IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BIG OAK FARMS, INC., et al., On behalf of themselves and all others similarly situated, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	)	No. 1:11-CV-00275-NBF

PLAINTIFFS' MEMORANDUM OF LAW ON THE IMPACT OF THE SUPREME COURT'S DECISION IN ARKANSAS GAME & FISH COMMISSION V. UNITED STATES

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STATEMENT OF THE ISSUE

On December 4, 2012, the United States Supreme Court issued a unanimous opinion in *Arkansas Game & Fish Commission v. United States* (*Arkansas Game & Fish*), vacating the Federal Circuit's underlying opinion and judgment, and setting forth the standard to be applied to takings claims stemming from flooding caused by the government. 133 S. Ct. 511 (2012). In so doing, the Supreme Court cast serious doubt on a line of Federal Circuit and Court of Claims cases going back nearly 80 years. Because this Court relied, as it had to, upon this now-questionable line of decisions and the Federal Circuit's now-vacated opinion in *Arkansas Game & Fish* in dismissing Plaintiffs' takings claims, and because Plaintiffs stated valid takings claims under the standard articulated by the Supreme Court in its *Arkansas Game & Fish* decision, this Court's decision dismissing Plaintiffs' takings claims should be reconsidered and Plaintiffs' claims reinstated.

STATEMENT OF THE FACTS

The Flood

On May 2, 2011, the United States Army Corps of Engineers ("the Corps") deliberately destroyed with explosives large swaths of the levee which historically and ordinarily protected Plaintiffs' land from flood waters of the Mississippi River, inundating Plaintiffs' land with water, sand, and gravel. Complaint at ¶ 1, 51-52. A wall of water 15-feet high crashed through homes, farms, businesses, and infrastructure, destroying everything in its wake. *Id.* at ¶ 51. The flood scoured large sections of land, leaving deep "blue holes" and crevasses on formerly rich and arable cropland. *Id.* at ¶ 53. Top soil was largely washed away or degraded. *Id.* This damage to

the land is permanent and negatively impacts or destroys the land's arability and substantially diminishes its value. *Id*. Moreover, large deposits of sand and gravel remain on the land and have filled drainage ditches, rendering them ineffective. *Id.* at ¶ 52.

The Corps' flooding of Plaintiffs' land was done pursuant to an established and permanent plan legislated by the United States government with the express and specific intent to sacrifice Plaintiffs' land to superimposed water, sand, and gravel in order to benefit the public by diverting high water away from other personal and real properties in and around Cairo, Illinois. *Id.* at ¶ 35.

In 1928, the United States took over control of local levees along the Mississippi River pursuant to the Flood Control Act. The previous year, the Mississippi River Commission submitted a flood control plan to the Corps, which recommended raising and strengthening already-existing levees, including a 70.4 foot levee on the Cairo gauge to protect the then-prosperous city of Cairo, Illinois. *Id.* at ¶ 35. Deeming the Commission's plan too expensive, the Corps rejected it in favor of its own plan, which created the Birds Point-New Madrid Floodway ("Floodway"), where Plaintiffs' land is located. *Id.* at ¶ 36.

The Corps' plan provided for the building of a "setback" levee between three and ten miles west of the existing "frontline" (or riverside) levee and lowering eleven miles of the frontline levee by 3.5 feet to correspond with a stage of 55 feet on the Cairo gage. *Id.* The plan also permitted the Corps, at its discretion, to breach the frontline levee with explosives at the degraded, or "upper fuseplug," section. The Floodway was specifically designed to divert and contain flood waters of the Mississippi River to and in the Floodway, providing for an estimated 7 feet of stage lowering in the vicinity of Cairo, Illinois. *Id.* at ¶ 34. In other words, Plaintiffs'

land, pursuant to federal government planning, was intentionally subjected to greater and more frequent floods than it had historically endured in order to reduce flood stages in a neighboring state. *Id.* at ¶ 37.

