Nos. 2023-1363, 2023-1365, 2023-1366, 2023-1412

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

EDGAR ABLAN, ET AL.,
Plaintiffs

CHRISTINA BANKER, TODD BANKER
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

2023-1363

Appeal from the United States Court of Federal Claims in Nos. 1:17-cv-01409-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow

---

RESPONSE AND OPENING BRIEF OF PLAINTIFFS-CROSS-APPELLANTS

Daniel H. Charest
Emery Lawrence Vincent, Jr.
BURNS CHAREST LLP
900 Jackson Street, Suite 500
Dallas, TX 75202
(469) 904-4550
dcharest@burnscharest.com
lvincent@burnscharest.com

Ian Heath Gershengorn
Counsel of Record
Elizabeth B. Deutsch
Victoria Hall-Palerm
Leslie K. Bruce
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6869
igershengorn@jenner.com

Counsel for Plaintiffs-Cross-Appellants
Christina Micu, Scott Holland, Catherine Popovici, Kulwant Sidhu

(case caption continued below; additional counsel listed in signature block)

SANDRA ABDOU, ET AL.,
Plaintiffs

ELIZABETH BURNHAM
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2023-1365

Appeal from the United States Court of Federal Claims in Nos. 1:17-cv-01786-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

CHRISTINA MICU, AND ALL OTHERS SIMILARLY SITUATED, SCOTT HOLLAND, CATHERINE POPOVICI, KULWANT SIDHU,
Plaintiffs-Cross-Appellants

ELISIO SOARES, SANDRA GARZA RODRIGUEZ, ERICH SCHROEDER, MARINA AGEYEVA, GLENN PETERS, VIRGINIA HOLCOMB,
Plaintiffs

v.

UNITED STATES,
Defendant-Appellant

2023-1366, 2023-1412

Appeals from the United States Court of Federal Claims in Nos. 1:17-cv-01277-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

CERTIFICATE OF INTEREST

Pursuant to Circuit Rules 26.1 and 47.4, counsel for Plaintiffs-Cross-Appellants certifies the following:

1. The full name of every party or amicus represented by me is: Christina Micu, Scott Holland, Catherine Popovici, and Kulwant Sidhu.

2. The names of the real parties in interest appear in the caption.

3. No parent corporations or publicly held companies own 10 percent or more of the stock of the parties represented by me.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency, or who are expected to appear in this Court, are: Jenner & Block LLP, Ian Heath Gershengorn, Elizabeth B. Deutsch, Victoria Hall-Palerm, Leslie K. Bruce; Burns Charest LLP, Daniel H. Charest, Emery Lawrence Vincent, Amanda Klevorn; Irvine & Conner PLLC, Charles Irvine, Mary Conner; Dunbar Law Firm PLLC, Lawrence Dunbar.

5. The cases known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal are: *In re Upstream Addicks & Barker Reservoirs*, Nos. 1:17-cv-01277-CFL (Fed. Cl.), 1:17-cv-09001-CFL (Fed. Cl.), 1:17-cv-3000 (Fed. Cl.); and *In re Downstream Addicks & Barker Reservoirs*, No. 1:17-cv-9002 (Fed. Cl.).

/s/ Ian Heath Gershengorn
Ian Heath Gershengorn
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6869
igershengorn@jenner.com

Counsel for Plaintiffs-Cross-Appellants

September 22, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, Plaintiffs-Cross-Appellants' counsel states:

No other cases pending before this Court are appeals from individual judgments based on the same underlying opinions at issue in the present consolidated appeals.

The proceedings pending before the U.S. Court of Federal Claims for the following cases could be directly affected by this Court's decision in these consolidated appeals:

- *In re Upstream Addicks & Barker Reservoirs*, Nos. 1:17-cv-01277-CFL (Fed. Cl.), 1:17-cv-09001-CFL (Fed. Cl.), 1:17-cv-3000 (Fed. Cl.), which is the master docket associated with claims by non-bellwether plaintiffs in the same set of cases as the present appeal;
- *In re Downstream Addicks & Barker Reservoirs*, No. 1:17-cv-9002 (Fed. Cl.), which includes consolidated claims for the taking of private properties located downstream from the Addicks and Barker dams.

JURISDICTIONAL STATEMENT

The Court of Federal Claims ("CFC") had jurisdiction over Plaintiffs' claims alleging Fifth Amendment takings of their property under 28 U.S.C. § 1491(a)(1). The CFC held the government liable as to thirteen bellwethers and awarded compensation to owners of six test properties. On October 28, 2022, the CFC entered partial judgments for those Plaintiffs under CFC Rule 54(b). Appx91. On December 27, 2022, the government filed notices of appeal. On January 10, 2023, Plaintiffs-Cross-Appellants filed a notice of cross-appeal, which was timely under Fed. R. App. P. 4(a)(3). Appx2195. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the CFC correctly found the government liable for taking Plaintiffs' property during Tropical Storm Harvey, when that property is located upstream and within the reservoirs of dams constructed, maintained, and operated by the federal government and the property would not have flooded but for the dams.

2. Whether the CFC correctly awarded Plaintiffs just compensation for the property interests directly invaded by the government-induced flooding, including costs of repairing damaged structures; loss of personal property; loss of a leasehold advantage; lost rental value; and displacement costs.

3. Whether the CFC erred in granting the government a permanent flowage easement on Ms. Popovici's property, yet awarding $0 of compensation for that easement.

4. Whether the CFC erred in offsetting from Plaintiffs' just compensation awards emergency relief aid provided by the Federal Emergency Management Agency ("FEMA"), when that aid was available to more than 270,000 victims of Harvey, irrespective of their properties' connection to the taking.

5. Whether the CFC erred in denying class certification based solely on the timing of the certification motion, where Plaintiffs relied on the CFC's statements directing them to defer the motion and the government has not shown prejudice from that timing.

INTRODUCTION

When the government takes private property for a public use, it must pay "just compensation" to the owner. U.S. Const. amend. V. This case asks the Court to enforce that constitutional requirement in a context nearly as familiar as the requirement itself: flooding upstream of the government's dam. For such cases, there exists a "simple, *per se* rule." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). When the government builds a dam, it must pay for the land it floods behind that dam. That simple rule resolves this case.

A series of storms around the turn of the twentieth century in and near Houston made clear that the city and its ship channel were vulnerable to flooding that could cause economic devastation. So the government acted. It built two dams—Addicks and Barker—that would, when significant rain fell, impound water upstream to save downtown. But the government chose not to purchase all the land within the dams' reservoirs.

Since the construction of the dams in the 1940s, the government has improved their embankments and enlarged their capacity. And it repeatedly weighed whether to buy additional private property within the reservoirs. Each time, however, the government demurred, deciding it was economically wiser to wait for a storm and take the property by flood.

In 2017, that storm came. Hurricane Harvey struck Texas's Gulf Coast. It weakened to a tropical storm and stalled, releasing roughly 31 inches of rain in 5 days over the Addicks and Barker watersheds. The dams worked as planned. They protected "downstream" property—sparing downtown Houston $7 billion in damage—by impounding billions of gallons of water "upstream," inundating thousands of homes and businesses that lie within the dams' reservoirs.

As the CFC recognized, the Constitution permits the government to take private property in this manner. But the Constitution requires the government to pay for what it takes.

Faced with this constitutional deprivation, Plaintiffs-Cross-Appellants Christina Micu, Scott Holland, Catherine Popovici, and Kulwant Sidhu ("Plaintiffs") filed suit. They are upstream landowners whose properties "are, by government design, within the dams' flood-pool reservoirs." Appx34. The CFC found (and the government all but conceded) that Plaintiffs' properties would not have flooded but for the dams. Because of that flooding, the CFC further found, Plaintiffs suffered significant property damage and displacement from their homes. And they (and any prospective buyers of their properties) now know that the next time a storm hits, it will happen all over again.

Case after case, stretching back over a century, confirms the blackletter rule that decides this appeal. As the government has summed it up: "[W]hen the water

impounded in [a] reservoir created by a government-constructed dam submerges private property," that is a "classic taking" and "a form of recurring flooding long understood to be compensable." Br. for United States at 24, 44-45, *St. Bernard Parish Gov't v. United States*, No. 16-2301 (Fed. Cir. Dec. 9, 2016), ECF 25 ("Katrina Br."); *see, e.g.*, *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 181 (1872); *United States v. Cress*, 243 U.S. 316, 328 (1917); *United States v. Dickinson*, 331 U.S. 745, 749 (1947). This case is that simple.

The government's contrary arguments do not hold water. The government first casts Harvey as a freak storm that severed the causal chain between the dams and the damage upstream. But what matters for the takings analysis is that the government built the dams to contain that much water and more. The dams worked as intended. Regardless, the government ignores the CFC's findings that the Army Corps of Engineers ("Corps") "was aware or should have been aware since the initial construction of the dams[,] and at every point onward, that the flood pools in the Addicks and Barker Reservoirs would at some point (and thereafter) exceed the government-owned land, inundating private properties," Appx36-37, and that "the Corps itself had fully anticipated a storm the likes of Harvey," Appx31.

Next, the government says Plaintiffs should have expected the flood because they bought property upstream from the dams. But a takings claim does not ripen until flooding occurs. The government's approach would thus allow free takings of

any land bought or sold in the 70+-year period between when it built the dams and when Harvey hit—neither seller nor buyer could ever bring a takings claim. Little wonder the Supreme Court has rejected the government's proposed "rule that purchasers with notice have no compensation right when a claim becomes ripe." *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). "The Takings Clause is not so quixotic." *Id.*

Ultimately, the government argues, once Harvey hit, the government operated the dams pursuant to its emergency police powers, so it should not pay for losses arising from a "no-win" situation. For starters, this Court has already rejected a police power exception to liability for physical takings from floods. *See Milton v. United States*, 36 F.4th 1154, 1162 (Fed. Cir. 2022).

Nor can the government invoke emergency or necessity as a defense. This case does not involve a random exigency like a great uncontrolled fire. The dams did not appear unbidden on the landscape when Harvey hit. The government built, maintained, and operated the dams to put water on upstream land, planning for this eventuality. No case frees the government from paying where, as the CFC found, the "government [was] responsible for creating the emergency." Appx45.

The government's arguments about how it could have or should have managed the dams during Harvey, its mantra that "the water had to go *somewhere*," Opening Br. for United States at 37, 50 ("Br."), its suggestion that the downstream

landowners received significant benefits from the dams, and its position that no one is entitled to perfect flood control may raise difficult questions in the separate downstream litigation. But this upstream case is simple. This Court should apply settled precedent confirming that when the government builds a dam and floods private property upstream, it must pay.

As to the amount the government must pay, Plaintiffs again ask for a straightforward application of established law. As this Court recently confirmed in *Ideker Farms, Inc. v. United States*, 71 F.4th 964, 987-88 (Fed. Cir. 2023), the CFC was right to award Plaintiffs not only compensation for the taking of a permanent flowage easement, but also compensation for the government's invasion of other compensable property interests—structural repairs and personal property damage, loss of a leasehold advantage, lost rental value from condo units, and displacement costs. The CFC's approach to just compensation was, by and large, correct.

But the CFC's just compensation analysis failed in two specific respects. First, the court found the government liable for taking a permanent flowage easement on Ms. Popovici's property, yet awarded her $0 for that easement. That cannot be. Even the government's expert valued the easement on her property at $5,000, and Plaintiffs' experts put it in the six figures. If the government gets an easement, Ms. Popovici is entitled to compensation for it. Second, the CFC offset from the Plaintiffs' individualized just compensation awards the generalized aid FEMA

provided to over 270,000 flood victims, even though that emergency relief was disbursed without regard to whether a claimant's land was partially taken and bears no relationship to the value of the remaining land. Under this Court's caselaw, FEMA aid does not qualify as a "special benefit," the only benefit that may be offset from a takings award. *See Hendler v. United States*, 175 F.3d 1374, 1380 (Fed. Cir. 1999). The CFC's concerns about "duplicate recovery" cannot overcome settled law. And even were "duplicate recovery" the test, the CFC's offsets would have to be reversed. For tactical reasons, the government declined to introduce evidence that FEMA paid Plaintiffs for any specific damages sought in this case. There is no evidence—and no finding—of actual, specific duplication.

Finally, the CFC was wrong to deny class certification based solely on the timing of Plaintiffs' motion to certify. Both then-Chief Judge Braden and Judge Lettow directed Plaintiffs to defer class certification until after jurisdiction had been confirmed. That is what Plaintiffs did. The government has never identified how it would have tried the merits "differently had they been aware that a class judgment was at stake." 7AA C. Wright & A. Miller, *Federal Practice & Procedure* § 1785.3 (3d ed. 2005) ("Wright & Miller"). On this record, the denial of class certification cannot stand.

STATEMENT OF THE CASE

I. Factual Background

Hurricane Harvey made landfall along the Texas coast around 10 pm on August 25, 2017. Appx18. It weakened to a tropical storm and then stalled over southeast Texas, including the Houston area. Appx18. Plaintiffs reside upstream of the Addicks and Barker dams, which the Corps built, maintained, and operated to prevent costly flooding downtown. Appx2, Appx5. Over the dams' watersheds, Harvey released roughly 31 inches of rain in 5 days. U.S. Post-Trial Br., ECF 242 at 59 (citing Appx9740, Appx9746, Appx9752). The water was impounded by the dams, and flooded Plaintiffs' properties, preventing entry or egress, and flooded most Plaintiffs' homes, rendering them uninhabitable for months. Appx19-22, Appx31-32.

II. Procedural Background

After the flood, Plaintiffs Christina Micu, Scott Holland, Catherine Popovici, and Kulwant Sidhu, among others,[1] filed this lawsuit against the United States alleging a taking of their property without just compensation. Appx1-2. Additional upstream cases followed. Appx2. Many downstream homeowners also filed claims based on the Corps' release of some dam water downstream. *See Milton*, 36 F.4th at 1158. The CFC separated the downstream cases from the upstream ones, placing

[1] Plaintiffs Elisio Soares, Sandra Garza Rodriguez, Erich Schroeder, Marina Ageyeva, Glenn Peters, and Virginia Holcomb are not parties to this appeal.

them on different sub-master dockets. Appx2. The downstream cases are not at issue here.

As to the upstream cases, then-Chief Judge Braden bifurcated liability and damages. Appx2. Thirteen properties, including Plaintiffs', were designated as bellwethers. Appx3, Appx20-21. The government moved to dismiss for lack of jurisdiction and failure to state a claim. Appx3. The CFC declined to dismiss the litigation and deferred a ruling on jurisdiction until the liability trial. Appx3.

A. The CFC Found The Government Liable For Taking Plaintiffs' Properties.

On May 6, 2019, the CFC commenced a 10-day bench trial on liability as to the thirteen bellwether properties. On December 17, 2019, it issued a 46-page ruling holding that the CFC had jurisdiction and finding the government liable for taking permanent flowage easements on each of the thirteen properties. The CFC made findings of fact that prove a taking.

1. The government built the Addicks and Barker dams to save downtown Houston from flooding.

Houston sits at the confluence of two bayous. Appx3-4. During significant rainfall, the stream channels overflow and the plain has difficulty draining. Appx3-4. That natural topography resulted in six major floods between 1854 and 1935. Two storms in 1929 and 1935 caused severe flooding in and near Houston, producing substantial property damage and economic loss. Appx4. The government realized

that larger storms were likely to recur and could be much worse. Appx4-5, Appx36. The Corps concluded that "only chance" had "prevented the occurrence of a storm over the basin much larger than the 1935 storm." Appx4-5 (quoting Appx9888).

