ultimately consider in evaluating whether a temporary taking has occurred from government-induced recurring flooding. *See id.* at 38-39. It did not, however, alter the underlying substantive elements or factors that inform consideration of takings claims. *Id.* at 36.

Plaintiffs cite no legal authority for the notion that a court must consider each of the illustrative considerations identified in *Arkansas Game & Fish* before dismissing a case under Rule 12. Where the complaint reveals the plaintiffs cannot meet other threshold requirements, dismissal is plainly warranted. And notably, in *Arkansas Game & Fish,* the Supreme Court cited with approval the Federal Circuit's decision in *Ridge Line* and its own earlier decision in *Portsmouth Harbor*, observing that "[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]." *Ark. Game & Fish*, 568 U.S. at 39 (citing *Ridge Line*, 346 F.3d at 1355-56 and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922)).

Put simply, then, nothing in *Arkansas Game & Fish* alters *Ridge Line's* threshold requirement that Plaintiffs allege facts sufficient to support a claim that flooding is or will necessarily be "frequent." 346 F.3d at 1357. As the Federal Circuit described it, "[t]he second prong of the taking-tort inquiry in this case requires the court to consider whether the government's interference with any property rights of Ridge Line was substantial and frequent

enough to rise to the level of a taking." *Id*. This requirement is stated in the conjunctive—meaning both elements of substantiality and frequency must be plausibly alleged and proven to state a claim.

C. Plaintiffs Have Not Met Their Burden to Allege That Flooding of Their Properties Has Been or Will Inevitably be "Frequent."

Plaintiffs wish to eliminate the "frequency" requirement articulated in *Ridge Line*. They rely heavily on the pre-*Ridge Line* case, *Stockton v. United States*, 214 Ct. Cl. 506 (1977). However, *Stockton* concerns a factual scenario not at issue here: in *Stockton*, the Corps had explicitly attempted to acquire a flowage easement for land under an elevation of 597 feet, but the Court of Claims found that that easement had been improperly acquired, based on misrepresentations to an unsophisticated plaintiff. *Stockton*, 214 Ct. Cl. at 515-16 ("And here, the effect of a decision for plaintiffs is not to impair the flowage easement, but to prevent the Government from avoiding paying for it, by a gratuitous conveyance induced by the misrepresentation of its ostensible agent."). The *Stockton* court's findings about the government's intent, *id.* at 518-19, as quoted in Plaintiffs' Response, were made in that unusual factual context. Pls.' Br. 36. They should not, of course, be read to nullify elements of the subsequent *Ridge Line* decision.[18] Furthermore, flooding occurred in *Stockton* at least twice, and in addition to alleging flooding, the plaintiffs also brought a claim for permanent erosion. *Stockton*, 214 Ct. Cl. at 511, 514 (noting the reservoir "at times temporarily submerged" lands).

[18] Plaintiffs also rely on the non-binding, interlocutory Court of Federal Claims opinion in *United States v. Quebedeaux,* 112 Fed. Cl. 317, 323-24 (2013), in which the court allowed a taking claim to proceed even with only a single flooding, though the floodway had previously been activated. Pls.' Br. 37. But the Court never addressed the *Quebedeaux* claim on its merits. And, to the extent the *Quebedeaux* court interpreted *Arkansas Game & Fish* to have disrupted previous case law such as *Ridge Line*, it erred.

The facts here are not comparable, and the subsequent *Ridge Line* decision remains binding on this Court.

Nothing in Plaintiffs' Complaint suggests that flooding has been permanent, frequent, recurrent, or even likely to recur in the future. USA's Mot. to Dismiss 27-28. Plaintiffs nowhere allege that they have been subject to flooding at any other time in the Addicks and Barker dams' 70-year history. They do not plausibly allege any facts that would support a finding of frequency or recurrence. Plaintiffs' only suggestion of frequency of flooding relates to their speculation about flooding in the future as a result of conjectural actions by the government; those allegations, which are insufficient to support a claim, are themselves conclusory. Pls.' Am. Compl. ¶¶ 80, 107, 134-35, 138 (stating the existence of the dams constitutes a governmental commitment to recurring flooding). Plaintiffs' conclusory allegations do not satisfy the pleadings standards of *Iqbal* and *Twombly* or the substantive standards of *Ridge Line* or *Arkansas Game & Fish*.

D. Plaintiffs' Submission of Expert Affidavits to Support Their Allegations is Not Appropriate for Consideration on a Motion to Dismiss.

The Court should disregard the affidavits filed by plaintiffs with their response. A motion to dismiss is a device for testing the legal sufficiency of allegations in a complaint and, unlike in response to a motion for summary judgment, affidavits are a procedurally improper response. Plaintiffs do not cure the pleading defects described above by attempting to interject expert testimony concerning potential future flooding of Plaintiffs' properties and the potential change in value of the properties from such hypothetical flooding. Pls.' Br. Exs. A and B. Indeed, Plaintiffs, by appending affidavits to their response, make a tacit acknowledgement that the complaint standing alone is deficient.

Plaintiffs state that they are offering affidavits only in the eventuality that the Court should evaluate the taking-tort distinction under a Rule 12(b)(1) standard. Pls.' Br. 37-38. Since no analysis under a 12(b)(1) framework is necessary to determine whether Plaintiffs state a claim for a taking, the proffered expert affidavits should be stricken or disregarded. Furthermore, the two declarations do not change a critical flaw in Plaintiffs' pleadings: that they have not and cannot allege facts that, if proven, mean they have actually experienced "substantial *and* frequent" flooding. *Ridge Line*, 346 F.3d at 1357 (emphasis added). The expert declarations do not change that the Plaintiffs have failed to allege that they experienced flooding more than once as a result of the alleged government action.[19]

CONCLUSION

For these reasons, and the reasons given in the United States' motion to dismiss, the United States respectfully requests that the Court dismiss this action for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

April 11, 2018

Respectfully submitted,

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[19] Plaintiffs do not allege that any of their properties were flooded in the extreme rain event they describe from 2016. USA's Mot. to Dismiss 31. Even if the likelihood of recurrence of a storm could help meet the *Ridge Line* requirement that an invasion be "substantial and frequent," evidence in the record shows that a storm like Hurricane Harvey is rare and has a far longer and more speculative recurrence interval than cases examining actual recurrent flooding that was not frequent enough to be considered a taking.*Id*.

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