There is no question that the specific intent of the Corps in creating the Floodway, and of the United States in codifying it in the Flood Control Acts of 1928 and 1965, was to "deliberately turn[] floodwaters upon the homes and property of people . . ." to avoid flooding in other areas. *Id.* at ¶ 41. The legislation acknowledged the government's servitude on Plaintiffs' land, requiring the government to compensate landowners who would be subjected "to additional destructive floodwaters that will pass by reason of diversion" from the Mississippi River. *Id.* at ¶ 38. Pursuant to this directive, the United States, in the 1930s and between 1968 and 1974, obtained limited easements over certain properties of the Floodway at an average price of $17 an acre. *Id.* at ¶ 40. Contrary to the directive, however, the United States failed to procure flowage easements over the entirety of properties in the Floodway that would be subject to additional flooding. *Id.*

The Corps substantially modified the Floodway's operating plan in the 1980s, permitting it to crevasse the frontline levee by explosion in several additional locations, two points along the upper fuse plug, one point along the lower fuse plug, a second degraded section, and one point along the midsection of the frontline levee. *Id.* at ¶ 45. The government's easements were not broad enough to cover this modified plan, and the government failed to seek or obtain new or modified easements that would cover execution of this or any subsequent version of the operation plan. *Id.* at ¶ 48.

On May 2, 2011, faced with high floodwaters, the Corps detonated the frontline levee in multiple locations pursuant to the most recent iteration of the Floodway operation plan. *Id.* at ¶ 51. It intentionally destroyed arable land, crops, roads, bridges, drainage systems, farm operations and equipment, and 90 residences. *Id.* at ¶ 53-60. This damage is permanent in nature and would not have occurred in the natural course absent the Corps' detonation of the levee. *Id.* at ¶ 52. The destruction, damage, and devaluation of Plaintiffs' land are greater than they would have been under previous operation plans that imposed greater limitations on where the frontline levee could be breached and absent any intervention by the federal government. *Id.* at ¶ 63.

Filing and Initial Dismissal of Plaintiffs Takings Claims

On July 9, 2011, Plaintiffs filed their initial complaint with the Court. That complaint was subsequently amended multiple times. The instant complaint ("Complaint") was filed on April 23, 2012. Plaintiff's Complaint included three Counts. Count I alleged that the operation of the Floodway on May 2, 2011 constituted a taking vis-à-vis all affected properties over which the government had not procured an easement and, for those properties over which the government had procured easements, the operation constituted a taking to the extent it exceeded the scope of those easements. Count II, also a takings claim, overlapped to some extent Court I. Per Count II, in 1983, the Corps adopted a new plan for operating the Floodway that required the Corps to obtain conforming flowage easements over all affected properties. The 1983 plan was the plan the Corps eventually executed when it operated the Floodway. Plaintiffs' second count alleges the Corps' maintenance and operation of that plan for decades while failing to even

attempt to obtain any conforming easements constituted an appropriation of flowage easements without just compensation.[1]

On September 9, 2011, pursuant to United States Court of Claims Rule 12(b)(6), the government brought a motion to dismiss Plaintiffs' complaint. In response, the Court permitted Plaintiffs to amend their complaint, and ruled that the September 9, 2011 motion to dismiss would apply to the amended complaint, filed April 23, 2012, *i.e.* the Complaint. On May 4, 2012, the Court issued an Opinion granting the motion as to Counts I and II. *Big Oak Farms v. United States*, 105 Fed. Cl. 48 (Fed. Cl. 2012). The Court began its Opinion by laying out the "Analytical Framework for Plaintiffs' Takings Claims." *Big Oak Farms*, 105 Fed. Cl. at 52. The Court observed that the government has historically only been held liable under the Fifth Amendment for operation of flood control projects resulting in "permanent flooding or 'intermittent but inevitably recurring overflows.'" *Big Oak Farms*, 105 Fed. Cl. at 52 (citing *United States v. Cress*, 243 U.S. 316, 328 (1917)). The Court recognized that, under *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), a takings claim is analyzed pursuant to a two-prong test. *Big Oak Farms*, 105 Fed. Cl. at 53. Under the first prong of the analysis, a plaintiff must either demonstrate an intent to invade a protected property interest or establish that the invasion is the "direct, natural or probable result of" government action as opposed to "incidental or consequential injury inflicted by" the government action. *Big Oak Farms*, 105

[1] There appears to have been some previous confusion regarding the distinction between Counts I and II. The Court's Opinion suggests that Count I related to the damage caused on or about May 2, 2011, while Count II related to the risk of recurring flooding from sand and gravel deposits left in drainage ditches. See *Big Oak Farms*, 105 Fed. Cl. at 52. However, Count 1 also incorporated allegations about the deposits in, and destruction of, drainage ditches from paragraphs 2, 52, and 98.