Congress enacted the River and Harbor Act of 1938, directing the Corps to build dams to "control … floods on the Buffalo Bayou watershed" for "the protection of the city of Houston, Texas, and the Houston Ship Channel against the estimated probable maximum storm." Appx5 (quoting Appx9884). The "probable maximum storm" referred to an 1899 storm over nearby Hearne, Texas. Appx6. In contemporaneous records, the Corps stated a comparable storm was "likely to occur with a frequency of once every 50 years." Appx8 (quoting Appx9094).

In response, the Corps built the Addicks and Barker dams. The dams are not imposing structures, but earthen embankments that rise at a gradual slope over several miles. Appx6-7 (noting the dams rise "almost imperceptibly"). On a typical day, the land is dry. Appx16. But when rain comes, the dams create flood pools upstream of the embankments. In the dams' planning phase, the Corps contemplated buying all vulnerable land upstream within the new reservoirs, but it acquired only some due to the financial "savings." Appx7-9 (quoting Appx9907-08). The CFC found that "the dams were designed to contain more water than the acquired land could hold." Appx7.

2. The government recognized its dams would flood private property upstream but repeatedly declined to buy that land.

Within 20 years of completing the dams, several developments "raised concerns with the Corps that flooding beyond the extent of government-owned land was highly probable, if not inevitable, during a severe storm." Appx10; *see* Appx36. In a 1962 manual, for example, the Corps calculated that the maximum design pool exceeded government-owned land by 6.6 vertical feet in Addicks and 8.1 vertical feet in Barker. Appx10 (citing Appx9930). In a 1973 memorandum, the Corps' Galveston Division Chief "lamented" that "the possibility of flooding lands in the reservoirs beyond the government-owned land" was "soon expected to become a public issue." Appx10 (citing Appx8836). He urged the Corps to "develop a history and rationale for [its] operating concept of imposing flooding on private lands without benefit of flowage easement or other legal right." Appx10 (quoting Appx8836). In a 1974 report, the Corps echoed that this state of affairs "will eventually place the Government in the position of having to flood the area within the reservoir with the accompanying damages in order to protect downstream." Appx10-11 (quoting Appx8864).

In 1979, Tropical Storm Claudette hit near Houston, dropping 43 inches of rain in 24 hours. Appx17. The Corps acknowledged that, "'[i]f this event had occurred over the Addicks and Barker watersheds, their reservoir capacities may have been exceeded'"—so much so "it would [have] take[n] between … 53 and 55

days to remove enough water to get it back on government-owned land." Appx17 (quoting Appx8786).

The Corps fortified the dams to protect downstream Houston from another major storm like Claudette, which was much more severe than the original design storm. Appx11-12 (crediting Appx10725, Appx10728). Record evidence shows that the new "theoretical design storm for Addicks and Barker" was "about 43 inches of rainfall in 72 hours." Appx11001; *see* Appx12 (crediting Appx10997). The corresponding design flood (the "spillway design flood") would produce reservoir pools reaching 115 feet elevation in Addicks and 108 feet elevation in Barker. Appx16 (crediting Appx10629, Appx10631). The Corps again "consider[ed] the purchase of real estate upstream of the reservoirs," but again declined despite its "definite understanding that larger pool sizes were highly probable." Appx11-12, Appx36, Appx49.

The Corps knew that "flooding beyond government-owned land" was, as the CFC put it, "virtually inevitable." Appx36. In 1992, a series of storms produced "then-record flood pools in both reservoirs." Appx12. So "the Corps prepared a special report" analyzing "anticipated flooding damages which could occur beyond government-owned property in Addicks and Barker." Appx12. The Corps concluded that "[t]he Possible Maximum Flood would affect over 4,000 structures valued at approximately $725 million and cause damages of $245 million." Appx12 (quoting

Appx10160). It again considered "purchasing flowage easements" and "land buyouts," but found "insufficient economic benefits to justify" doing so. Appx12-13.

Throughout the 1990s and 2000s, the Corps completed surveys of structures located within each dam's reservoir—over 95% of which were residential—"for the purpose of determining potential flood-damage estimates." Appx13. "The Corps also prepared internal 'Reservoir Structure' maps that depicted the elevations of these surveyed upstream structures," meaning they reflected anticipated upstream flooding of private properties. Appx13. "As a result" of these meticulous exercises, the CFC found that "the government gained an appreciation of the specific risks upstream in Addicks and Barker associated with a severe storm." Appx13.

Then came another series of near misses. In 2001, Tropical Storm Allison dropped 36 inches of rain near Houston over 5 days. Appx17. The Corps recognized that Allison "could have potentially exceeded reservoir capacity had the storm event occurred directly over the reservoirs." Appx17 (quoting Appx8787). In 2016, the "Tax Day Storm" produced new then-record flood pools and exceeded government-owned land (though just barely) for the first time. Appx17. As the CFC found, and the Corps acknowledged, "it was not a question of whether the pools would reach the level they did—it was merely a question of when and how often." Appx36; *see* Appx15 (quoting Appx9501), Appx17 (quoting Appx11299).

3. When Harvey hit, the dams worked as planned and caused upstream flooding on Plaintiffs' properties.

On August 25, 2017, the storm the government had anticipated finally arrived. Even before Harvey made landfall, "the Corps knew that flooding 'beyond the government-owned land limits' in Addicks and Barker was imminent." Appx18 (quoting Appx10647). As the storm weakened and stalled, it dropped an average of 43 inches over the greater Houston region, 34 inches over Harris County, and about 31 inches over the Addicks and Barker watersheds. Appx18; ECF 242 at 59.

The dams worked as intended. They "protect[ed] downstream property by impounding water in upstream reservoirs." Appx40. This produced record flood pools in both reservoirs, reaching 109.1 feet elevation in Addicks and 101.6 feet elevation in Barker. Appx19. The flooding remained within the dams' maximum design pool elevations—115 feet in Addicks, 108 feet in Barker—but "far exceeded the extent of government-owned land in both Addicks and Barker." Appx19.

4. On this extensive record, the CFC found a clear taking.

The CFC found a taking on each of the thirteen properties. Appx46. As found by the CFC, "plaintiffs' properties are, by government design, within the dams' flood-pool reservoirs." Appx34. As the CFC also found, but for the dams, these properties would not have flooded. Appx37-39. Because "the Corps was aware or should have been aware since the initial construction of the dams[,] and at every point onward, that the flood pools in the Addicks and Barker Reservoirs would at

some point (and thereafter) exceed the government-owned land, inundating private properties," the CFC concluded that "Harvey's magnitude does not exculpate the government of liability." Appx36-37.

The CFC found the government had taken—and so must pay just compensation for—"both 'a permanent flowage easement' and 'plaintiffs' personal property, fixtures, and improvements damaged or destroyed by [flooding attributable to Harvey].'" Appx69 (alteration in original). The government's flowage easement granted it "a permanent right to inundate the property with impounded flood waters" up to "the elevation of the pools at their highest level on August 30, 2017, *viz.*, 101.6 feet in Barker and 109.1 feet in Addicks." Appx72 (quotation marks omitted); *see* Appx1053. While the CFC could not "predict for certain how frequently the government will use its easement," it found that "the government understates the frequency of a Harvey-level storm" and that "[s]imilarly large storms will likely occur in the future." Appx73; *see* Appx31 (finding "the likelihood of recurrent flooding is high").

B. The CFC Denied Class Certification.

After the liability trial, Plaintiffs moved to certify a class. This was consistent with the schedule contemplated by then-Chief Judge Braden (who presided before the case was assigned to Judge Lettow). After lifting a "premature" class-certification deadline in November 2017, Appx2285, Chief Judge Braden explained

that Plaintiffs should wait to move for class certification and stated this case "may require a liability determination, before class action certification is considered," Appx2307-08.

When Judge Lettow took over, Plaintiffs reiterated that they planned to move for class certification. Judge Lettow, too, told them to wait. Appx2205-08. "[T]he Court would strongly prefer that we focus on jurisdiction first, even though a lot of that would carry over to liability. That might affect your thinking on class certification." Appx2206. Jurisdiction indeed carried over to liability. The CFC did not confirm jurisdiction until its decision finding takings liability. Appx3, Appx1016. Plaintiffs filed their class certification motion after the liability phase concluded and before the damages trial. Appx200-02.

The sole basis the CFC gave for denying class certification was the timing of Plaintiffs' motion. Appx201, Appx203, Appx205.

C. The CFC Awarded Plaintiffs Partially Incomplete Compensation.

The just compensation trial took place from May 31 to June 10, 2022. It involved six test properties. On October 28, 2022, the CFC issued a 44-page decision awarding Plaintiffs compensation for the taking of their property.

The CFC awarded all Plaintiffs except Ms. Popovici compensation for the taking of a permanent flowage easement, measured by the diminution in value of Plaintiffs' property resulting from the government's right to flood up to the Harvey

level in the future. Appx70, Appx75-77. That sum was designed to compensate "for any damage caused by future flooding up to the elevation of the government's easement." Appx72.

The CFC also awarded compensation associated with structural repairs and personal property loss. Appx75-77, Appx80-81. For Ms. Popovici, however, the CFC awarded no compensation for the taking of a flowage easement, awarding only $1,401.49 for her actual garage repair costs. *Compare* Appx75-77, *with* Appx81.

In addition, the CFC provided compensation for the loss of Mr. Holland's leasehold advantage, Appx76-77; the loss of rental value of Mr. Sidhu's condo units, Appx82-83; and certain displacement costs due to the loss of habitability of Plaintiffs' homes, Appx81-82.

The CFC then reduced several Plaintiffs' awards by the amount of FEMA emergency relief they—like 270,000 other Harvey victims—received, claiming such reduction was needed to avoid "duplicate recovery." Appx83-85; Press Release, FEMA, *Historic Disaster Response to Hurricane Harvey in Texas* (Sept. 22, 2017), https://www.fema.gov/press-release/20230425/historic-disaster-response-hurricane-harvey-texas. However, for tactical reasons, the government produced no evidence to show any actual, specific duplication.

SUMMARY OF ARGUMENT

I. For more than 150 years, the Supreme Court has held that flooding upstream land behind a government-built dam constitutes a taking. *See Pumpelly*, 80 U.S. at 181. For over a century, it has said that "[t]here is no difference of kind … between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows." *Cress*, 243 U.S. at 328. Binding precedent in this Court holds the same. *E.g.*, *Stockton v. United States*, 214 Ct. Cl. 506, 518-19 (1977). A permanent easement to intermittently flood property is a *per se* taking.

Even though it is unnecessary to apply the multi-factor tests articulated in *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), and *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (*Arkansas Game*), Plaintiffs meet those tests as well, supplying an independent basis to affirm. *See Ideker Farms*, 71 F.4th at 978 n.6 (affirming the CFC's application of multi-factor tests while holding that a *per se* rule applied).

The government's counterarguments ignore both the CFC's findings of fact and binding precedent. First, Harvey's scale and scope provide no escape from takings liability. The government's weather predictions are irrelevant where, as here, the dams worked as intended to store water behind the dams within their reservoirs. Regardless, the CFC found that the government should have foreseen—and actually

foresaw—flooding upstream beyond government-owned land caused by severe rainfall. Second, the government's invocation of its "emergency" power to address unanticipated exigencies goes nowhere. As the CFC found, as to upstream owners whose land would not otherwise have flooded, "the government [was] responsible for creating the emergency." Appx45. Third, binding precedent forecloses the government's proposal for a coming-to-the-nuisance defense. *See Palazzolo*, 533 U.S. at 629-30 (rejecting identical argument). It could hardly be otherwise, as the government's approach would allow it to take private land behind the dams for free. Fourth, this Court has also rejected the government's argument that the Flood Control Act abrogates the government's liability under the Fifth Amendment. Finally, the government's familiar sky-is-falling argument that it should not be held liable because the bill is too big must fail. That has never been the law. And such complaint is particularly inapt here, where the government chose to take its chances in litigation rather than exercise eminent domain to secure the flood rights it knew it would need.

II. In awarding just compensation for the taking, the CFC rightly included costs to repair structures and personal property loss under a straightforward application of this Court's precedents and precedent from the Supreme Court. The CFC also correctly awarded compensation for Mr. Holland's leasehold advantage

and lost rental value from Mr. Sidhu's condo units. The CFC was well within its discretion to provide compensation for Plaintiffs' displacement costs.

III. The CFC erred in finding the government liable for taking a flowage easement on Ms. Popovici's property but awarding $0 for that easement. Even the government valued the easement at $5,000, and Plaintiffs' experts valued it at many times that. Either the government took no easement, or Ms. Popovici is entitled to just compensation.

IV. The CFC erred in offsetting Plaintiffs' compensation awards with emergency aid provided by FEMA to over 270,000 victims of Harvey. This Court has held the only permissible offsets are "special benefits," *i.e.*, those that arise from the taking and improve the value of the remaining land. General emergency relief available to all downstream and upstream flood victims does not meet that test. The CFC acknowledged as much but proposed a new test: whether the governmental benefit results in "duplicate recovery." Even under that novel approach, no offset is proper. For tactical reasons, rather than seek to prove any specific duplication, the government categorized FEMA aid into broad buckets that thematically relate to Plaintiffs' compensation claims. The government made no attempt to show that any specific damages sought here actually duplicated particular FEMA payments. The FEMA offsets must be reversed.

V. The CFC also erred in denying class certification solely due to timing. Plaintiffs relied on the court's instructions to wait until jurisdiction had been confirmed to file their certification motion, and the government identified no prejudice from that timing.

STANDARD OF REVIEW

"Whether a taking under the Fifth Amendment has occurred is a question of law with factual underpinnings." *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1359 (Fed. Cir. 2018). This Court reviews the CFC's "legal determinations de novo and its fact-findings for clear-error." *Id.*

ARGUMENT

I. Flooding Upstream From A Dam Is A Textbook Taking.

The government built the Addicks and Barker dams to prevent the destruction of downtown Houston, and those dams impounded water—which would have otherwise surged down the Buffalo Bayou—on Plaintiffs' properties upstream. That is a taking under "a simple, *per se* rule," *Cedar Point*, 141 S. Ct. at 2071, or the multi-factor tests from *Ridge Line* and *Arkansas Game*. The government's counterarguments ignore the CFC's findings and binding caselaw.

A. Flooding Behind A Dam Is A *Per Se* Taking.

Case after case dating back more than 150 years establishes the blackletter rule that "the government … effects … the clearest sort of taking," when it causes "recurring flooding as a result of building a dam." *Cedar Point*, 141 S. Ct. at 2071

(quotation marks omitted). This case is subject to that "simple, *per se* rule: The government must pay for what it takes." *Id.*

An unbroken line of precedent decides this case. Beginning in 1872, the Supreme Court recognized that though the government has the *power* to build a dam for the public good, that power does not excuse its constitutional *duty* to pay for the land it takes. *See Pumpelly*, 80 U.S. at 177, 181. *Pumpelly* addressed that duty in the context of a state constitution, but the Supreme Court soon clarified that, under the federal Constitution, it is likewise "clear … that where the government by the construction of a dam … floods lands belonging to an individual … there is a taking within the scope of the [Fifth] Amendment." *United States v. Lynah*, 188 U.S. 445, 470 (1903), *overruled on other grounds by United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592 (1941). And the Court soon thereafter confirmed that the compensation due must account for the reduced value of the remaining land caused by partial flooding. *United States v. Welch*, 217 U.S. 333, 338-39 (1910).