Fed. Cl. at 53 (quoting *Ridge Line,* 346 F.3d at 1355). Under the second prong, the plaintiff must establish that the government's invasion caused "substantial harm." *Ridge Line*, 346 F.3d at 1355-56. The Court found that, under this second "appropriation" prong, a plaintiff alleging taking by flood must demonstrate that the flooding was either permanent or a "permanent liability to intermittent but inevitably recurring overflows." *Big Oak Farms*, 105 Fed. Cl. at 53 (quoting *Nicholson v. United States*, 77 Fed. Cl. 605, 616 (Fed. Cl. 2007)). The Court further clarified the standard to which plaintiffs would be held when it found that, "[w]here it is not 'obvious' that the government action will lead to frequent and inevitably recurring flooding, the flooding will not result in a taking." *Big Oak Farms*, 105 Fed. Cl. at 54 (citing *Ark. Game & Fish Comm'n*, 637 F.3d at 1378)). The rationale for the Federal Circuit's *Arkansas Game & Fish* rule was that "[d]amages from government-induced flooding that cannot be deemed permanent or intermittent and inevitably-recurring are consequential damages that may only give rise to a claim in tort." *Big Oak Farms*, 105 Fed. Cl. at 54 (citing *Barnes v. United States*, 538 F.2d 865, 870 (Ct. Cl. 1976)).

In initially concluding that Plaintiffs had not stated a takings claim based upon the May 2, 2011 operation of the Floodway, the Court held that Plaintiffs' claims, as pled, failed to meet the second prong of the *Ridge Line* test. *Big Oak Farms*, 105 Fed. Cl. at 55-56. The Court relied primarily upon the Federal Circuit's *Arkansas Game & Fish Commission* opinion, holding that "in order to state a takings claim under the conceded facts of this case, plaintiffs were required to allege facts to show that flooding is likely to frequently repeat. This they did not do." *Big Oak Farms*, 105 Fed. Cl. at 56.

The Court then turned to Count II. Although the Court had acknowledged that "the government does not dispute that plaintiffs have adequately alleged a property interest to the extent the alleged injuries to plaintiffs' properties exceed the scope of any existing flowage easements across plaintiffs' land" (*Big Oak Farms*, 105 Fed. Cl. at 54), the Court nonetheless held that Plaintiffs had not stated a valid takings claim based upon the current Floodway operation plan because, while the government could be held responsible for subjecting Plaintiffs' land to more frequent flooding than would have otherwise existed, it cannot be held responsible for subjecting Plaintiffs' land to more severe flooding. *Big Oak Farms*, 105 Fed. Cl. at 58. In so holding, the Court concluded that pre-World War II flooding jurisprudence established rules that necessarily tied the government's responsibility to compensate plaintiffs to the *frequency* of flooding events. *Big Oak Farms*, 105 Fed. Cl. at 57 (citing *United States v. Sponenbarger*, 308 U.S. 256, 265 (1939)).

ARGUMENT

I. *ARKANSAS GAME AND FISH* HOLDS THAT FLOODING CASES ARE SUBJECT TO THE SAME STANDARDS AS OTHER TAKINGS CASES AND REJECTS THE NOTION THAT "PERMANENT" OR "INEVITABLY RECURRING" FLOODING IS A PREREQUISITE TO COMPENSATION FOR A TAKING

On December 4, 2012, the Supreme Court issued a unanimous decision reversing the Federal Circuit's judgment in *Arkansas Game & Fish*. 133 S. Ct. 511 (2012). The Court rejected the notion that flooding cases were subject to a special set of rules or standards that set them apart from other takings cases, specifically holding that flooding cases, like other types of temporary takings cases, do not require any showing that the invasion by the government is permanent or inevitably recurring. For purposes of the instant case, it is highly instructive to

examine the Supreme Court's opinion in detail in order to determine its impact on the viability of Counts I and II in the instant case.