In *United States v. Cress*, 243 U.S. 316 (1917), the Supreme Court recognized "[t]here is no difference of kind … between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other." *Id.* at 328. "[W]here … land is not constantly but only at intervals overflowed, the fee may be permitted to remain in the owner, subject to an

easement in the United States to overflow it with water as often as necessarily may result from the operation of the … dam." *Id.* at 329. That is, by intermittent partial flooding, the government has taken a flowage easement for which it must pay. *Id.*

Since then, this basic fact pattern—government builds a dam, dam floods private property upstream, government must pay—has been hornbook law at every level of the judiciary. *See, e.g.*, *Dickinson*, 331 U.S. at 749 ("when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner" is entitled to sue for just compensation); *Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1290-91 (Fed. Cir. 2006) ("[w]hen the damages from a taking only gradually emerge, *e.g.*, as in recurrent flooding, a litigant may" sue (citing *Dickinson*, 331 U.S. at 749)); *Cotton Land Co. v. United States*, 75 F. Supp. 232, 233 (Ct. Cl. 1948) ("If the construction of Parker Dam and the impounding of water behind it had included some of the company's land within the bed of the lake … there would be a plain case of taking, and the Government would have to pay compensation.").

Against that wall of precedent, this case is easy. Indeed, in precedent that binds this Court, the Court of Claims in *Stockton v. United States*, 214 Ct. Cl. 506 (1977),[2] confirmed the clear, controlling rule: if the government "fail[s] to acquire

[2] This Court has adopted as precedential decisions issued by the Court of Claims prior to the establishment of the Federal Circuit. *See S. Corp. v. United States*, 690 F.2d 1368, 1371 (Fed. Cir. 1982).

flowage easements to forestall future flooding claims," "only one actual flooding is enough when the property is upstream of the dam and below the contour line to which the dam is designed to impound water"—even when "[h]eavy" precipitation raises the water to an "unprecedented" level within the reservoir. *Id.* at 512, 513, 518-19.

There, the Stocktons bought land upstream of a dam from a developer and built a house. *Id.* at 512. After several years without incident, "[h]eavy rains … brought reservoir elevations" up to "unprecedented levels," causing "intermittent but inevitably recurring" flooding. *Id.* at 513, 515 (quotation marks omitted). The Court of Claims held that a taking occurred upon a single flood, reasoning "even if there has been but one flooding, the result is only that which the engineers intended the dam to achieve." *Id.* at 519. That plaintiffs lived within the dam's reservoir made *Stockton* straightforward. "Having taken … part of plaintiffs' land" within the dam's reservoir, the government "is liable for injury to the value of the remainder caused by its use of the land taken" via its "flowage easement." *Id.*

This case is another unusually straightforward one. Here, as the CFC found, "plaintiffs' properties are, by government design, within the dams' flood-pool reservoirs." Appx34. And they would not have flooded without the dams. Appx37-39; *see* Appx28 n.18 ("[P]laintiffs' properties are privately-owned land within a reservoir that only flooded in this cause because of the government's construction

of the Addicks and Barker Dams[.]"). The government is therefore liable upon a flooding for taking a flowage easement.

To be sure, more complicated cases exist. Both this Court and the Supreme Court have addressed cases that involve flooding caused by a government project *other* than a dam, like a post office (purpose-built to do something besides impound water in a reservoir), *see, e.g.*, *Ridge Line*, 346 F.3d at 1350; or involve property that is *downstream* from the dam, *see, e.g.*, *Arkansas Game*, 568 U.S. at 28, 37.

In a case where the government project is something other than a dam, for instance, the foreseeability of the flood or the government's intent to cause flooding may be murkier. *See Sanguinetti v. United States*, 264 U.S. 146, 150 (1924) (runoff was not "within the contemplation of or reasonably to be anticipated by the government" in building a canal).

Downstream cases can introduce complex causation issues because the property might have flooded even absent the dams. In addition, courts may need to weigh the relative benefits of the dam for downstream claimants who may stand to benefit from its flood control. *See Alford v. United States*, 961 F.3d 1380, 1382 (Fed. Cir. 2020) (flooding of land adjacent to lake must be considered against flooding absent flood control project).

Even in more difficult cases, this Court has found takings in non-dam and downstream cases alike. *See Ridge Line*, 346 F.3d at 1350 (finding taking where

flooding was caused by post office); *Ideker Farms*, 71 F.4th at 987-88 (finding taking downstream); *Jacobs v. United States*, 45 F.2d 34, 37-38 (5th Cir. 1930) (same, due to increased frequency of flooding).

But the key point is that *this* case—brought by property owners upstream within the reservoirs created by government-built dams—involves none of those complications. "Cases saying that 'one flooding does not constitute a taking' and cases therein cited, are cases where the property flooded downstream of the dam and[/or] the damage is an unintended and unwanted result of" the government's project. *Stockton*, 214 Ct. Cl. 519. "[O]nly one actual flooding is enough when the property is upstream of the dam and below the contour line to which the dam is designed to impound water." *Id.* at 518-19. This case ends there.

B. Plaintiffs Likewise Meet The Inapplicable Multi-Factor Tests.

As the Supreme Court and this Court have said, no "multi-factor test" is needed in a *per se* physical takings case like this. *Ideker Farms*, 71 F.4th at 978 & n.6 (holding "Plaintiffs[] prevail under" the *Arkansas Game* and *Ridge Line* multi-factor tests and the *per se* takings rule); *see Cedar Point*, 141 S. Ct. at 2071. The multi-factor tests articulated in *Arkansas Game* and *Ridge Line* are reserved for "closer calls." *Ideker Farms*, 71 F.4th at 980.[3] Yet even applying those tests, the

[3] The *per se* test for physical takings "reinforce[s] the principle that the permanent appropriation of a flowage easement is 'clear enough' to be on the side of a *per se*

CFC found Plaintiffs met every factor. Appx27, Appx44.[4] As it did in *Ideker Farms*, this Court should affirm that holding.

1. Nature and magnitude of the government's action.

Plaintiffs meet the first *Ridge Line* factor—the nature and magnitude of the government action—which maps onto *Arkansas Game*'s look at time and severity.

Time and Duration. As the CFC found, this factor is "essentially undisputed" and "manifestly supports the finding of a taking." Appx29-30. The *Stockton* Court held that "only one actual flooding is enough when the property is upstream of the dam and below the contour line to which the dam is designed to impound water." 214 Ct. Cl. at 518-19; *see Quebedeaux v. United States*, 112 Fed. Cl. 317, 323 (2013) (finding taking where government used a permanent structure to "flood[] a property once"); Appx30. And here the CFC found that the "construction, maintenance, and

taking and not a trespass" or tort. *Ideker Farms*, 71 F.4th at 981 (quoting *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991)).

[4] As the CFC observed, several of the *Arkansas Game* factors "subsum[e] the considerations of the *Ridge Line* test," such that the tests substantially overlap. Appx27. Under *Ridge Line*, this Court has policed the line between a tort and a taking by asking: (1) whether "the nature and magnitude of the government action" either "appropriate[s] a benefit to the government at the expense of the property owner, or at least preempt[s] the owners [*sic*] right to enjoy his property for an extended period of time," and (2) whether "the government intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity.'" 346 F.3d at 1355-56. The Supreme Court in *Arkansas Game* looked to: (1) time; (2) intent; (3) foreseeability; (4) the character of the land; (5) the plaintiffs' reasonable investment-backed expectations; and (6) the severity of the flooding. 568 U.S. at 38-40.

operation of the Addicks and Barker Dams in the past, present, and future" means the government "reserves the right to *repeat* the impoundment." Appx29-31 & n.20 (emphasis added).

Severity. The dams' interference with Plaintiffs' property rights is "substantial and frequent enough to rise to the level of a taking." *Ridge Line*, 346 F.3d at 1357. As the CFC found, the flooding caused "significant harm." Appx31. Most Plaintiffs were evicted from their homes for months and could enter and exit their property only by watercraft. Appx31-32. Plaintiffs were "almost entirely prevent[ed]" from "normal use and enjoyment" of their properties. Appx31. Plaintiffs also suffered "extensive damage" to their "real and personal property," and "significant diminution of property values." Appx32-33. Because "a future storm of significant magnitude" is "nearly inevitable," Plaintiffs stand to be subjected to these harms all over again. Appx31.

Benefit to the Government. The construction, maintenance, and operation of the dams "appropriate[d] a benefit to the government at the expense of the property owner." *Ridge Line*, 346 F.3d at 1356. Here, the "benefit to the government" was protection of a major metropolis and its ship channel. By the government's own account, the dams' "purpose is to protect [these] downstream areas from flooding." Br. 35. Mission accomplished. The dams "prevent[ed] an estimated $7 billion in projected losses downstream in Houston." *Id.* (quoting Appx19).

Those savings to the public fisc came "at the direct expense" of upstream property owners—Plaintiffs here—who derive no flood protection from the dams and whose property would not have flooded but for the dams. Appx33-34; *see* Br. 26 (agreeing that any benefit "accrued to downstream property owners"). The Fifth Amendment "bar[s] [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960).

2. Intent or foreseeability.

Arkansas Game asks "the degree to which the invasion is intended or is the foreseeable result of authorized government action." 568 U.S. at 39. *Ridge Line* similarly inquires whether the invasion is the "direct, natural, or probable result of an authorized activity," 346 F.3d at 1355 (quotation marks omitted). A plaintiff must establish causation and *either* intent *or* foreseeability. *Arkansas Game*, 568 U.S. at 39. On causation, the government does not contest that the dams were a but-for cause of the upstream flooding.[5] (The government's argument that Harvey's rains broke the causal chain are addressed below, *infra* 36-39.) As to foreseeability or intent, the CFC correctly found both met. Appx35-36.

[5] "[F]or ten of the thirteen properties," the government "essentially conceded that without the dams these properties would not have flooded." Appx37. And the CFC found that "but for the Addicks and Barker project, flooding would not have occurred to the level it did on the three contested properties." Appx39. The government does not appeal that finding.

Foreseeability. Flooding Plaintiffs' upstream property behind the dams was "the predictable result of the government action." *Ridge Line*, 346 F.3d at 1356. Foreseeability is an objective inquiry that asks whether there is "any reason to expect that such result would follow." *Sanguinetti*, 264 U.S. at 147-48. When the government builds a dam capable of holding a certain amount of water, there is reason to expect it will hold at least that much water. *See Stockton*, 214 Ct. Cl. at 518-19. Applying that rule, the CFC found the government "should have been aware since the initial construction of the dams[,] and at every point onward, that the flood pools in the Addicks and Barker Reservoirs would at some point … exceed the government-owned land, inundating private properties." Appx36.

More than that, the CFC found the government actually foresaw flooding beyond government-owned land. Appx36-37, Appx40-41. Contemporaneous documents spanning 80 years demonstrate the government was subjectively aware that private property flooding within the reservoirs was not merely possible, but "probable." Appx40-41. As the CFC found, "the Corps knew from the outset that the land it purchased was inadequate to hold the amount of water that would be contained in the reservoirs should the embankment-design storm occur." Appx40. The government studied upstream flooding of private land for decades and conducted drills to prepare for this scenario. *See* Appx11-17 (citing Appx10012 (1977 hydrology report); Appx10715 (1984 general design memorandum);

Appx10149 (1992 special report on flooding damages); Appx10185 (1995 reconnaissance report); Appx10301, Appx5599 (1990s and 2000s home elevations surveys); Appx11067 (reservoir structure maps); Appx9500 (2009 multi-agency tabletop exercise); Appx8780 (2009 operational assessment)). The government concluded "it is only a matter of time before the reservoirs flood off government-owned land." Appx15 (quoting Appx9501). As the CFC found, "it is unreasonable to contend" that the government did not "believe[] flooding beyond the extent of government-owned land was probable." Appx37.

The government's "awareness" for takings purpose does not, contra its brief, depend on the government's supposed subjective weather forecasts.[6] Instead, per *Stockton*, what matters are the basic rules of physics that dictate the size of a dams' reservoir. *See infra* 36-37. Regardless, even if the government's subjective awareness mattered, the CFC found "the Corps itself had fully anticipated a storm the likes of Harvey." Appx31; *see* Appx36, Appx40-41. According to the Corps' own calculations, the original design storm used to construct the dams produced an

[6] The government is thus wrong that the CFC needed to pick a particular point in time at which the CFC foresaw flooding on private property upstream. Br. 35 n.4. Regardless, the CFC found that the government was aware "since the initial construction of the dams and at *every* point onward"; its understanding only became more sophisticated with time. Appx35-37 (emphasis added). "Therefore, it is irrelevant in this case whether foreseeability is measured by the 1940s, 1970s, or even in the 2000s, because at all of those points defendant should have objectively foreseen that the pools could and would exceed government-owned land." Appx36.

amount of rainfall roughly equivalent to Harvey. *Compare* Appx6-7 (design storm generated 31.4 inches of rain over 3 days), *with* ECF 242 at 59 (Harvey dropped 31.3 inches in Addicks and 31.1 inches in Barker over 5 days). The government modified the dams after Tropical Storm Claudette to withstand an even larger storm. *Supra* 13, 15. Even setting aside the government's design storms, the CFC found that "the sheer frequency of significant storms in the region both before and since construction of the dams" indicated "that [Harvey] was more than an isolated event." Appx31; *see* Appx17 (finding that Tropical Storms Claudette and Allison generated more rainfall than Harvey). On that record, the CFC found the government was "well aware that storms capable of overflowing government-owned land were likely to occur." Appx40-41. "The Corps subjectively knew by the 1940s, and particularly by the 1960s, that storms larger than the design storm were likely to occur over Addicks and Barker" and "that pools exceeding government-owned land were probable at some point." Appx40-41.

Intent. Because upstream flooding beyond government-owned land was both foreseeable and foreseen, this Court need not decide whether the government intended this result. But it did.

"[I]ntent," under *Ridge Line*, is satisfied if the government intended its physical occupation of Plaintiffs' property, even if it did not specifically intend to abridge a private property right. *See LaBruzzo v. United States*, 144 Fed. Cl. 456,

474 (2019). "[B]uild[ing] a flood-control dam knowing that certain properties will be flooded by the resulting reservoir" is a "conscious decision to subject particular properties to inundation so that other properties [will] be spared." *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 807 (Tex. 2016).

That is exactly what transpired. As the CFC put it, "the Corps planned all along to impound water to the maximum extent of the available storage—a determination that never altered." Appx41. The government also made "a calculated decision" not to acquire all the land within the dams' reservoirs. Appx7, Appx45. Thus, as the CFC found, "plaintiffs' properties are, by government design, within the dams' flood-pool reservoirs." Appx34. And that establishes intent.

3. Property interests and investment-backed expectations.

The government has effectively conceded that Plaintiffs held the relevant property interest at the time of the taking; they "are owners of properties not subject to flowage easements." Appx28 & n.18; *see infra* 45 (addressing the government's argument that *Milton* was wrongly decided and the Flood Control Act alters property owners' expectations). Plaintiffs also had "reasonable investment-backed expectations" that their property would not flood as it did.[7]

[7] The investment-backed expectations inquiry is irrelevant to physical takings cases. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). But Plaintiffs still satisfy it.

As the CFC found, Plaintiffs "did not know their properties were located within the reservoirs and subject to attendant government-induced flooding," and had no objectively reasonable cause to know of that risk. Appx43-44. The Addicks and Barker dams are relative bumps on the Texas landscape. They do not loom over the horizon like the Hoover dam, but rather rise gradually, "almost imperceptibly" over several miles. Appx6. On a typical day, their "reservoirs" are ordinary dry land. Appx16. As the court explained, "in rapidly developing suburbs of a large city like Houston," there is "a regular flow of people moving in and out of the area." Appx44. These residents, moving to a suburb like any other—with homes, schools, shopping malls—have no cause to suspect that their new homes lie within reservoirs absent "an especially aggressive public campaign." Appx44. Though the government held some town halls and made maps available online, the CFC found those were not enough to put a reasonable homeowner on notice. Plaintiffs thus had reasonable expectations their properties would not flood as they did.

C. The Government's Counterarguments Fail.

The preceding analysis applies hornbook law—indeed, even the *government* has endorsed this rule in other cases. *See* Katrina Br. 24 ("[T]he invasion of private property necessary for [a] project to be constructed, operated, or used as intended can be understood as an authorized acquisition of the property"—such as, for example, "when the water impounded in [a] reservoir created by a government-

constructed dam submerges private property."); Br. for United States at 18-19, *Arkansas Game*, 568 U.S. 23 (2012) (No. 11-597), 2012 WL 3680423 ("[T]he inundation of land by backwaters behind a dam" is "now recognized as an archetypal taking by floodwaters."). Today, however, the government reaches for a grab bag of foreclosed arguments and policy defenses to keep from paying Plaintiffs for what it took. This Court should reject each one.

1. Subjective weather predictions are irrelevant, but the CFC found the government foresaw Harvey's rainfall.

The theme of the government's brief is that Harvey was an unprecedented storm. That fact, the government argues, absolves it of liability for several reasons: (1) it rendered the storm not foreseeable; (2) it broke the causal chain between the dams and upstream damage; and (3) it is unlikely to recur, which the government says reduces the duration and severity of its action. The government's subjective weather predictions are not the test. In any event, the government's premise about the storm is wrong, and its conclusions lack merit.

When the government builds a dam and flooding occurs upstream, that is a taking irrespective of whether the government subjectively predicted the conditions that would cause the dam to fill. *Supra* 22-27. In *Stockton*, there was no indication the particularly "[h]eavy rains in April 1973" were predictable or predicted. 214 Ct. Cl. at 513. Likewise in *Cotton Land Co. v. United States*, 75 F. Supp. 232, 233 (Ct. Cl. 1948), the Court of Claims found a taking where the plaintiff's land was flooded

even *beyond* the dam's reservoir due to later changes to water flow and land. There, government engineers had not "studied" this chain of events "in advance." *Id.* at 233-34. The Court nevertheless found a taking because the eventual flooding followed "naturally" from the government's building the dam. *Id.* at 235. When the government builds a dam, it must "expect," in the relevant sense, that it could fill and flood upstream—even if that flooding requires extreme weather or geological changes to occur. This case, though, is much easier because Plaintiffs' properties "are, by government design, within the dams' flood-pool reservoirs." Appx34; *see supra* 10-15, 34. That is enough.

Regardless, the government's premise about the storm is wrong. Yes, Harvey was exceptional in its reach and the amount of rain in some areas. Appx18. But as to the rain that fell over Addicks and Barker, Harvey was not unprecedented for the region. Its rainfall was on par with Hearne (31") and less than Claudette (43") and Allison (36"). Appx17, Appx31, Appx 36-37. As the CFC found, the government should have foreseen and indeed foresaw that amount of rain. *Supra* 31-33.[8]

[8] The government suggests historical storms are irrelevant because they were centered "outside the Project area." Br. 25. But, as the CFC found, the Corps contemporaneously acknowledged their relevance: the Corps' studies foresaw that had these storms "centered over Addicks and Barker … the combined rainfall … could have resulted in flood pools exceeding the limits of government[-]owned land." Appx17 (quoting Appx8787) (bracket in original).

Next, the government's conclusion, that extreme rain severs causation, is untenable. Courts have found causation on much more attenuated facts. In *Cotton Land*, for example, the government built a dam and water filled the reservoir, leaving plaintiff's land untouched. Then "the river flowed into the lake; deposited its sand where it collided with the still water; the deposit of the sand placed another obstacle to … the river; this filling up of the bed of the river raised the level of its water; it overflowed its banks" and, at last "[spread] out over the [plaintiff's] land." 75 F. Supp. at 233. That "series of events" subsequent to the government's construction of the dam did not "break the chain of legal connection between the defendant's act and the plaintiff's loss." *Id.*

Causation is much more straightforward here. The government built the dams to spare Houston *in the event of extreme rainfall*. The government cannot now claim that Harvey's rainfall (similar to the original design storm and less than other area storms) broke the causal chain between its dams and the flooding that resulted. Nor does it matter that extreme rainfall is a very low probability event on any given day. The point is that, over time, it is possible, even probable, that a severe storm will eventually hit. Appx31. That is why the government built the dams and spent 70 years improving them and running flood scenarios in preparation for just such an event. *Compare supra* 10-14, *with* Br. 31-32.

The government's comeback—that it should be allowed to pay only for the land that, in its view, "optimize[s] the cost of achieving a desired level of flood management"—would let the government take land for free if it deems that "cost-efficient[] … policy." Br. 30-33.[9] But the CFC found that "the dams were designed to contain more water than the acquired land could hold," and "the Corps planned all along to impound water to the maximum extent of the available storage." Appx7, Appx41. Moreover, by the late twentieth century, the dams were fortified to handle a storm and flood pool substantially larger than Harvey. *Supra* 13, 15. The government cannot avoid takings liability in that instance just because it believes payment is not "optimal."

The government's arguments about the duration and severity of the invasion onto Plaintiffs' property, too, must be rejected. The government protests that evidence was lacking and that the CFC made no findings regarding the recurrence of a Harvey-like storm. Br. 23-24. This is inaccurate and misses the point.

There was evidence on this issue at the liability and compensation phases. Appx31 (citing government-witness Kappel's and Plaintiffs-witness Long's testimony); *see also, e.g.*, Appx8977 (Bedient's expert report for Plaintiffs finding

[9] The government's carefully worded point that its land acquisition "was consistent with the Corps' guidelines in effect when the Project was designed and built," Br. 31-32, writes around the reality that that was no longer the case by the late twentieth century. *See* Appx8925-26, Appx8888 n.2.

"there will continue to be rainfalls of similar magnitude or greater"). Based on that evidence, the CFC rejected the government's recurrence estimates and found that "a similarly large storm, producing comparable rainfall [to Harvey], remains likely to occur again." Appx31; *see* Appx33, Appx73. As the government stated when it designed the dams, rainfall like Harvey's (measured over Addicks and Barker) may be "likely to occur with a frequency of once every 50 years." Appx8 (quoting Appx9094). That would put the odds of another Harvey over the life of a 30-year mortgage at 45%.[10] In any event, the CFC found that "one Harvey-sized storm was not necessary to create large flood pools—a series of consecutive moderate storms could have the same effect." Appx37 (crediting testimony).

On the law, the specific frequency with which a storm like Harvey will recur is relevant, at most, to the valuation of the easement, not "the character of the invasion," which is what "determines the question whether there is a taking." *Cress*, 243 U.S. at 328; *Hendler v. United States*, 952 F.2d 1364, 1381 (Fed. Cir. 1991) ("[T]he extent of occupation was only relevant to compensation, not liability."). As the CFC found, the government will "use its easement" when the next storm comes because "this was more than an isolated event, and … it is likely to recur." Appx73; *see* Appx31; *see also 2,953.15 Acres of Land v. United States*, 350 F.2d 356, 360

[10] Even a 1-in-100-years storm has a 25% chance of occurring during a 30-year mortgage.

(5th Cir. 1965) (law presumes that the condemnor will exercise its easement). Whether the government uses its flowage easement in 50 years or 100 years or more has no effect on its permanence.

2. There is no "police power" exception to the Takings Clause, nor does this case fit the facts of a necessity defense.

As the government acknowledges, Br. 49, this Court has already rejected a "police power" exception to takings liability. *Milton*, 36 F.4th at 1162. Regardless, even as a putative defense, the "necessity" line of cases has no application.

For one, this case does not involve land use "akin to public nuisances." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022 (1992) (citing *Miller v. Schoene*, 276 U.S. 272, 279 (1928), *Mugler v. Kansas*, 123 U.S. 623 (1887)); *see Bachmann v. United States*, 134 Fed. Cl. 694 (2017). Diseased apple trees and criminal enterprises are irrelevant.

For another, this case is not one where the government acted in a surprise exigency out of "actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives and property and others." *Lucas*, 505 U.S. at 1029 n.16 (quotation marks omitted). The government focuses on the tick-tock of events after Harvey's rains started to fall on August 25, 2017. The government repeats that the "water had to go *somewhere*." Br. 37, 50. It insists all the government could do was open or close the dams' gates, choosing upstream or down.

But that artificial aperture takes as a state of nature—rather than as the government's considered choice—the very dams of which the gates are part. For nearly a century, the government had planned where to put the water: upstream. "[T]he whole purpose for the … project was to prevent downstream flooding, especially in downtown Houston." Appx5.

During the storm, the government operated the dams consistent with its statutory directive and Water Control Manual exclusively to protect downtown. Appx45 (the Corps "had little to no choice on how to act when Harvey hit"). At no point did the Corps "stray from its primary objective to prevent downstream flooding," even when that "mean[t] impounding water on private property." Appx40.[11] The government's complaints that it "provided long-term benefits" to others and should not be held "responsible for *perfect* flood control," Br. 29, 55, have no application upstream because the people who reside in the reservoirs reap no benefits from the dams, *supra* 11, 29-30. With respect to them, "the government [wa]s responsible for creating the emergency." Appx45.

Handwringing about its "no-win" situation, the government gestures toward the classic "trolley problem." That puzzle may pose a gray area to ethicists and moral

[11] The government at one point seems to suggest the dams lacked a public purpose because "[a]ny … benefit accrued to downstream property owners, not the government." Br 26-27. That makes no sense. The dams' $7 billion in savings to a major city and shipping artery serves the public policy objective the government elsewhere acknowledges—"devastation in a highly populated urban area." Br. 17.

philosophers. But for courts, the Fifth Amendment supplies a black-and-white answer. The government may reroute the trolley—or redirect the rainfall—to save many and burden a few. It simply must *pay* the people who, as a result, find themselves on the wrong side of the tracks, or the upstream side of the dam.

The government's cited "necessity" cases make this clear. In each one, the government acted upon property *already in the path* of some surprise disaster, be it blight or fire. *See Bowditch v. City of Boston*, 101 U.S. 16, 17-18 (1879) (government blew up a building in the path of the fire); *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (same as to trees in the path of the blight); *cf. Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 90-92 (1969) (approving emergency occupation of buildings in which rioters had already started fires). No case allows the government to move unconnected property into the path of the emergency without compensation.[12] And no case has ever applied the "emergency" exception to free the government from compensating property owners behind a dam.

3. There is no "coming-to-the-nuisance" defense to takings.

The government next says that, because Plaintiffs bought land next to a dam in a "flood-prone region," they should have known they might get flooded and

[12] The *YMCA* Court distinguished the situation where the government appropriated the building *not* because the rioters were already bearing down, but because the building was strategically located and could be used to stop destruction of *other* buildings. *See* 395 U.S. at 90. That fact pattern—more akin to this one—was outside the emergency exception.

therefore cannot sue. Br. 39-45. This theory is foreclosed by the CFC's factual findings that Plaintiffs did not know—and had no reason to know—about the flood risk. *Supra* 35. Still, setting aside that finding, the government's "coming-to-the-nuisance" defense defies law and logic.

On the law, the Supreme Court has been clear. A plaintiff's takings "claim is not barred by the mere fact that title was acquired after" the governmental action. *Palazzolo*, 533 U.S. at 630. This Court recognized the same rule in *Cooper v. United States*, where, although the plaintiff "did not acquire legal title … until after the physical events causing the taking began," that was "no impediment to recovery." 827 F.2d 762, 764 (Fed. Cir. 1987). Case after case confirms the point. The Stocktons, for instance, bought their property and built their house after the government built a dam. 214 Ct. Cl. at 510. In *Dickinson*, the Supreme Court held that a plaintiff could recover for partial upstream flooding even though the flooding had *already begun* at the time he acquired title. 331 U.S. at 747-49. The Supreme Court has recognized that even "purchasers *with* notice" have a "compensation right when a claim becomes ripe." *Palazzolo*, 533 U.S. at 628 (emphasis added). "[P]eople still do not expect their property … to be actually occupied." *Horne v. Dep't of Agric.*, 576 U.S. 350, 361 (2015).

As for its logic, the government's argument proves too much. As the government puts it, *any* "reasonable property owner" should "appreciate[] the

implications of acquiring property" near a dam. Br. 43. If that were true, the government could take the *entire* reservoir for free so long as private property changed hands before the first flood, when a takings claim ripens. Only individuals who acquired property before a dam's construction and held it through the flood could ever bring a claim. That is not the law. "The Taking Clause is not so quixotic." *Palazzolo*, 533 U.S. at 628.

4. The Flood Control Act does not abrogate the Fifth Amendment.

Next, the government suggests that the Flood Control Act cuts off Fifth Amendment liability. The government, however, concedes that this Court rejected that very argument in *Milton*. 36 F.4th at 1160. The government repackages the point, arguing that the Flood Control Act is a "background principle limiting … Plaintiffs' expectations and property rights." Br. 55. The government's rule would preclude takings liability for *all* property behind the dam. Whatever its wording, the government's position is that it may take property for free any time it legislates to diminish property-holders' expectations. This Court should reject that thinly veiled attempt to end-run *Milton* and the Fifth Amendment.

5. "It costs too much" is not a defense.

Finally, the government says it should not have to pay just compensation because it costs too much. Br. 30-34, 54. To quote the Supreme Court: "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a

just compensation claim would unduly impede the government's ability to act in the public interest." *Arkansas Game*, 568 U.S. at 36. But, after each successive case reaffirming the government's obligation to pay just compensation, "[t]he sky did not fall." *Id.* at 37. Nor will it today.

The government's plea is particularly inapt here. The government laments that "unanticipated urban development" since the dams' construction has run up the bill for the taking. Br. 33 (alteration omitted). But "[t]he Government could, of course, have taken appropriate proceedings, to condemn as early as it chose, both land and flowage easements." *Dickinson*, 331 U.S. at 747. "By such proceedings it could have fixed" the price at a lower level. *Id.* Indeed, as the CFC found, the government made repeated cost-benefit calculations over decades and chose not to purchase additional land. *Supra* 11-14, 31-34.[13] The government's regret that it made a bad bet does not insulate it from the demands of the Fifth Amendment.

[13] The government suggests it should not be liable because, in order to purchase land after the dams' completion, it would have had to get congressional approval—and that would make the government liable for its inaction. Br. 34. The government is being held liable for "inaction" in this case no more or less than in *any* inverse condemnation proceeding, where by definition the government has not acquired the property in advance of the taking. In any event, the CFC found liability based on the government's "*actions* relating to the Addicks and Barker Dams," from construction, through maintenance, and operation. Appx46 (emphasis added).

II. The Government's Attacks On Just Compensation Lack Merit.

The government's attacks on just compensation for past damages in addition to the taking of its permanent flowage easements run counter to precedent. The appropriate measure of compensation is the "'past, present, and prospective' damages" resulting from the taking. *Ideker Farms*, 71 F.4th at 987 (quoting *Ridge Line*, 346 F.3d at 1359). "[W]hile the flowage easement … compensates Plaintiffs for the taking caused by *future* flooding, it does not compensate them for *past* damages" caused by already-occurred flooding. *Id.* at 986. That rule supports each of the compensation awards the government attacks as "consequential." Br. 55-56.

A. Plaintiffs Are Entitled To Compensation For Structural Damage And Loss Of Personal Property.

The CFC was right to award compensation for damaged structures and personal property losses. *See* Appx75-77. "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Horne*, 576 U.S. at 358. There is "no difference in the destruction of personal property and real property, where i[n] either case the owner is deprived of its use." *Causby v. United States*, 75 F. Supp. 262, 264 (Ct. Cl. 1948). "In each case there is a taking for which the Constitution requires just compensation." *Id.*

This axiom yields a clear answer here. The CFC held the government liable for taking "plaintiffs' personal property, fixtures, and improvements [to structures] damaged or destroyed" by water impounded behind the government's dams.