At the outset of the analysis in *Arkansas Game & Fish*, the Court recited the basic principle that "temporary government action may give rise to a takings claim if permanent action of the same character would constitute a taking," *id.* at 517, although it noted that the principle was only "solidly established in the World War II era," *id.* at 519. The Court then observed that the Federal Circuit had held below that "cases involving flooding and [flowage] easements are different" from other takings insofar as they depart from that general rule. The Court examined the origin and validity of that conclusion, and ultimately rejected it.

The Court began its substantive analysis by observing that "[t]he Takings Clause is 'designed to bar 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.'" *Id.* at 518 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Court further explained that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). The Court retraced its history of establishing both that government-induced flooding can constitute a taking and that takings temporary in duration can be compensable. *Arkansas Game & Fish*, 133 S. Ct. at 518-19. The Court explained that "[o]nce the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'" *Id.* at 519 (quoting *First*

English Evangelical Lutheran Church of Glendale v. Cnty. Of L.A., 482 U.S. 304, 321 (1987)).

The Court then simply concluded:

> Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.

Id. This, in a nutshell, is the holding of the case.

The Court determined that the Federal Circuit's confusion about flooding cases stemmed from misunderstanding the holding in *Sanguinetti v. United States*, 264 U.S. 146 (1924). While the *Sanguinetti* Court found no taking on the facts before it, the Court was addressing an unintentional and unforeseeable flood and damages that may not have exceeded natural seasonal flooding. *Arkansas Game & Fish*, 133 S. Ct. at 520. The Court explained that "[t]here is certainly no suggestion in *Sanguinetti* that flooding cases should be set apart from the mine run of takings claims." *Id.* at 520. After further analysis of historical flooding cases, the Court held, "[t]here is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property. And the Government has presented no other persuasive reason to do so." *Id.* at 521. With this analysis and conclusion, the Court essentially cast doubt on any continuing precedential value for preexisting lower court opinions holding that flooding, unlike other invasions, could only constitute a taking when it was permanent, repeated, or inevitably recurring.[2]

[2] Although the Supreme Court did not expressly revisit its analysis in *United States v. Sponenbarger*, 308 U.S. 256 (1939), that decision also pre-dates the World War II era in which

Ultimately, the Court held that "[f]looding cases, like other takings cases, should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Id.* (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). In so holding, the Court rejected the government's suggestion of a limited rule whereby temporary flooding cases would only qualify as takings where they involve "sufficiently prolonged series of nominally temporary but substantively identical deviations." *Id.* at 521. The Court also rejected invitations to create an upstream/downstream distinction or to address the bearing of state water-rights laws on the question at issue. The Court clarified that it was rejecting these proposed limitations on its ruling when it stated, "[w]e rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id.* at 522. Flooding cases thus remain subject to the basic principle that temporary government action gives rise to a valid takings claim if permanent action of the same character would constitute a taking. *First English*, 482 U.S. at 328.

II. INSTANT PLAINTIFFS' TAKINGS CLAIMS PASS THE MULTI-FACTOR TEST FOR TAKINGS CLAIMS DISCUSSED IN *ARKANSAS GAME & FISH*

The Court in *Arkansas Game & Fish* did not merely reject the takings exemption for government-induced temporary flooding. It also offered affirmative guidance for lower courts to