Appx69. Plaintiffs' "personal property was not merely damaged by the government's taking of plaintiffs' real property. Rather, the personal property itself was taken by the government." Appx77.

This Court took the same approach in *Ideker Farms*. 71 F.4th at 987-88. There, as here, "Government-induced flooding … directly took both a permanent flowage easement on Plaintiffs' land and destroyed" personal property, their "crops." *Id.* at 987. This Court awarded damages for each aspect of the taking as "a separate and independent loss of compensable property in its own right." *Id*.

The government's contrary arguments fail.

First, the government argues that Plaintiffs' claims for structures and personal property represent "consequential damages," "too attenuated" from the flooding. Br. 61. (The government levels this accusation against every aspect of Plaintiffs' damages awards it appeals.) This Court rejected the identical argument in *Ideker Farms*, explaining "Plaintiffs do not claim compensation consequential to the taking of an easement—rather, they seek compensation for the government's appropriation" by flooding "of two distinct property interests." 71 F.4th at 987-88.

Ideker Farms does not stand alone. In *Arkansas Game III*, this Court awarded compensation for flood damage to plaintiffs' trees together with a flowage easement. *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1370-72 (Fed. Cir. 2013). Similarly, in *Pete v. United States*, 531 F.2d 1018 (Ct. Cl. 1976), the court

awarded compensation for cabin barges due to the government's taking of the property on which the barges resided. *Id.* at 1032-34. And in *Causby v. United States*, the court awarded compensation not only for "a decrease in rental value of $1,060," but also for "the taking and of the exercise of the easement[, the] personal property thereon, to wit, chickens, of a value of $375.00 [which] were destroyed and thereby taken." 75 F. Supp. at 263. This Court should not depart from its longstanding approach.

Second, the government suggests that *Jackson v. United States*, 230 U.S. 1 (1913), bars recovery for personal property. Br. 61. But that case is irrelevant because the Supreme Court found *no taking*. *Jackson*, 230 U.S. at 20-23; *see also Cress*, 243 U.S. at 327 (distinguishing *Jackson* as inapposite because there was "no direct invasion of the lands of the claimants" by the government).

Third, the government makes a policy pitch. It says requiring compensation for structural damage and personal property loss is unfair because the government may flood Plaintiffs' land again and so might have to pay for structures, appliances, and the like in a subsequent action. Br. 61-62.

That argument ignores the rule of *Ideker Farms* and the line of cases that came before, all of which hold that personal property interests are separately compensable in inverse condemnation cases upon a finding of a permanent easement. *See* 71 F.4th

at 986. What the government might be liable for under that rule in some future case is the subject of *that* case, not this one.

At bottom, the government's unfairness argument boils down to an objection to paying more when it chooses to take property through inverse condemnation rather than eminent domain. But that is exactly what the caselaw contemplates. In *Dickinson*, the Supreme Court had no patience for this complaint. 331 U.S. at 750. "[W]hen the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events," the government—not the plaintiff—bears the financial risk. *Id.* at 749. The government cannot get out of paying for the structures and personal property its dams took by flood because of its decision to wait for that flood.

B. The CFC Correctly Awarded Mr. Holland Compensation For The Taking Of His Leasehold Advantage.

The CFC's decision to grant Mr. Holland $3,300 for his lost leasehold advantage was similarly supported by precedent. Appx77. "It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States." *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976) (collecting cases) (footnote omitted). The accepted means of valuing a taken leasehold interest is to award "the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the

value of the right to renew … less the agreed rent which the tenant would pay." *Id*. at 304 (quoting *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946)).

The CFC followed this law to the letter. The court found that "the government effectively terminated Mr. Holland's leasehold" by flooding his property, rendering it uninhabitable. Appx20, Appx77. Next, the court accepted the expert valuation of Mr. Holland's rental payment, which was $550 under-market. Appx58 & n.8. The court awarded Mr. Holland that $550 leasehold advantage for the six months remaining on his lease. Appx58, Appx76-77.

Seeking to overturn this faithful application, the government begins by incorrectly describing Mr. Holland's leasehold advantage as "expectations under a contract." Br. 57. But that contravenes *Alamo Land*, *Petty*, and a host of other cases, which hold that a leasehold interest is property requiring compensation. *See Causby*, 75 F. Supp. at 263 (compensating for rental property); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973) (compensating lease-holder for unexpired lease interest); *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 152 (1924) ("claimant's possession under its lease was a part of the res").

The government next invokes off-point precedents that, unlike here, found no taking because the government did not intend to occupy the leased property. *Compare* Br. 57, *with Sun Oil Co. v. United States*, 572 F.2d 786, 818-19 (Ct. Cl. 1978) (no taking because the government's "interferences with plaintiffs' lease

rights" stemmed from disputes regarding lease terms, rather than the government's "intent … to take plaintiffs' property"); *Palmyra Pac. Seafoods, LLC v. United States*, 561 F.3d 1361, 1363-65, 1370 (Fed. Cir. 2009) (no taking where the government created a wildlife refuge adjacent to land leased by plaintiffs to conduct commercial fishing, even though that action rendered plaintiffs' operation less profitable). By contrast, the CFC found that the government directly and intentionally occupied Mr. Holland's leased property by flood and thereby took his "unexpired leasehold interest in [that] land." *Alamo Land*, 424 U.S. at 303.

C. The CFC Correctly Awarded Compensation For Lost Rental Value.

The CFC was also right to compensate Mr. Sidhu for lost rental value from his condo units. Appx82-83. Compensation must be paid for real or personal property that constitutes a business asset—whether crops, chickens, or buildings—where its destruction or disruption is "the product of [the government's] direct invasion." *United States v. Causby*, 328 U.S. 256, 265 (1946); *accord Ideker Farms*, 71 F.4th at 987-89 ("the underlying property of a business" is compensable where "directly" taken by government-induced flooding). For real property, the measure of just compensation is "the fair rental value of the property for the period of the taking." *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990).

As the CFC explained, Mr. Sidhu's units are business assets, which he rents to tenants for a steady rental income each month. *See* Appx67, Appx82.

"Impounding floodwaters directly displaced Mr. Sidhu's tenants" and terminated that rental income. Appx83. That loss requires compensation.

Breaking from this established approach, the government argues that rental value "resembles lost profits, which are generally not compensable." Br. 58-59 (collecting lost-profits cases). But that argument "misapprehends the distinction" between "lost profits from operating a business" and "the underlying property of a business." *Ideker Farms*, 71 F.4th at 988-89. "The former, but not the latter, is merely incidental to the taken property" and therefore non-compensable. *Id.* at 989. The rental value of a business property is a core example of compensable "property of a business." *Id.*

The government's resort to cases about non-compensable "business-management and travel costs" only highlights that the condo units fall on the compensable side of the line. *Compare* Br. 58, *with Yuba Nat. Res.*, 904 F.2d at 1580-82 (awarding rental value of mineral rights but declining to award lost profits from goldmining operation); *Causby*, 75 F. Supp. at 263-64 (allowing recovery for the destruction of chickens but declining to award lost profits from the operation of the chicken farm).[14]

[14] Indeed, the CFC applied the government's cases to *deny* Mr. Sidhu damages for travel costs to manage his properties as "hav[ing] too attenuated a connection with the government's taking." Appx82-83.

The government retreats to its familiar rejoinder that the CFC was wrong to award lost rent "in addition to, not instead of" a permanent flowage easement. Br. 57-59. As discussed, Plaintiffs are entitled to compensation for the "future" permanent easement and "past" property deprivation, reflecting "the government's appropriation of … distinct property interests." *Ideker Farms*, 71 F.4th at 987-89; *supra* 47-50. This Court should not depart from that rule.

D. The CFC Correctly Awarded Compensation For Displacement From Property Rendered Uninhabitable By The Taking.

Plaintiffs are due the displacement costs the CFC awarded. Appx82. When the government occupies private property, displacement costs such as "the reasonable cost of moving out" can be compensated in the appropriate case. *United States v. General Motors Corp.*, 323 U.S. 373, 382-83 (1945) (*GMC*).

The calculation of just compensation is context dependent. The Supreme Court has eschewed rigid rules because doing so would "defeat the Fifth Amendment's mandate for just compensation." *Id.* at 380-82. Lower courts have discretion to fashion appropriate awards in takings cases, including by "deviat[ing] from the traditional permanent taking-diminution in value and temporary taking-rental value approaches" when doing so is necessary to make plaintiffs whole. *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1369 (Fed. Cir. 2012) (citing *Vaizburd v. United States*, 384 F.3d 1278, 1286-87 (Fed. Cir. 2004)).

Allowing the recovery of displacement costs in this case falls within that zone of discretion. As the CFC found, Plaintiffs' "homes were rendered uninhabitable" for months by the taking. Appx82. It therefore awarded Plaintiffs the cost of "securing substitute housing actually and necessarily incurred." Appx82. The CFC reasonably determined that failing to award these costs would undercompensate Plaintiffs in light of the nature of the government's taking. Appx82.

The Supreme Court has endorsed that approach in other cases where the government took some portion of, but not the "entire interest" in, a property. *GMC*, 323 U.S. at 382. In *GMC*, for example, the government took temporary occupancy of plaintiff's factory, which was full and operative, to assist manufacturing for the war effort. *Id.* at 375. That meant plaintiffs had to move out. The lower court pegged just compensation to the rental rate of the property as if it were sitting empty. But the Supreme Court reversed that holding. "[B]y the form of its [taking]," the Court explained, the government "chop[ped]" plaintiffs' proverbial bundle of sticks "into bits" and left them "holding the remainder, which may then be altogether useless to [them]." *Id.* at 382. In such a case, the government must "pay more than the 'market rental value' for the use of the chips so cut off." *Id.* Relocation costs are part of the equation. *Id.* at 382-83.

Applying this rule, the Supreme Court has also awarded moving and displacement costs, for example, in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 8-9 (1949). And so, too, did the CFC here. Appx82-83.

The government suggests that compensating Plaintiffs for displacement was wrong because the CFC found a permanent, not temporary, taking. Br. 60-61. This argument merely repackages the government's general objection to the *Ideker Farms*-endorsed approach of compensating each invaded property interest—"past, present, and prospective"—upon the finding of a permanent flowage easement by flood. 71 F.4th at 987-89; *see supra* 47-50; Appx26 n.17 (recognizing separate compensable property interests). Moreover, the argument flips just compensation principles on their head. It presumes that compensation for a permanent easement "is much less than the compensation that would be due if the easement were temporary," when this Court has held precisely the opposite. *Otay Mesa*, 670 F.3d at 1368. The CFC's sound, discretionary judgment to award displacement costs should be affirmed.

* * *

The CFC's finding of liability for a taking, as well as its compensation awards for structural and personal property damage, loss of a leasehold advantage and rental value, and displacement costs should be affirmed.

CROSS-APPEAL

Three aspects of the CFC's decision must be reversed. *First*, the CFC erred by finding the government liable for taking a permanent flowage easement on Ms. Popovici's property but awarding her $0 in damages for that easement. *Second*, the CFC erred by offsetting as "special benefits" FEMA aid that was generally available to Harvey victims. Moreover, the government failed to meet its burden to prove any offset is merited. *Third*, the CFC was wrong to ignore the court's earlier directives and deny class certification based on the timing of the motion alone.

I. The CFC Erred By Finding A Permanent Flowage Easement On Ms. Popovici's Property, But Awarding $0 Of Compensation For It.

The Constitution imposes a "clear and categorical" rule for physical takings: "the government must pay for what it takes." *Cedar Point*, 141 S. Ct. at 2071. With respect to Ms. Popovici, the CFC broke that cardinal rule by rendering two contradictory holdings. First, at the liability phase, it found the government liable for a permanent flowage easement on Ms. Popovici's property. *See* Appx21, Appx46. Then, at the just compensation phase, it awarded her $0 for that easement. *See* Appx75-77, Appx81. Though the CFC did not explain its award to Ms. Popovici, the $1,401.49 figure matched the cost of repairing her garage (which the CFC credited) to the penny. *Compare* Appx75-77, *with* Appx81.

That was error. Either Ms. Popovici is entitled to compensation in exchange for the flowage easement taken, or the government is not entitled to a flowage

easement on her property. Even the government's expert valued Ms. Popovici's flowage easement at $5,000. *See* ECF 569 at 26; Appx63. And Plaintiffs' experts valued it at over $100,000. *See* Appx11418, Appx11537.

Giving the government an easement for free is particularly unfair in these circumstances. Because the CFC failed to clarify the partial extent of the easement on Ms. Popovici's property (which reached only her land and did not cause structural damage to her home), her property record will not reveal the limited nature of the easement. As a result, her home value is significantly impacted.

Nor will this decision affect Ms. Popovici alone. The error, if allowed to stand, will permit the government to take for free easements on the hundreds or thousands of properties that (like Ms. Popovici's property) straddle Harvey's flood line. As to all these property owners, the CFC could find an easement and award compensation, or it could decline to find an easement. The Constitution, however, precludes it from awarding a permanent flowage easement for free.

II. The CFC Erred By Offsetting Generally Available FEMA Relief.

The CFC erred by offsetting from several Plaintiffs' just compensation awards generally available emergency relief aid provided by FEMA to over 270,000 Harvey victims in the storm's immediate wake. Appx84-85. These aid payments do not meet this Circuit's test for "special benefits," the only category of benefits that can be offset. The CFC recognized as much, but then devised its own, new test, purportedly

to avoid "duplicate recovery." Even were that approach defensible, the CFC's judgment cannot stand because the government made a tactical decision not to seek to prove any duplicate recovery for Plaintiffs here.

A. FEMA Aid Does Not Meet This Circuit's Test For Special Benefits.

As the CFC recognized, FEMA emergency relief does not fit this Court's established "special benefits" test. Appx83. The CFC should have stopped there.

This Court has permitted only a narrow category of benefits to be offset from just compensation awards: so-called "'special' benefits." *See Hendler*, 175 F.3d at 1379-80 (citing *City of Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983)); *accord Bauman v. Ross*, 167 U.S. 548, 574-75 (1897). To qualify as a "special benefit," an economic advantage must (1) "inure specifically to the landowner who suffered the partial taking"; and (2) be "associated with the ownership of the remaining land." *Hendler*, 175 F.3d at 1380. In addition, a "special benefit" must differ in kind from the benefits conferred on others. *See* 3 *Nichols on Eminent Domain* § 8A.02[4][a], Lexis (3d ed. database updated 2023) (collecting cases). Economic benefits conferred broadly on people and properties cannot constitute "special benefits." *See City of Van Buren*, 697 F.2d at 1062. This Court and the Supreme Court have only ever found this strict test met on a very particular fact pattern: a partial taking of land that also "increase[d] … the value of the remaining portion." *United States v. River Rouge Improvement Co.*, 269 U.S. 411,

415-16 (1926) (finding "special benefit" where land partially taken by riparian improvement project increased in value because of its frontage on improved, widened river); *see also Bauman*, 167 U.S. at 574-75 (considering "increase in value" of partially taken land due to new highway).

FEMA emergency relief does not meet the "special benefits" test. It was not awarded to takings victims because of their property's relationship to the taking and did not relate to the value of the remaining land. Over 270,000 victims received FEMA assistance, irrespective of whether their property was taken, or benefitted, by the government's dams. *See* Appx67 ("Individuals within the disaster zone are eligible if they are a U.S. citizen, noncitizen national, or a qualified alien, they register within the application period, and FEMA verifies their request for disaster-related damages."); Appx84 (recognizing "the government made funds available to some others whose homes were flooded during Harvey but not because of a government taking"). And some of the aid was related to emergency supplies (diapers and toothbrushes) and rental and repair assistance, none of which related to the value of Plaintiffs' remaining land. *See* Appx67. Since FEMA emergency relief is not a "special benefit," it cannot be offset.