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the recognition of temporary takings was "solidly established." *Ark. Game & Fish*, 133 S. Ct. at 519. To the extent this Court read *Sponenbarger* to "require[]" allegations of "more frequent flooding" than would have occurred absent government intervention, *Big Oak* Farms, 105 Fed. Cl. at 57, the Supreme Court's opinion in *Ark. Game & Fish* strongly suggests that reading should be reconsidered in light of subsequent temporary takings jurisprudence. *Ark. Game & Fish*, 133 S. Ct. at 520 ("There is certainly no suggestion…that flooding cases should be set apart from the mine run of takings claims."); *id.* at 521 (holding that the "public interests" advanced by the government, i.e. the public interest in flood control, is not "categorically different from the interests at stake in myriad other Takings Clause cases.").

use to determine the existence *vel non* of a compensable taking. *Arkansas Game & Fish*, 133 S. Ct. at 522-23.. The Court noted that, in addition to time*, i.e.*, degree of permanence, Courts should also consider 1) whether the invasion is "intended or is the foreseeable result of authorized government action;" 2) the character of the land at issue and whether the invasion interferes with the "reasonable investment-backed expectations" regarding the land's use; and 3) the "severity of the interference."[3] *Id.* at 522. The Court explained that the Court of Federal Claims had found the flooding at issue to be foreseeable and to severely interfere with the reasonable investment-backed expectations of the Commission, but remanded the case to the Federal Circuit to weigh the government's challenges to those factfindings. *Id.* at 523.

The three factors laid out by the Court strongly favor Plaintiffs' takings claims in the present case. First, the flooding was clearly intentional. In the words of the former Chief Engineer for the Army Corps of Engineers, operation of the Floodway involves a decision to "deliberately turn[] floodwaters upon the homes and property of people." Complaint at ¶ 41 (citing testimony specifically about operation of the Birds Point-New Madrid Floodway). The use of explosives to destroy the fuse plug sections of the levees was directly intended to send floodwaters rushing over Plaintiffs' land in order to alleviate the risk of flooding in Cairo and other upstream communities. This is uncontroverted.

Second, the invasion clearly interfered with the reasonable investment-backed expectations of the plaintiffs. The land at issue was prosperously cultivated farmland which, prior to the invasion, featured planted crops, installed irrigation systems, farm buildings and

[3] Not surprisingly, the Supreme Court's test is largely consistent with the Federal Circuit's *Ridge Line* test, *Ridge Line, Inc.*, 346 F.3d 1346, which the Court cites approvingly. *See Big Oak Farms*, 105 Fed. Cl. at 52-53;.

equipment as well as family residences. Complaint at 1, 51-61. As a result of the flooding at issue, this property was destroyed and devalued. *Id.*

Third, the interference with plaintiff's property was severe. This was not a scenario whereby floodwaters rose due to gradual releases leaving equipment, structures and crops to endure mere high water for a limited period of time. Instead, a fifteen foot high wall of water crashed through homes, farms, and businesses, utterly devastating structures, land, and possessions. The river scoured large sections of land, leaving deep "blue holes" and crevasses on formerly arable cropland. Top soil has been largely washed away or degraded and deep sand and gravel deposits were left on the farmland. Such gouging, scouring, crevassing and silting of the farmland is permanent in nature. Complaint at ¶ 51-53.

Because all three of the factors described by the Supreme Court strongly favor Plaintiffs' takings claims (crediting the allegations in the complaint), those claims must be reinstated. The government, of course, remains free to contest through discovery and litigation the veracity of Plaintiffs' allegations of intentionality, foreseeability, substantiality and the amount of damages, just as it was free to pursue those issues on remand in *Arkansas Game & Fish*.

III. PLAINTIFFS ENJOYED NO COUNTERVAILING BENEFIT FROM THE FLOOD CONTROL ACT AND THE FEDERAL GOVERNMENT TAKING CONTROL OF LOCAL LEVEES.

Certainly, a case might be unseemly if landowner plaintiffs enjoyed a benefit for decades from the federal government's maintaining and operating a flood protection plan and then brought a takings case the one time they were adversely affected by the federal government's decisions. That is not remotely this case.

Here, before the federal government took over Mississippi River floodwater management, Plaintiffs were protected by locally-controlled levees. Complaint at ¶¶ 35-37. The

federal government, however, had an interest in further protecting the then prosperous river town of Cairo, Illinois. Thus, the government adopted a flood plan whereby, in order to protect Cairo, Plaintiffs' property would be subjected to "additional destructive floodwaters that will pass by reason of diversion" from the Mississippi River. Flood Control Act of 1928, 33 U.S.C. § 702(d) (1928); Complaint at ¶ 35-39. State and local officials obviously would not have sacrificed Missouri land, structures and personal property in order to reduce the risk to Illinois land, structures and personal property. Plaintiffs expressly plead that they were worse off under the federal management of floodwater than they would have been in the "but for" world. Complaint at ¶¶ 35-39, 82. This allegation is bolstered by the basic fact that the essence of the government's plan was to replace a levee system designed to provide maximum protection to local interests during periods of extremely high floodwaters with a plan that, in the words of the Chief Engineer for the Army Corps of Engineers, would "deliberately turn[] floodwaters upon the homes and property of people" when necessary to protect valuable out-of-state interests. Complaint at ¶ 41 (citing testimony specifically about operation of the Birds Point-New Madrid Floodway).

In its prior briefing, the government repeatedly suggested that Plaintiffs benefitted from "74 years of flood protection" from the federal government before the events at issue in the case. *See, e.g.,* Reply to Response to Motion to Dismiss, *Big Oak Farms v. United States*, No. 11-cv-00275 (Fed. Cl. Dec. 2, 2011) ECF No. 23 at 4-6. This statement is misleading. The fact that the Floodway was not put into operation has nothing to do with government benevolence and is instead solely attributable to the fact that floodwaters did not get high enough during that time to trigger exploding the fuse plugs under the Plan. The government cannot take credit for the acts

of nature. The relevant issue is not how long the government refrained from blowing the levee, but what would have happened to Plaintiffs' property but for the federal government's involvement in managing Mississippi headwaters. Plaintiffs have pled that, in the absence of the federal government's involvement, their land would have enjoyed greater flood protection from local maintenance and operation of levees that were already in place before the U.S. Army Corps of Engineers took over. Complaint at ¶¶ 35-38. At a minimum, this allegation creates a factual issue that cannot be resolved against Plaintiffs at the pleading stage.

Moreover, as unlikely as it may seem that *any* subject property in the Floodway would actually benefit from the federal flood control plan vis-à-vis the preexisting local control over the levee system, the Corps was nonetheless ordered to take into account any such benefits "by way of reducing the amount of compensation to be paid" for flowage easements anywhere that such benefits would exist. Flood Control Act of 1928, 33 U.S.C. § 702(d).[4] Thus, to the extent any property in the Floodway was anticipated to benefit from the federal program, those benefits were already bought and paid for directly out of the pockets of any and all landowners from whom the Corps contracted for easements.

In its initial dismissal of Counts I and II, this court noted that it "cannot ignore the benefits landowners receive from government flood control projects." *Big Oak Farms*, 105 Fed. Cl. at 54. The Court also quoted from *United States v. Sponenbarger* 308 U.S. 256, 266 (1939) for the proposition that, "[e]nforcement of a broad flood control program does not involve a

[4] Importantly, this was a general requirement that applied to any property in the United States affected by the Flood Control Act over which the government was directed to obtain a flowage easement and does not reflect a judgment that any specific properties within the Birds-Point/New Madrid Floodway would actually benefit from the imposition of the "Jadwin Plan."

taking merely because it will result in an increase in the volume or velocity of otherwise inevitably destructive floods, where the program measured in its entirety greatly reduces the general flood hazards, and actually is highly beneficial to a particular tract of land." *Big Oak Farms*, 105 Fed. Cl. at 54. The Court stated that *Sponenbarger* created a requirement "unique to the flood control context" whereby plaintiffs must affirmatively allege the relative benefits they received from flood plans and explain how the detriments outweighed the benefits to their land. *Big Oak Farms*, 105 Fed. Cl. at 58, n.6. The Court found that Plaintiffs failed to meet this requirement. *Id.*

It is unclear the role, if any, these considerations played in the Court's initial dismissal. There is no dispute in this case over whether federal management of Mississippi floodwaters benefits the public interest *in the aggregate* nor that there are numerous properties that specifically benefit – among them are numerous properties in Cairo, Illinois. It is important to note, however, not only that Plaintiffs have *expressly* pled that *their* properties did not receive any benefits from the plan vis-à-vis the "but for" world, but furthermore that owners of the subject properties have already paid out of pocket for such benefits to the extent they ever existed. Affording the government some "credit" for managing floodwaters on Plaintiffs' behalf would amount, at the very least, to double-counting such supposed benefits and would be inappropriate to factor in before discovery has occurred.

IV. FINDING A TAKING ON THE PRESENT FACTS IS CONSISTENT WITH THE RIGHTS AND RESPONSIBILITIES PROVIDED UNDER THE FLOOD CONTROL ACT AND WITH SUBSEQUENT RELATED LITIGATION

The Flood Act required the government to obtain easements over land that would be subjected to "additional floodwaters that will pass by reason of diversion" from the Mississippi River. Complaint at ¶ 38; Flood Control Act of 1928, 33 U.S.C. § 702(d) (1928). This requirement implicitly recognizes that the Act will effectuate a taking of property to the extent that it subjects land to additional floodwaters through acts like those at issue. The law has long recognized that eminent domain proceedings to obtain flowage easements are merely ex ante "takings" that would otherwise be the subject of ex post Fifth Amendment or Tucker Act claims. *See, e.g., United States v. Dickinson*, 331 U.S. 745, 747 (1947) ("The Government could, of course, have taken appropriate proceedings to condemn, as early as it chose, both land and flowage easements. By such proceedings, it could have fixed the time when the property was "taken."""). In fact, the government did initiate condemnation proceedings to obtain easements over some, but not all, properties that would be subjected to additional floodwaters. Complaint at ¶ 47.

In 1984, when operation of the Floodway appeared imminent, a group of landowners that overlap with the instant Plaintiffs sought an injunction to prevent operation of the Floodway. *See Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984). One argument made by the *Story* Plaintiffs was that the 1965 Mississippi River Commission stated that "[i]t is deemed necessary to secure modified easements in the Birds Point – New Madrid area *that will specifically permit breaching of the levee at any point*" and that the Corps had failed to do so despite the fact that it imminently planned to breach the levee at a point not permitted within the scope of existing easements. *Id.* at

1383-84. After the Plaintiffs won in the trial court, the Eighth Circuit reversed that judgment. Despite ultimately denying the injunction, the *Story* court found that the government likely possessed insufficient easements to operate the Floodway under the 1983 plan. "The modified flowage easements executed by the landowners convey to the government only the right to flood lands by artificial crevassing of the fuse plug sections of the frontline levee. However the 1983 plan also calls for the artificial crevassing of the section of the frontline levee between the two fuse plug sections." *Id.* at 1384. The court further made clear that, "if the government has failed to obtain the necessary easements," "the landowners have an adequate remedy [for a takings claim] under the Tucker Act."

Thus, from the time the Jadwin Plan was first adopted until the present day, it has been understood that operating the Birds Point—New Madrid Floodway would constitute a "taking" of any inundated property over which the government had not already obtained an easement or wherever the operation of the Floodway exceeded the scope of an existing easement. This Court's initial dismissal of Counts I and II had effectively rendered unnecessary or redundant any government purchases of and subsequent modifications of easements in the Floodway by determining that activation of the Floodway did not constitute a taking as to any affected properties, regardless of whether easements were acquired or their terms abided. Reinstatement of Counts I and II would bring the present status quo back into harmony with the historical treatment of land and water rights in the area.[5]

[5] The Court noted in the "background" section of its Opinion that "[t]he 1928 Act provides in relevant part that '[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.'" *Big Oak Farms*, 105 Fed. Cl. at 51

CONCLUSION

For the reasons set forth herein, Counts I and II should be reinstated.

Date: February 22, 2013

Respectfully submitted,

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(quoting 33 U.S.C. §702(c)). Of course, such disavowals of liability are irrelevant in the context of Tucker Act claims.