The CFC conceded that FEMA emergency relief "do[es] not fall neatly within the relative-benefit doctrine." Appx83. But rather than follow binding precedent, the CFC fashioned a new test, invoking "the general principle guiding the proper

measure of just compensation": that there should be no "duplicate recovery." Appx83-84. The CFC wove its new "duplicate recovery" test from whole cloth, citing no cases applying any similar test to government-requested offsets. *See* Appx83-84 (citing *River Rouge*, *supra* 59-60). The CFC's departure from this Court's precedent requires reversal.

B. The Government Failed To Carry Its Burden To Prove An Offset.

Even if "no duplicate recovery" were the correct test, reversal is required because the government failed to prove any actual, specific duplication—a burden it bore at trial. *See CCA Assocs. v. United States*, 667 F.3d 1239, 1245 (Fed. Cir. 2011).

The government made a calculated choice. It opted to present evidence exclusively about the categories of relief FEMA paid, rather than any specific items for which FEMA reimbursed Plaintiffs. Appx68 (citing Appx7694 (testimony of Leistra-Jones) (categorizing FEMA aid into home repair, personal property, and displacement)). That approach had a strategic upside for the government: it maximized the potential offset, debiting from Plaintiffs' damages entire categories of emergency relief. But it also carried an inherent downside: the government failed to show any actual "duplicate recovery." Appx83.

Because of its litigation tactic, the government proffered *zero* evidence—not receipts, not individual claims, nothing—to prove how, or even if, FEMA emergency relief related to specific compensation claimed by Plaintiffs in this case.

See Appx7693-95 (expert's methodology); Appx9810 (Expert Report of Dan Leistra-Jones); Appx9764 (Appendix D of Expert Report).

The government's tactic left key questions about Plaintiffs' FEMA aid unanswered. For example, FEMA's "critical needs assistance" included a $500 lump sum available to *all* Harvey victims to help them buy water, food, first aid, prescriptions, infant formula, diapers, medical supplies, personal hygiene items, and fuel. *See* Appx67, Appx15157-58 (cited at Appx67 n.23). Ms. Micu and Mr. Holland, as well as hundreds of thousands of Houston-area residents, collected that $500 check. The government included it among the categories of FEMA payments to be offset. And the CFC offset it. How does that $500 relate to Plaintiffs' property damages claims in this case? Your guess is as good as theirs. Neither the government nor the CFC ever said.

Or check the math. Mr. Holland sought about $79,087.52 in personal property damages from the CFC. Appx64; *see also* Appx80 (citing Appx11301). Meanwhile, he received FEMA aid "to help repair or replace essential items damaged by the disaster" totaling $5,913.67. Appx9878. What, if anything, is the extent of the overlap? Again, the government presented no evidence about this, so there is no way to know. Even if "duplicate recovery" were the right inquiry, the government must be held to its litigation decisions and burden of proof. The FEMA offsets must be reversed.

III. The CFC Erred By Denying Class Certification Based Solely On The Motion's Timing.

The CFC denied class certification based only on "the timing of the[] motion" to certify. Appx205. That conclusion stemmed from an erroneous view of the record and the law, and so was an abuse of discretion. *ATEN Int'l Co., Ltd. v. Uniclass Tech. Co., Ltd.*, 932 F.3d 1371, 1373 (Fed. Cir. 2019) (a district court "necessarily abuse[s] its discretion if it based its ruling on … a clearly erroneous assessment of the evidence"); *Personalized Media Commc'ns, LLC v. Apple Inc.*, 57 F.4th 1346, 1353 (Fed. Cir. 2023) (same as to "error of law").

A. The CFC Clearly Erred In Construing The Timing Of Plaintiffs' Class Certification Motion.

The record shows that Plaintiffs moved for class certification at the stage of litigation indicated by the CFC.

Plaintiffs always "contend[ed]" the complaints "should be certified as class actions." Appx2285. Then-Chief Judge Braden, who was presiding over the master docket, initially ordered certification motions filed by November 9, 2017; but she eliminated those deadlines at a November 1 status conference, stating: "Whatever the deadlines are that I sent [*sic*] are off the table." Appx2192-93. She stressed this was not preliminary: "I'm giving you an oral instruction. … You have nothing to do until we hear" about proposals for counsel leadership. Appx2192-93. Shortly thereafter, on November 20, 2017, the court reiterated that "class certification is

premature at this juncture." Appx2285. The court then appointed counsel for prospective class members and individual plaintiffs and set a schedule that did not contain any deadlines regarding class certification. Appx2286.

The government moved for reconsideration, objecting that the schedule "indefinitely delay[ed] determination of class certification." Appx2294. Chief Judge Braden disagreed. She stressed that the earliest appropriate time to move for class certification may be after "a liability determination." Appx2308. Collecting legal authority supporting delayed class certification under certain circumstances, she concluded that "the economic impact of the Army Corps of Engineers' actions in these cases requires discovery and full consideration of the legal theory that may require a liability determination, before class action certification is considered." Appx2308. The reason is important. Judge Braden was clear from the inception that she wanted to avoid endless litigation of individual claims of the kind that occurred in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). In *Winstar*, the government agreed to a bellwether process. But when the bellwethers were resolved, the government tried "all the rest of those cases"; it "started all over again." Appx2330-31, Appx2334.[15] Judge Braden's instructions on class certification were part of a case management plan designed to avoid that fate.

[15] *See generally* Michael Grunwald, *Lawsuit Surge May Cost U.S. Billions*, Wash. Post (Aug. 10, 1998), https://www.washingtonpost.com/archive/politics/1998/08/10/lawsuit-surge-may-cost-us-billions/f4ad3fb6-68da-494c-9a2f-021e84924a22.

After this case was assigned to Judge Lettow, Plaintiffs renewed the question of the timing of class certification. At a January 30, 2018 hearing, Plaintiffs' counsel said they planned "to move for a class certification concurrent with this liability phase," and "ask[ed] the Court for a schedule that allows [class certification] to happen concurrent with the existing schedule." Appx2205-06. Judge Lettow, too, instructed Plaintiffs to wait, explaining that, although "liability and jurisdiction almost are hand in glove, … the Court would strongly prefer that we focus on jurisdiction first, even though a lot of that would carry over to liability," because "[t]hat might affect your thinking on class certification." Appx2206. Judge Lettow also noted the "test plaintiffs as a bellwether situation … might evolve to something that could turn into a representative of a class or subclass." Appx2212. Plaintiffs acquiesced, agreeing to move for class certification "when we have gone past the jurisdictional … step." Appx2207.

But the CFC did not "go[] past the jurisdictional" step until after the court rendered a decision at the conclusion of the merits phase. Appx3, Appx1016. Plaintiffs thereafter moved to certify the class at the stage instructed by the CFC—after the court had determined its jurisdiction and before the compensation phase. *See* Appx200-02.

Based on the court's statements, Plaintiffs' motion was not untimely. In holding otherwise, the CFC ignored the record, stating there was "no basis … to

credit plaintiffs' argument that the court instructed or asked them to delay their class certification motion." Appx209. That finding, "unsupported" by the "full record," was clearly erroneous, as the litigation history shows. *See Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1110 (Fed. Cir. 1986). The CFC also faulted Plaintiffs for missing Chief Judge Braden's initial certification date. Appx201, Appx209. But, as recounted, Chief Judge Braden lifted the initial deadline eight days in advance of the deadline, at the parties' November 1 status conference. *Compare* Appx2192-93, *with* Appx201. It was error to deny class certification based on this misreading of the record.

B. There Is No Bar To The Timing Of Plaintiffs' Class Certification Motion.

The CFC also misapprehended the relevant law.

First, the CFC disregarded Plaintiffs' prerogative to rely on the court's scheduling statements in determining when to file their certification motion. *See, e.g.*, *Little v. Wash. Metro. Area Transit Auth.*, 100 F. Supp. 3d 1, 7-8 (D.D.C. 2015) (timing was reasonable because "the Court sidetracked the normal orderly proceeding of this case"); *Brewer v. Acct. Discovery Sys. LLC*, No. 18-cv-262, 2018 WL 11476149, at *1 (D. Utah Oct. 24, 2018) (motion not untimely because party "reasonably believed the court's order … contemplated a longer time for filing the motion").

Second, contra the CFC's suggestion, there is no bar to post-liability class certification here. Equitable considerations justify addressing class certification even after liability has been determined. *See, e.g.*, *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1383-84 (D.C. Cir. 1980); *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998).

To be sure, courts avoid post-liability class certification where possible. *Cf.* Appx203 (citing, *e.g.*, *In re Citizens Bank, N.A.*, 15 F.4th 607, 618 n.11 (3d Cir. 2021)). However, this case does not involve the types of factors that typically raise concerns in post-liability certification, as Chief Judge Braden recognized when she postponed class certification until after liability. *See* Appx2307-08 (collecting cases and treatises). For one, there is no risk that the parties "may have tried" the merits "differently had they been aware that a class judgment was at stake." Wright & Miller § 1785.3; *see Paxton v. Union Nat'l Bank*, 688 F.2d 552, 558-59 (8th Cir. 1982). Although pressed repeatedly, the government never identified a single defense or argument it would have made at liability had a class been certified. *See* Appx2573, Appx2595, Appx 2631, Appx 2637. For another, any concerns about strategic intervention are allayed because the pool of potential class members is circumscribed and known. Appx211-12. Here, as in *Winstar*, the legal claims are functionally identical, the plaintiffs are known and finite, and the costs and administrative burdens of failing to certify a class are astronomical. Finally, courts

outside the Federal Circuit have recognized that timing concerns are different in the context of Federal Rule of Civil Procedure 23(b)(2) versus 23(b)(3). *See* 3 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 7:11, Westlaw (6th ed. database updated June 2023); *Paxton*, 688 F.2d at 558-59. It remains open to this Court to clarify how Rule 23 of the Court of Federal Claims, which eliminates the distinction between (b)(2) and (b)(3) classes, fits in.

The CFC's errors regarding the timing of Plaintiffs' motion were, by the court's own lights, dispositive of class certification. The denial cannot stand.

CONCLUSION

The CFC's decision should be upheld as to the issues on appeal and reversed as to the cross-appeal.

Dated: September 22, 2023

Respectfully submitted,

/s/ Ian Heath Gershengorn

Ian Heath Gershengorn
Elizabeth B. Deutsch
Victoria Hall-Palerm
Leslie K. Bruce
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6869
igershengorn@jenner.com

Daniel H. Charest
Emery Lawrence Vincent, Jr.
BURNS CHAREST LLP
900 Jackson Street, Suite 500
Dallas, TX 75202
(469) 904-4550
dcharest@burnscharest.com

Charles Irvine
IRVINE & CONNER PLLC
4709 Austin Street
Houston, TX 77004
(713) 533-1704
charles@irvineconner.com

Counsel for Plaintiffs-Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2023, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system, which caused a copy of the foregoing to be delivered by electronic means to counsel of record.

/s/ Ian Heath Gershengorn
Ian Heath Gershengorn
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6869
igershengorn@jenner.com

Counsel for Plaintiffs-Cross-Appellants

September 22, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This Brief complies with the type-volume limitation of Fed. Cir. R. 28.1(b)(2) because this Brief contains 15,868 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2013 in Times New Roman, Font Size 14.

/s/ Ian Heath Gershengorn

Ian Heath Gershengorn
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6869
igershengorn@jenner.com

Counsel for Plaintiffs-Cross-Appellants

September 22, 2023

ADDENDUM

Orders and Opinions

In the United States Court of Federal Claims

Sub-Master Docket No. 17-9001L

(Filed: December 15, 2021)

IN RE UPSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS	Motion to certify class; timeliness; Rule 23 criteria
THIS DOCUMENT APPLIES TO: ALL UPSTREAM CASES	

Daniel H. Charest and E. Lawrence Vincent, Burns Charest LLP, Dallas, Texas, Charles Irvine, Irvine & Conner PLLC, Houston, Texas, and Edwin Armistead Easterby, Williams Hart Boundas Easterby, LLP, Houston, Texas, Co-Lead Counsel for Upstream Plaintiffs.

Kristine S. Tardiff, Trial Attorney, Environment & Natural Resources Division, United States Department of Justice, Washington, D.C., for defendant. With her on the briefs were Todd Kim, Assistant Attorney General, and Laura W. Duncan, Frances B. Morris, and Gregory M. Cumming, Trial Attorneys, Environment & Natural Resources Division, United States Department of Justice, Washington, D.C.

Vuk S. Vujasinovic, VB Attorneys, PLLC, Houston, Texas, filed a brief for the Banker plaintiffs. With him on the brief were Brian Beckom and Job Tennant, VB Attorneys, PLLC, Houston, Texas.

Zheng Luo, Katy, Texas, filed a brief *pro se*.

Ligang Lei, Katy, Texas, filed a brief *pro se*.

OPINION AND ORDER

LETTOW, Senior Judge.

Before the court is plaintiffs' motion to certify a class limited to liability issues pursuant to Rule 23 of the Rules of the Court of Federal Claims ("RCFC") in this Fifth Amendment taking case. Plaintiffs—property owners upstream of the Addicks and Barker Dams in the Houston, Texas area that experienced flooding during Tropical Storm Harvey—argue that the bellwether approach to case management employed throughout the past years of litigation is inferior to class certification. This motion arises after the conclusion of the liability phase of the trial of

bellwether plaintiffs using the bellwether test-case approach. *See generally* Pls.' Mot. for Class Certification ("Pls.' Mot."), ECF No. 397; Pls.' Suppl. Br. ("Pls.' Suppl."), ECF No. 404; and Pls.' Reply, ECF No. 408. The government counters that the motion for class certification comes too late and that plaintiffs should otherwise be denied certification on the merits. *See* Def.'s Opp'n to Pls.' Mot. for Class Certification ("Def.'s Opp'n"), ECF No. 405. Plaintiffs' motion is DENIED both because of the timing of their request and their failure to satisfy the criteria of RCFC 23.

BACKGROUND

These cases arise from a flooding event:

> After making landfall in August 2017, Tropical Storm Harvey ("Harvey") doused Houston with an average of 33.7 inches of rain over a four-day period. Many properties, including over 150,000 homes, flooded during the storm. Those affected included private property owners within the Addicks and Barker Reservoirs, west of Houston, upstream of the federally designed, built, and maintained Addicks and Barker Dams. During Harvey, the Addicks and Barker Dams collected storm water in their respective reservoirs [extending beyond government-owned land,] causing [private] properties [upstream but] within the reservoir to flood from the impounded water.

In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 227 (2019).

"The first complaint relating to Harvey and the Addicks and Barker Dams was filed on September 5, 2017. Hundreds of such cases followed." *In re Upstream Addicks & Barker*, 146 Fed. Cl. at 228 (internal citation omitted). Initially, Chief Judge Braden of the court ordered those plaintiffs who sought class certification to move for certification by November 9, 2017. *See Y and J Properties, Ltd. v. United States,* 134 Fed. Cl. 465 (2017). On November 20, 2017, however, the Chief Judge relieved plaintiffs of the class certification deadline. *See* Order of Nov. 20, 2017 at 2, No. 17-3000, ECF No. 68. Instead, after soliciting case management suggestions from plaintiffs and defendant, "the Chief Judge . . . issued Management Order No. 1, consolidating these cases, and all related later-filed cases, within one master docket. The Chief Judge then bifurcated the issues of liability and damages, initially setting a schedule to deal with liability. Subsequently, [on December 5, 2017,] the Chief Judge divided the Master Docket into two sub-master dockets—one for downstream properties and, pertinent here, one for upstream properties." *In re Upstream Addicks & Barker*, 146 Fed. Cl. at 228 (internal citations omitted).

In the upstream cases, the court applied the principles of multi-district litigation under 28 U.S.C. § 1407 and conducted pretrial proceedings under the guidance of 28 U.S.C. § 1407(b). "In the spring of 2018, thirteen plaintiff properties were designated to serve as bellwethers for the [upstream] cases." *In re Upstream Addicks & Barker*, 146 Fed. Cl. at 228. "A ten-day trial was held in Houston, Texas, commencing on May 6, 2019, regarding the liability of the United States for the thirteen test properties." *Id.* In December 2019, "the court [found] the government to be liable for a taking of a flowage easement on the [bellwether] properties." *Id.*

Nearly two years later, as the parties engaged in discovery in preparation for the just compensation phase of the trial of the claims of bellwether plaintiffs, plaintiffs moved for class certification on September 24, 2021. *See* Pls.' Mot. Following a supplemental briefing order, the matter is fully briefed. The court received additional briefs from one of the bellwether property owners raising questions about, but otherwise consistent with, certification, ECF No. 406, and from a *pro se* plaintiff, Zheng Luo, opposing certification on adequacy of counsel grounds, ECF No. 412. *See also* Pls.' Reply to *Pro Se* Opp'n, ECF No. 413; Def.s' Reply to *Pro Se* Opp'n, ECF No. 414. Another *pro se* plaintiff, Ligang Lei, filed a brief supporting certification, ECF No. 416. A hearing was held on November 29, 2021.

STANDARD FOR DECISION

Class actions are governed by RCFC 23.[1] To merit class certification,

> a putative class representative must demonstrate: (i) numerosity—that the proposed class is so large that joinder is impracticable; (ii) commonality—that there are common questions of law or fact that predominate over questions affecting individual prospective class members and that the government has treated the prospective class members similarly; (iii) typicality—that his or her claims are typical of the proposed class; (iv) adequacy—that he or she will fairly represent the proposed class; and (v) superiority—that a class action is the fairest and most efficient method of resolving the suit.

---

[1] Rule 23(a) and (b), in whole, require the following:

> **(a) Prerequisites.** One or more members of a class may sue as representative parties on behalf of all members only if: **(1)** the class is so numerous that joinder of all members is impracticable; **(2)** there are questions of law or fact common to the class; **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and **(4)** the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** A class action may be maintained if RCFC 23(a) is satisfied and if: **(1)** [not used]; **(2)** the United States has acted or refused to act on grounds generally applicable to the class; and **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: **(A)** the class members' interests in individually controlling the prosecution of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already begun by class members; **(C)** [not used]; and **(D)** the likely difficulties in managing a class action.

RCFC 23(a), (b) (brackets in original).

Gross v. United States, 106 Fed. Cl. 369, 373 (2012) (citing *Barnes v. United States*, 68 Fed. Cl. 492, 494 (2005)). These requirements are conjunctive, *id.* (quoting *Barnes*, 68 Fed. Cl. at 494), and require a showing by a preponderance of the evidence, *id.* (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) (additional citations omitted)).

ANALYSIS

Plaintiffs' class certification motion is limited to liability, alone. Pls.' Mot. at 1.[2] The motion raises the threshold question whether it is appropriate to move for certification after having succeeded on the merits at the liability phase of the trial. *See* RCFC 23(c)(1)(A) ("*At an early practicable time* after a person sues as a class representative, the court must determine by order whether to certify the action as a class action." (emphasis added)). While the court answers that question in the negative, it concludes that a complete analysis of plaintiffs' motion under RCFC 23 is nonetheless necessary. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1412 (D.C. Cir. 1984) ("But we need not, and do not, decide whether these [timeliness] considerations alone were sufficient to support the [trial court's] denial of certification, inasmuch as the court . . . also grounded its decision upon its view that plaintiffs' claims were not suitable for resolution on a classwide basis.").

A. Class Certification After Trial on Liability

The timing of a class certification motion by itself is not often an independent ground to deny class certification, though it is relevant in the context of the multi-prong analysis required by Rule 23. *See Trevizo v. Adams*, 455 F.3d 1155, 1161 (10th Cir. 2006) (affirming that the fact that the "lawsuit had been pending for five years before the plaintiffs moved for class certification" did "not create an independent basis for denying a party's motion" to certify a class under Rule 23 of the Federal Rules of Civil Procedure).[3] "Rather, the delay [in moving for class certification] will be evaluated in light of the circumstances of the case and certification will be denied only when the late timing of the determination may cause prejudice or unduly complicate the case." 7AA Wright, Miller & Kane, *Federal Practice and Procedure: Civil*, § 1785.3 (3rd ed., 2008, updated 2021) (collecting cases).

Seven U.S. Courts of Appeals have treated trial as a bright line after which a class certification motion is presumptively inappropriate, *see In re Citizens Bank, N.A.*, 15 F.4th 607, 618 n.11 (3d Cir. 2021) (collecting cases from the 1st, 2d, 4th, 7th, 8th, 10th, and 11th Circuits), while some have tolerated it so long as the defendant consents, *id.* at 618-19 n.12 (collecting cases from the 3d, 5th, 9th, and D.C. circuits). The U.S. Court of Appeals for the Federal Circuit does not appear to have squarely addressed the issue, although it acknowledges that some merits decisions may precede class certification. *See, e.g.*, *Charleston Area Med. Ctr., Inc. v. United States*, 940 F.3d 1362, 1372 (Fed. Cir. 2019) (holding that a trial court commits no error when it

[2] Plaintiffs categorically and explicitly state, "[c]ertification is sought only as to the question of liability." Pls.' Mot. at 1.

[3] Inasmuch as RCFC 23 mirrors Fed. R. Civ. P. 23, the rules should be interpreted *in pari materia*.

considers the merits of a motion to dismiss or a motion for summary judgment that moots a motion for class certification under RCFC 23); *Romero v. Am. Postal Workers Union*, 178 F.3d 1310, 1998 WL 846826, at *2-3 (Fed. Cir. Dec. 4, 1998) (holding that the trial court committed no error when it considered merits of remand before class certification because the outcome of the merits analysis undermined the commonality prong of Fed. R. Civ. P. 23). In one instance, this court's predecessor dealt with a similar question when it rejected plaintiffs' request to defer class certification until after the final judgment on the merits. *See Saunooke v. United States*, 8 Cl. Ct. 327, 331 n.4 (1985) ("Case law interpreting this sentence [(from Rule 23 that class certification should be decided 'as soon as practicable')] dictates the well-settled proposition that class certification should precede any determination on the merits of a case." (citing *Otto v. Variable Annuity Life Ins. Co.*, 98 F.R.D. 747 (N.D. Ill.1983), and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974)); *see also Wal-Mart Stores, Inc. v. Duke*, 564 U.S. 338, 351-52 (2011) ("The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.,* jurisdiction and venue, is a familiar feature of litigation." (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001)).

Plaintiffs contend that their class certification motion is "neither too early nor too late" because "the parties have appeared to treat the proceedings as being adjudicated on behalf of a class," Pls.' Suppl. at 12 (quoting Wright, Miller & Kane § 1785.3), and because the class complaint was chosen as the master complaint, *id.* The remainder of plaintiffs' timeliness arguments focus on the problems that would have followed if they had chosen to delay their motion until even later, as well as the benefits that notice to the proposed class could provide. *Id.* at 13-15. The government responds that the appropriate time to decide class certification was during case management discussions with the Chief Judge. Def.'s Opp'n at 9. It continues that permitting post-trial class certification would enable "one-way intervention," a discouraged practice. *Id.* at 10-11 (citing *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 547 (1974)). Finally, the government argues that plaintiffs' motion is "a *de facto* attempt to circumvent the acknowledged rule that 'nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues.'" *Id.* at 14 (quoting *United States v. Mendoza*, 464 U.S. 154, 162 (1984)). In their reply, plaintiffs contend that their motion is timely because the first Harvey-related complaint filed was styled as a class action, Pls.' Reply at 1, the parties recognized the potential for the bellwether approach to evolve into a class action, *id.* at 2-3, commonality prevails over any collateral estoppel defense that the government might raise, *id.* at 4, discovery was not limited exclusively to bellwether issues, *id.* at 4-5, and the timing of class certification is ultimately subject to the court's discretion, *id.* at 5.

The court concludes that a trial on the merits of liability is a line after which moving for class certification is presumptively inappropriate. The prior version of Fed. R. Civ. P. 23 permitted potential plaintiffs to wait to opt into a class until after a favorable decision on the merits. That outcome was criticized, and the rule was revised to eliminate that result. Although RCFC 23 differs in some respects from Fed. R. Civ. P. 23, these circumstances counsel against granting class certification at this time:

> This situation—the potential for so-called 'one-way intervention'—aroused considerable criticism [of the pre-1966 Fed. R. Civ. P. 23] upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment

> without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments [to Fed. R. Civ. P. 23 (upon which RCFC 23 is modeled)] were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.

Am. Pipe & Const. Co., 414 U.S. at 547 (footnotes omitted)). Moreover, the same structure exists in RCFC 23(c) as in Fed. R. Civ. P. 23(c) that elicited Justice (then Judge) Stevens' observation that "the text [of Fed. R. Civ. P. 23] certainly implies, even if it does not state expressly, that such a decision [(to certify class)] should be made in advance of the ruling on the merits." *Jimenez v. Weinberger*, 523 F.2d 689, 697 (7th Cir. 1975).

While the "rigorous analysis" necessary to decide a class certification motion "will entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart*, 564 U.S. at 351, this does not open the door to decide the merits of the case before deciding class certification, *see Amgen Inc. v. Connecticut Ret. Plans and Tr. Funds,* 568 U.S. 455, 466 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." (citing *Wal-Mart,* 564 U.S. at 351 n.6)). Here, the liability phase of trial has been completed, which well exceeds "some overlap," *id.*, and instead presents the kind of one-way intervention that the Supreme Court described as "spurious," *Am. Pipe & Const.*, 414 U.S. at 545. The court therefore concludes that the late timing of plaintiffs' class certification motion counsels against certifying a class at this stage of the litigation.

B. Rule 23's Numerosity, Commonality, Typicality, Adequacy, and Superiority Requirements

The timing of plaintiffs' class certification motion also bears heavily on the court's analysis of RCFC 23's multiple requirements, even if the court were to not treat it as an independent ground to deny certification. While plaintiffs succeed at showing numerosity, commonality, and typicality, they fail to show how the timing of their motion would not undermine the adequacy of representation and superiority of class certification at this late stage.

1. Numerosity

The first prerequisite of class certification is whether "the class is so numerous that joinder of all members is impracticable." RCFC 23(a)(1). Numerosity requires that joinder be impracticable—"extremely difficult or inconvenient," *Jaynes v. United States*, 69 Fed. Cl. 450, 453-54 (2006) (quoting 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil*, § 1762 (3d ed., 2005))—not "impossible," *id.* (quoting *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)). "There is no set number of potential class members that must exist before a court can certify a class. Instead, a court must examine the facts of the case to determine whether the numerosity requirement has been satisfied." *Gross*, 106 Fed. Cl. at 374 (citing *General Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). Relevant considerations include "the number of potential class members, the geographic dispersal of the potential class members, and the size of each potential class member's claim." *Id.* (citing *King v. United States*, 84 Fed. Cl. 120, 123-24 (2008) and *Jaynes*, 69 Fed. Cl. at 454). "Joinder is considered more practicable

when all members of the class are from the same geographic area" and "are easily identifiable." *Jaynes*, 69 Fed. Cl. at 454 (internal quotations omitted) (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131-132 (1st Cir. 1985)).

Plaintiffs argue that numbers alone resolve the numerosity requirement in their favor. Pls.' Mot. at 9 (citing *Land Grantors in Henderson, Union and Webster Counties, Ky. v. United States*, 71 Fed. Cl. 614, 622 (2006) ("This fact [that the potential class included over 1,000 members] alone supports the numerosity requirement.")). Based on one of plaintiffs' expert reports, plaintiffs assert that the class includes over 10,000 potential members. *Id.* at 9 n.19 (explaining that Philip Bedient's expert report identified over 15,000 flooded upstream properties based on U.S. Army Corps of Engineer records). The government counters that plaintiffs fail to prove that so many putative class members exist. Def.'s Opp'n at 17. Nevertheless, defendant continues, other factors outweigh the number of potential class members. *Id.* at 18-19. For example, the government argues that joinder is practicable because approximately 2,000 upstream plaintiffs have already filed short-form complaints and all potential class members are in close geographic proximity to one another. *Id.* Plaintiffs reply that the fact that thousands have already filed short-form complaints does not show that joinder would prove practical for all potential plaintiffs and that many thousands of potential plaintiffs still have not filed. Pls.' Reply at 7-8.

The relevant inquiry is not merely whether a potential class involves a large number of putative members. *See Jaynes*, 69 Fed. Cl. at 454 ("While the number of class members is central to the Rule 23(a)(1) inquiry, number alone is not determinative."). Rather, the court must determine whether "the specific facts of [this] case," *Gen. Tel. Co.*, 446 U.S. at 330, make joinder extremely difficult or inconvenient. The court observes that many of the relevant factors weigh in favor of joinder, *i.e.*, most of the putative class members are located within a close geographic proximity to one another and can be easily identified via property records. *See Jaynes*, 69 Fed. Cl. at 454-55 (weighing in favor of joinder that "at least 81 percent of the class members reside within the same state" and that potential plaintiffs' identities and contact information were readily available). The sheer number of putative class members is instructive. The flooding of the Addicks and Barker Dams implicated many thousands of properties. *See In re Upstream Addicks & Barker*, 146 Fed. Cl. at 228. This case's docket demonstrates that thousands of upstream property owners have already been identified and filed short-from complaints, a fact that the government's arguments acknowledge. The court therefore concludes that plaintiffs have carried their burden and have shown that the potential class members are so numerous as to render joinder impracticable.

2. Commonality

The second prerequisite of class certification is comprised of three related elements: whether "there are questions of law or fact common to the class," RCFC 23(a)(2); whether "the United States has acted or refused to act on grounds generally applicable to the class," RCFC 23(b)(2); and whether "questions of law or fact common to class members predominate over any questions affecting only individual members," RCFC 23(b)(3). The commonality requirement entails "some overlap" with the merits, *Wal-Mart,* 564 U.S. at 351, inasmuch as it requires the court to "look beyond the pleadings . . . and seek to develop an understanding of the relevant

claims, defenses, facts and substantive law," *Gross*, 106 Fed. Cl. at 377-78 (quoting *Barnes*, 68 Fed. Cl. at 494).

"Individual class members need not be identically situated to warrant a finding of commonality; 'rather, to meet RCFC 23(a)(2), the questions underlying the claims of the class merely must share essential characteristics, so that their resolution will advance the overall case.'" *Geneva Rock Prods., Inc. v. United States*, 100 Fed. Cl. 778, 788 (2011) (brackets omitted) (quoting *Barnes*, 68 Fed. Cl. at 496). "The threshold for proving commonality 'is not high.'" *Haggart v. United States*, 89 Fed. Cl. 523-33, 532 (2009) (quoting *King*, 84 Fed. Cl. at 125). Plaintiffs argue that they satisfy this requirement because each putative class member raises the same facts and legal claim, *i.e.*, that the government intentionally used potential class members' property to store detained floodwaters from the Addicks and Barker Dams and that these actions constituted a taking. Pls.' Mot. at 10-11. The government responds that the individual factual nature of each putative class member's property, *i.e.*, "extent of flooding," property elevation, property type, and "ownership interest," undermine commonality. Def.'s Opp'n at 20. The court concludes that although plaintiffs' claims are not identical, they share the essential elements of a taking caused by the government's operation of the Addicks and Barker Dams.

The government acts on generally applicable grounds when its conduct is "system-wide" or "affects all of the putative class members." *Barnes*, 68 Fed. Cl. at 496 (quoting *Armstrong v. Davis,* 275 F.3d 849, 868 (9th Cir. 2001)). Plaintiffs argue that the government's operation of the Addicks and Barker Dams during Harvey affected all putative class members who experienced flooding, akin to class members in rails-to-trails takings cases where the government's decision to decommission a railway affects all those with interest in the underlying railroad right-of-way. *See* Pls.' Mot. at 11-12. The government appears to contend that the government's conduct could not be generally applicable to all putative class members because the proposed class definition is so vague as to encompass property owners who experienced no flooding. *See* Def.'s Opp'n at 20-22. The court determines that, inasmuch as putative class members experienced flooding, the government's decision to handle Harvey floodwaters at the Addicks and Barker Dams did affect all potential plaintiffs.

Additionally, "[c]lass-wide questions predominate over issues specific to individual members 'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *Geneva Rock*, 100 Fed. Cl. at 789 (quoting *Barnes*, 68 Fed. Cl. at 496). "This predominance inquiry 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation' and 'is far more demanding' than the initial common-issue inquiry." *Gross*, 106 Fed. Cl. at 379 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)). Plaintiffs argue that the only issue to resolve other than the government's operation of the Addicks and Barker Dams is property ownership, *see* Pls.' Mot. at 12-13, and that the nature and extent of damages are irrelevant to this question because the putative class would only cover liability issues, *id.* at 13 n.21. The government contends that the damages issues that plaintiffs would put aside are in fact critical to the analysis and prevent common issues from predominating over individual issues. *See* Def.'s Opp'n at 22-23. Generally, if governmental actions "effect a taking, then the putative

class members will be owed just compensation regardless of the specific property interest they held in the land." *Geneva Rock*, 100 Fed. Cl. at 789 (citing *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945)). Therefore, common issues of the government's liability predominate over individual issues of the nature and extent of compensation putative class members would be owed.

The court determines that plaintiffs have satisfied the commonality requirement because they share common questions of law and fact concerning generally applicable government conduct—namely, the common claim that the operation of the Addicks and Barker Dams resulted in a taking—and those liability questions predominate over individual compensation questions. The circumstance that plaintiffs focus on certifying a class for purposes only of liability nonetheless limits the significance of this determination.

3. Typicality

The third prerequisite of class certification is whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class." RCFC 23(a)(3). Typicality, like commonality, is a "guidepost[] for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). "Typicality is demonstrated 'when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Gross*, 106 Fed. Cl. at 381 (quoting *Barnes*, 68 Fed. Cl. at 498 (internal quotation marks and additional citation omitted)).

Plaintiffs assert that their arguments and success at the liability phase of the trial demonstrate that they each allege the same government conduct, state the same claim, and seek the same liability determination. *See* Pls.' Mot. at 13-14. The government counters that the bellwether plaintiffs' success during the liability phase renders them atypical of all the remaining putative class members who must still prove government liability, and once bellwethers receive a just compensation ruling at the imminent next phase of the trial, they will no longer have any interest in pursuing litigation on behalf of the class. *See* Def.'s Opp'n at 24-25. Plaintiffs argue that "exact alignment is not required between class representatives and other class members" because "the claims of the class representatives and other class members [do not] implicate a significantly different set of concerns." Pls.' Reply at 11 (emphasis omitted) (quoting *Ramona Two Shields v. United States*, 820 F.3d 1324, 1331 (Fed. Cir. 2016)).

Concerning liability, all putative class members would rely upon the same facts and legal arguments, *i.e.*, that the Harvey floodwaters retained at the Addicks and Barker Dams overflowed onto their property and that this constituted a taking. To the extent that typicality overlaps with adequacy, the government's argument that bellwether plaintiffs are no longer typical of the proposed class is not persuasive because bellwether plaintiffs, like putative class members, must continue to litigate the matter fully to arrive at a just compensation ruling. The court therefore holds that plaintiffs have carried their burden as to typicality.

4. Adequacy

The fourth prerequisite of class certification is whether "representative parties will fairly and adequately protect the interests of the class." RCFC 23(a)(4). Adequacy asks both whether proposed class counsel is qualified and capable of representing the class and whether conflicts exist between the putative class representatives and the remaining class members. *See Geneva Rock*, 100 Fed. Cl. at 790 (citing *Haggart*, 89 Fed. Cl. at 534, and *Barnes*, 68 Fed. Cl. at 499).

Plaintiffs argue that there is no conflict between putative class representatives and class members because they state the same claim for relief due to the government's operation of the Addicks and Barker Dams. *See* Pls.' Mot. at 15. They aver, moreover, that proposed class counsel is qualified and capable, relying on each proposed attorney's extensive curricula vitae and experience. *Id.* at 15-18. The government contends that the bellwether plaintiffs and putative class members would have antagonistic interests because the bellwethers would have no incentive to relitigate liability on the class members' behalf and because the government would raise collateral estoppel against the bellwethers at the subsequent class-wide liability trial, which the class members would have no incentive to oppose. *See* Def.'s Opp'n at 25-26. Defendant also argues that plaintiffs are not qualified to adequately represent the class because of the lateness of the class certification motion. *Id.* at 26-27.

The court considers timing to be critical. "[T]he named plaintiffs' failure to protect the interests of class members by moving for certification [prior to trial on liability] surely bears strongly on the adequacy of the representation that those class members might expect to receive." *E. Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). It has been four years since these claims were first filed, and an initial deadline to move for class certification came and went. Moreover, it has been nearly two years since the bellwethers prevailed at the liability trial.

Plaintiffs argued at the hearing before the court that the timing of their class certification motion was in response to suggestions from the court that doing so before now was premature. Hr'g Tr. 12:17 to 13:1 (Nov. 29, 2021) (referring to a hearing on January 30, 2018 when supposedly "the [c]ourt deferred class treatment and told us to wait");[4] Hr'g Tr. 37:10 to 13 ("[W]hen I asked the first time about making this motion, and I think a couple times in the interim, the [c]ourt sort of asked me to wait, and, therefore, I waited.").[5] Contrary to plaintiffs' representation, however, the court sees no basis in the record to credit plaintiffs' arguments that the court instructed or asked them to delay their class certification motion. Instead, co-lead counsel indicated at a hearing on January 30, 2018 that he intended to wait until the parties had resolved jurisdictional issues and then move for class certification concurrently with the liability

[4] The date will be omitted from further citations to the transcript of the hearing held on November 29, 2021.

[5] Plaintiffs also argued that timing should have no bearing on the court's decision because the court has discretion "wholly and completely" to grant class certification, Hr'g Tr. 37:17 to 20, and because there would be no prejudice to the government by certifying class at this late time, Hr'g Tr. 39:7 to 10.

phase of trial. Hr'g Tr. 11:5 to 10 (Jan. 30, 2018) ("[T]hen we move into the merits briefing and all that—that sort of thing, and it's in that phase, during the merits briefing, is when we think we would also be briefing the class . . . certification."); Hr'g Tr. 11:20 to 12:2 (Jan. 30, 2018) ("[W]hen we have gone past the jurisdictional sort of step there, that's when we would anticipate raising class, . . . getting a ruling on liability and a ruling on class, hopefully concurrently."). The judge did commend plaintiffs for this plan. Hr'g Tr. 11:11 (Jan. 30, 2018) ("That makes sense."); Hr'g Tr. 12:4 to 6 (Jan. 30, 2018) ("That is a remarkably ambitious but commendable goal, and we hope we can achieve that result in terms of timing.").

"RCFC 23 is ultimately a procedural technique aimed at improving 'judicial economy and efficiency.'" *Geneva Rock*, 100 Fed. Cl. at 782 (quoting *Singleton v. United States*, 92 Fed. Cl. 78, 82 (2010) (additional citation omitted)). Lengthy delays before moving to certify the class, especially now that plaintiffs have succeeded at a merits phase of the trial, are incompatible with RCFC 23's purpose. Plaintiffs' timing thus calls into question the adequacy of the proposed representation. Plaintiffs have failed to advance any credible argument for why they delayed. The court concludes, therefore, that plaintiffs have failed to carry their burden to prove that they are qualified and capable of adequately representing the proposed class.

5. Superiority

The final requirement of class certification is whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." RCFC 23(b)(3). Putative class members recount the superiority of class actions insofar as they establish that it "would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods.*, 521 U.S. at 615 (ellipses omitted) (quoting Fed. R. Civ. P. 23, Advisory Committee Note (1966 Amendment)). "Essentially, under this prong of the analysis, the court is obliged to conduct a cost/benefit analysis, weighing any potential problems with the manageability or fairness of a class action against the benefits to the system and the individual members likely to be derived from maintaining such an action." *Barnes*, 68 Fed. Cl. at 499 (citing *Eisen*, 417 U.S. at 163-64 (additional citation omitted)).

Plaintiffs argue that class action is the superior approach because "an issue class would provide all [c]lass [m]embers the opportunity to avail themselves of the enormous amount of work performed during the discovery, motions practice, and trial over the past four years." Pls.' Suppl. at 4; *see also* Hr'g Tr. 38:15 to 17 ("[T]hey would be opting into a win rather than . . . deciding to go and fight the same fight again."). They continue that class action is superior to thousands of individual claims because "that process would not only waste money, time, and judicial resources, but may also lead to conflicting results." Pls.' Suppl. at 5. Plaintiffs assert that the current bellwether approach is inferior to class action because collateral estoppel cannot be used offensively against the government, rendering the bellwethers' success on the merits unavailable for the non-bellwether plaintiffs. *Id*. at 6-7. They opine moreover that earlier cases from this court that used the bellwether approach cannot prove that that approach is feasible because the facts of those prior cases are too different from the present case. *Id.* at 10-11. They also argue that the structure of this court prevents it from relying on an adapted multidistrict

litigation approach because there would be no transferor court to which the court could refer pending claims at the conclusion of the test case. *Id.* at 8-9.

The government contends that the current bellwether approach remains the superior approach because its application over the years of litigation proves its effectiveness. Def.'s Opp'n at 28. Defendant avers that resolution of the liability phase of the trial has deprived class certification of potential "economies of time, effort, or expense." *Id.* at 28-29 (quoting *Turner v. United States*, 115 Fed. Cl. 614, 618 (2014)). It claims that certifying a class at this stage of the litigation would "result in greater inefficiencies and delays . . ., create case management difficulties, and inject uncertainty shortly before [the just compensation phase of] trial." *Id.* at 29. For example, the government cites the potential need for additional briefing, *id.* at 30, the administrative complexity of presenting potential claimants with either the existing short-form complaint or the proposed class opt-in, *id.* at 31, the addition of an opt-in deadline on top of the existing statute of limitations deadline, *id.* at 32, and the potential need to certify an interlocutory appeal to permit appellate review of any class certification decision, *id.* at 32-33. Finally, defendant argues that class certification would necessarily result in a separate class-wide liability trial, which would be nearly impossible to manage. *Id.* at 33-35.

In reply, plaintiffs assert that the government's stance that it will not be bound by collateral estoppel after the bellwether trial on liability moots any arguments that the current case management approach would be superior to class certification. Pls.' Reply at 12. They reason that "the government can use its unlimited resources to put each upstream flood victim to the test of proving liability individually at a cost that will far outweigh the potential recovery." *Id.* at 13. Plaintiffs question the inefficiencies that the government identifies as either hypothetical or not actually burdensome and instead emphasize the potential cost of individual litigation should the government refuse to honor the results of the bellwether liability trial and a subsequent appeal of any just compensation awards. *Id.* at 13-15. Finally, plaintiffs contend that the close commonality of the putative class members' claims makes a class action superior to alternative case management approaches. *Id.* at 15-19.

The timing of plaintiffs' class certification motion again influences the court's analysis. The superiority prong requires the movant to prove that the benefits of class certification—*i.e.*, "economies of time, effort, and expense, and promot[ing] uniformity," *Amchem Prods.*, 521 U.S. at 615 (ellipsis omitted)—outweigh the costs thereof—"sacrificing procedural fairness or bringing about other undesirable results," *id.* (internal quotations omitted). Here, the court cannot discount that, borrowing plaintiffs' language, "opting into a win," Hr'g Tr. 38:15 to 17, would save putative class members time and money. Concurrently, the court cannot say that it is fair to the government to bind it to instantaneous class-wide adjudication of potentially thousands of plaintiffs' claims after a trial on liability on the claims of thirteen bellwether plaintiffs. *See McCarthy*, 741 F.2d at 1412 ("Fundamental fairness, as well as the orderly administration of justice requires that defendants haled into court not remain indefinitely uncertain as to the bedrock litigation fact of the number of individuals or parties to whom they may ultimately be held liable for money damages. That is particularly true where, as here, the defendants were facing either thirty-nine named plaintiffs or a class of almost two hundred times the number of the original plaintiffs."). While the number of potential upstream plaintiffs was not unknown to the government, *see* Pls.' Mot. at 9 n.19 (citing plaintiffs' expert report that cited

government records to identify thousands of flooded upstream properties), plaintiffs engaged in the bellwether case management approach through years of motions practice, discovery, and trial on liability before moving for class certification. It would be unfair, after securing a favorable ruling at trial on liability, to permit plaintiffs to turn the tables on defendant and belatedly expand the scope of the court's liability decision from thirteen plaintiffs to thousands.

CONCLUSION

For the reasons above, plaintiffs' class certification motion is DENIED. The parties shall continue their preparations under the current bellwether approach for the just compensation phase of the trial, which is tentatively scheduled to occur in the latter half of March 2022.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge

In the United States Court of Federal Claims

Sub-Master Docket No. 17-9001L

(Filed: December 17, 2021)

IN RE UPSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS
THIS DOCUMENT APPLIES TO: ALL UPSTREAM CASES

ORDER

Pending before the court is plaintiffs' motion for reconsideration of this court's decision that plaintiffs' class certification motion should be denied. *See* ECF No. 418. Plaintiffs argue that the court's decision misconstrues the record and should therefore be reconsidered. *Id.* Plaintiffs' contentions generally restate the arguments the court considered in its opinion; therefore, plaintiffs' motion for reconsideration is DENIED.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge

In the United States Court of Federal Claims

Sub-Master Docket No. 17-9001L

(Filed: February 10, 2022)

IN RE UPSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS
THIS DOCUMENT APPLIES TO: ALL UPSTREAM CASES

ORDER

Pending before the court is the Remaining Master Complaint Plaintiffs' Motion for Class Certification ("Remaining Pls. Mot."), ECF No. 420, filed December 17, 2021, which has been fully briefed. *See* Pls.' Resp., ECF No. 425; Def.'s Opp'n, ECF No. 428; Remaining Pls.' Reply, ECF 431.

This motion is essentially a reprise of plaintiffs' earlier motion for class certification, denied on December 15, 2021, *see In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs*, ___ Fed. Cl. ___, 2021 WL 5915138 (Dec. 15, 2021), ECF No. 417. The court denied a motion for reconsideration of that decision on December 17, 2021, *see* ECF No. 419.

The current motion raises no persuasive grounds for revisiting class certification. All of the reasons for the denial of the first such motion appertain to the extant motion. The bellwether mode of proceeding has been successful thus far, liability has been found after a trial held two years ago, and trial of just compensation for certain bellwether claims will be scheduled to proceed within a few months. Certification of a class of plaintiffs at this late juncture would be inappropriate and unfair.

CONCLUSION

For the reasons stated, the Remaining Master Complaint Plaintiffs' Motion for Class Certification, ECF No. 420, is DENIED.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge