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

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

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

## I. INTRODUCTION

In its brief, the Government goes so far in minimizing *Arkansas Game & Fish Commission v. United States* that it misses the Court's fundamental point. 133 S. Ct. 511, 521, ___ U.S. ___ (2012) (hereinafter *Arkansas Game*). Despite the Court's explicit statement that "there is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property," *id.* at 521, the Government nonetheless argues that even intentional appropriations of private property that cause severe interference with owners' investment-backed expectations cannot be takings if they involve either single floods or actions that only increase the duration or severity of floods. Remarkably, the government even concludes its brief by arguing that most flooding cases are *still* subject to the special rule that takings can occur only where invasions are permanent or inevitably recurring. Government Brief Regarding Impact of *Arkansas Game & Fish Commission v. United States* on Order Dismissing Plaintiffs' Takings Claims, Dkt. No. 48, at 14-16 (filed Feb. 22, 2013) (hereinafter "Gov. Br."). This directly contravenes *Arkansas Game*.

The Government starts with faulty factual premises about both the history and character of Plaintiffs' land and then argues that the Court should apply to those supposed facts case law that has just been abrogated by the Supreme Court. Remarkably, the Government's entire brief avoids any mention of the factors that *Arkansas Game* instructs lower Courts to consider when confronted with a takings case in the flooding context. Plaintiffs propose a different approach, explaining why complex factual issues are inappropriate to resolve at the motion to dismiss stage and then arguing that this Court should apply the test *Arkansas Game* instructs. The facts will show that, under that test, the Government has appropriated a property interest from the Plaintiffs. Plaintiffs ultimately advocate for a simple rule—if the Government appropriates a

flowage easement to further the public interest, it should compensate the owner, and if the Government negotiates for an easement, it should be bound by its terms.[1]

## II. ARGUMENT

### A. The Government Improperly Contests Plaintiffs' Factual Allegations By Misstating the Findings of Prior Cases

Despite the fact that this case remains at the motion to dismiss stage, the Government's position is entirely based on its own version of the facts, nowhere contained in the Complaint. Rather than demonstrate the soundness of the Government's position, this only highlights that the merits of this case will ultimately turn on contested facts, and that it cannot, therefore, be decided without discovery. Moreover, even accepting *arguendo* that one could, as a matter of principle, rely on factual findings from prior unrelated cases as a substitute for discovery and fact-finding in this litigation, the Government seriously overstates and oversimplifies the facts that were actually found in those prior cases.

For its so-called "History Of Floodway Including Relevant Factual Findings," the Government relies on this Court's opinion on the motion to dismiss in addition to a handful of cases in which Plaintiffs did not participate. This Court did not purport to make factual findings in its opinion on the motion to dismiss, nor could it, as the Court is obligated to take the facts alleged in the Complaint as true at the motion to dismiss stage. The other cases cited by the Government for factual propositions each related to specific parcels of land and it is impossible to know at this stage which of those cases' facts were contested or how those facts might apply to each of Plaintiffs' parcels. Plaintiffs contend that discovery is needed in this case because, as *Arkansas Game* clarified, the merits of Plaintiffs' claims turn on factual issues and there has not been sufficient discovery in this case yet to resolve them.

[1] Plaintiffs respectfully request that the Court hear oral argument on this matter.

Even if it were proper for the government to rely on the facts found in these prior cases, however, nothing would justify the government's exaggeration of what the courts in these cases actually found. The government states as fact: "In its natural condition, all of Plaintiffs' lands are subject to periodic flooding from the Mississippi River." Gov. Br. at 3. But not one of the cases cited by the government for this proposition actually found that all of the land within the Birds Point-New Madrid Floodway was subject to periodic natural flooding. Instead, close examination of the cases cited by the government reveals that they concerned only particular parcels of land within the Floodway or even properties outside of the Floodway. For example, *Danforth v. United States* involved a dispute over the value of a particular property in the Floodway that the government sought to condemn, as it was directed to do by the 1928 Flood Act in implementing the Birds Point-New Madrid Floodway. 308 U.S. 271, 278 (1939). In describing the background of the case, the Court did note that during the 1937 flood "the land of the petitioner would have been flooded without crevassing," *id.* at 279, but nowhere did it hold that all of the land in the Floodway was subject to periodic flooding. Similarly, in *Matthews v. United States*, although the Court found that almost all of the particular parcel at issue in that case would already have been subject to backwater flooding at the point where the Jadwin Plan would cause headwater flooding to that property, nowhere does it hold that all of the land in the Floodway was subject to periodic flooding. 87 Ct. Cl. 662, 678 (Ct. Cl. 1938). In fact, although the Court did find that "[a] considerable part of the total area is always subject to backwater from St. John Bayou," it also found that "[t]he relinquishment of the remainder to extreme floods, at long intervals, is necessary to the assured protection of the adjoining land, and to the 15,000 residents of the city of Cairo." *Id*. In other words, the court explicitly acknowledged that some of the land was *not* subject to periodic flooding by nature, but that it was being taken by the

government to protect other properties and the town of Cairo. Likewise, the court in *United States v. Sponenbarger* found that the Boeuf Basin "has always been a natural floodway for waters from the Mississippi," but that case involved an entirely different portion of the Mississippi River and an entirely different floodway than the one at issue here. 308 U.S. 256, 262-63 (1939). For the Government to suggest—as it does—that these cases, in the aggregate, establish that every piece of land in the Floodway was subject to periodic flooding is disingenuous, at best. The Government's cite to the Complaint for this proposition, Gov. Br. at 3, citing to ¶¶ 31-34, is even more outrageous; the cited paragraphs say nothing of the sort.

Similarly, the Government's argument, without citation, that the 1937 flood demonstrates that the entire Floodway would have flooded during "extraordinary flood events," is an attempt to exploit the fact that some land in the Floodway was subject to such flooding and parlay it into a misunderstanding that *all* land within the Floodway was subject to such flooding. This is simply not true.

Finally, the Government boldly asserts: "As of May 2011, the United States provided the land within the Floodway with greater flood protection than at any time in the past," because the levees were raised from 58 feet to 60 feet. Gov. Br. at 5. Again, this misses the point; even if some of the land in the Floodway would have flooded under the local levee system in place prior to the Flood Plan, that does not mean that all of the land would have flooded; higher points within the Floodway may well have been spared.[2] Once the government built the setback levee, however, the entire Floodway was subject to flooding. In any event, the very fact that the parties

[2] Moreover, there is a fundamentally different character and effect on farmland to flooding caused by gradually rising backwaters that naturally increase and then recede than the type of flood caused by exploding the fuseplugs of a levee and releasing a sudden and massive wave that crashes through a floodway. This duration and destructiveness of floodwaters may be relevant to the takings inquiry. *See infra* at 7-9.

dispute this point is precisely why dismissing the case at this stage is improper. More generally, and as discussed in their opening brief, Plaintiffs strongly dispute that they benefitted from the Floodway or that any benefits they received outweigh the harm caused to their property by the Government's actions.

B. The Supposed Bright Line Rules Cited by the Government Are Not Supported by the Case Law and, in Any Event, Are Irreconcilable with *Arkansas Game*

The Government takes an artificially cramped reading of *Arkansas Game* and, as a result, misses the Supreme Court's central point: There are no special rules for taking by flood—flooding should be evaluated just like any other government act that deprives a person of his property for the public good. *Arkansas Game*, 133 S. Ct. at 520 ("There is certainly no suggestion in *Sanguinetti* that flooding cases should be set apart from the mine run of takings claims.") The Government also significantly over reads *Danforth* and *Sponenbarger*, ignoring the facts in which those cases arose and taking dicta out of context. *Danforth* and *Sponenbarger* do not stand for the bright-line rules advocated by the Government, that a taking by flood requires a greater number of floods or that a flood can never amount to a taking where it is more destructive or prolonged than a flood that would have otherwise occurred. But even if they once did stand for those rules, *Arkansas Game* makes clear that those cases are outdated and abrogated.

The Government does not quote any specific language from *Sponenbarger* in support of its assertion that to state a claim the Plaintiffs must allege that the Corps' actions would result in a greater number of floods than would have occurred otherwise. Gov. Br. at 6. In fact, the case contains no such rule. Rather, in the pages cited by the Government, the *Sponenbarger* court explains the uncontroversial principle that the government is not liable for a flood where "the same floods and the same damages would occur had the Government undertaken no work of any

kind." *Sponenbarger*, at 265. This is just basic causation. *Id.* The pages the Government cites from *Danforth* likewise make no mention of a rule that to allege a taking by flood the plaintiff must allege a greater number of floods than would otherwise have occurred. Rather, on those pages the Court explains that the mere building of the levee is not a taking, but makes clear that "[t]he Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction." *Danforth*, at 286. There is no reason to think the *Danforth* court intended "greater" in this context meant a greater *number* of floods; a far more reasonable reading is that the court meant "greater" in the general sense, *i.e.*, a burden beyond what the land had previously experienced. In other words, this language simply gets at the same basic causation issue addressed in *Sponenbarger*.

Similarly, these cases do not support the idea that increased depth, duration, or severity of flooding can *never* be a taking. The Government appears to rely on a partial quote from *Sponenbarger* as the basis for this supposed rule, but taken as a whole, the language is clearly addressed at another issue. In *Sponenbarger*, the Court said:

> Enforcement of a broad flood control program does not involve a 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.

*Sponenbarger*, at 266. The point of this passage is not that there is some critical distinction between government actions that cause a greater number of floods and government actions that cause larger or more destructive floods. Rather, the point is that where the government acts specifically to confer a benefit on a piece of property or its owner, and that benefit substantially

outweighs whatever incidental harm the government also inflicts on that same property, the owner cannot claim a taking based on that harm. *See* n.4.

In *Danforth*, the Court did conclude that increased depth and destructiveness of the floods caused by construction of a setback levee would not amount to a taking on the subject property, but it did not set forth a blanket rule that increased depth and destructiveness of a flood could *never* be a taking; rather, on the facts before the Court, it held that the damages claimed by the plaintiff were "incidental," *i.e.*, not substantial or intentional enough to amount to a taking. *Danforth*, 308 U.S. at 286-87. Here, the destructiveness of the flood was the direct and foreseeable result of the government's decision to dynamite the levee and was undeniably substantial.

In any event, to the extent that these cases ever did stand for such formalistic and flood-specific rules, *Arkansas Game* makes clear that they no longer govern. As that Court stated: "Flooding cases, like other takings cases, should be assessed with reference to the 'particular' circumstance of each case,' and not by resorting to blanket exclusionary rules." *Arkansas Game*, 133 S. Ct. at 521. Yet, to resort to "blanket exclusionary rules" is precisely what the Government asks this Court to do. The cases relied on by the Government for its position, like the *Sanguinetti* decision explicitly overruled by the Supreme Court, were decided before the Court's temporary takings jurisprudence was "firmly established." *Id.* at 519. Accordingly, they should not be read to limit that now-robust doctrine. Such a reading is precisely what the Supreme Court rejects in *Arkansas Game*: "If the Court indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence." *Id.* at 520.

Moreover, the facts of *Arkansas Game* itself make clear that the rules advocated by the Government cannot possibly be correct. Contrary to the Government's assertions and its proposed rule, *Arkansas Game* did not involve a situation where the government caused a "greater number" of floods; rather, the taking was based on an allegation that the floods were deeper, longer, and accordingly, more severe. The Court specifically noted that the Management Area (the area allegedly taken) "lies in a floodplain below a dam, and had experienced flooding in the past." *Id.* at 523. Thus, the fact that an area has flooded before is no bar to a taking by flood. The Court went on: "But the trial court found the Area had not been exposed to flooding comparable to the 1990's accumulations in any other time span either prior to or after the construction of the Dam. Severity of the interference figures in the calculus as well." *Id.* at 522 (internal citation omitted). When one looks at the *Arkansas Game* facts as recited by the Supreme Court and the holding thereon, they belie the Government's argument that a taking cannot arise from "merely" causing longer and more severe floods than the properties would have otherwise endured. Specifically, the Court noted that "the river level near the Management Area reached six feet an average of 64.7 days per year during the growing season…. Between 1993 and 1999, however, the river reached the same level an average of 91.14 days per year, an increase of more than 40 percent over the historic average." *Id.* at 517. Notably, nowhere in the facts does the Court state that the Management Area in question experienced a "greater number" of floods. Rather, the facts on which the Supreme Court found a taking were that the Management Area was subjected to floods of more severity and longer duration than it otherwise would have been.

C. No Offsetting Benefits from the Flood Plan Undermine Plaintiffs' Takings Claim

The Government's argument that flood-specific takings rules require balancing any harm to a plaintiff or property against the benefit conferred on that property by the flood-control

project, *see* Gov. Br. at 8-9, fails for the same reasons its other arguments that this Court should rely flood-specific rules fail; *Arkansas Game* makes clear that no such flood-specific takings rules survive. In *Arkansas Game*, the Court could not have been clearer that there "is no solid grounding in precedent for setting flooding apart from all other government intrusions on property." *Arkansas Game*, 133 S. Ct. at*521. The Government has cited no support for the rule it advocates beyond now-abrogated flooding cases, which are all ultimately based on a reading of *Sanguinetti* that the Supreme Court has disclaimed. *See* Gov. Br. at 8-9; *Arkansas Game*, 133 S. Ct. at 520.[3]

Moreover, as articulated in Plaintiffs' opening brief, whether Plaintiffs received any benefit from the Government's flood-control project above and beyond what they would have received from local levee management is a heavily contested factual matter. As discussed above, the supposed facts on which the Government seeks to rely are nothing of the sort. No court has ever made findings about the benefits to these Plaintiffs' land from the Government's actions.[4] Accordingly, the only facts are those set forth in the Complaint, which must be accepted as true at this stage.

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[3] To the extent that *Sponenbarger* still applies, the language cited above simply serves to highlight the fact-intensive inquiry called for by *Arkansas Game*. At best, this language in *Sponenbarger* merely outlines one of the factors to be examined by the court as a part of the inquiry into the owners "reasonable investment-backed expectations regarding the land's use." *See Arkansas Game*, 133 S. Ct. at **521-22; *see also id.* at *521 ("Flooding 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.") (citations omitted).

[4] Assuming *arguendo* that the language relied on from *Sponenbarger* remains relevant after *Arkansas* Game, it must at least be read together with the *YMCA v. United States*, which instructs that there is only a balancing required where the specific actions at issue in the alleged taking were intended to benefit the property at issue. 395 U.S. 85, 92 (1969). Here, the Government's decision to dynamite the levee was specifically to benefit the town of Cairo at the expense of Plaintiffs' property. Takings law does not require the nearly impossible task of trying to make factual findings comparing the actual damages cause by the Government's actions with potential outcome in a "but for" world where state and local interests controlled floodwater management for the past 80 years.

D. The Government Wrongly Asserts that a Blanket "Single Flood" Exception to the Takings Inquiry Survives *Arkansas Game*

The Government wrongly asserts that "*Arkansas Game* did not change the requirement for a temporary taking that the plaintiff must show *repeated* floodings that cause recurring and cumulative interference with property." Gov't Br. at 9 (emphasis in original). There is no general per se rule that government intrusions must be repeated in order to establish a taking, and *Arkansas Game* expressly holds that "[t]here is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property." *Arkansas Game*, 133 S. Ct. at 521. The *Arkansas Game* Court expressly holds "that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id*. at 522. These pronouncements are inconsistent with the Government's proffered "single flood" exception.

As discussed above, *Arkansas Game* makes clear that, instead of applying blanket exemptions to claims based upon single or more destructive flooding events, courts must employ a multi-factored inquiry centered around intent and foreseeability, interference with investment-backed expectations, and severity of interference. *See id.* at 522-23. Not surprisingly, the inquiry described by the Court tracks the Federal Circuit's *Ridge Line* takings test, which is cited approvingly in the same passage.[5] *Id.* In *Ridge Line, Inc. v. United States*, the Federal Circuit neatly summarized the tort-taking distinction in a two prong test. To satisfy the first prong, a claimant must assert either that "the government intends to invade a protected property interest *or* the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'" 346 F.3d 1346, 1355 (Fed. Cir. 2003) (emphasis added). "By casting these alternative approaches to establishing the first prong

[5] Plaintiffs incorporate by reference their original Memorandum in Opposition to the Government's Motion to Dismiss, Dkt. 47 (filed Feb. 22, 2013), which explains in detail why the Complaint alleges proper takings claims under *Ridge Line.*

in the disjunctive, the court explicitly recognized the subjective analysis incumbent in an evaluation of 'intent' is separate and distinct from the objective analysis required in the general tort-causation evaluation." *See Hansen v. United States*, 65 Fed. Cl. 76, 97 (Ct. Cl. 2005). The second prong—the so-called "substantial injury" prong—is satisfied if the claimant asserts that the invasion "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, rather than merely inflict an injury that reduces its value." *Ridge Line.* 346 F.3d at 1356.

The Supreme Court has explained the relevance of a finding of a single temporary invasion vis-à-vis repeated invasions on a takings claim in *Portsmouth Harbor Land & Hotel Co. v. United States*:

> If the United States, with the admitted intent to fire across the claimants' land at will, should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence.

260 U.S. 327, 329-330 (1922). In other words, repeated and continuing invasions are powerful evidence of intent and foreseeability where that issue is contested. Here, however, intent to make use of claimants' land is not disputed. The instant case is thus akin to the first scenario discussed in the *Portsmouth* excerpt above, where a single invasion amounts to a taking.

Whether an invasion is repeated could theoretically bear on the second *Ridge Line* prong if the severity of the interference of a single invasion might otherwise not rise to a substantial harm that is either appropriative or meaningfully deprives an owner of enjoyment of property. Here, however, the allegations in the complaint clearly involve *both* preemption of the property owners' right to enjoy their property for an extended period of time, Complaint ¶¶ 1-4, 51, 78,

*and* an invasion that appropriates a benefit to the government as the expense of the property owner, Complaint ¶ 35. *See also* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev 1393, 1464 (1991) (flooding that infringes on private property is a classic example of government action that is appropriative in nature). Because the instant claims satisfy both prongs of *Ridge Line* and the multi-factored inquiry described in *Arkansas Game*, Plaintiffs' takings claims based upon a single flood must be reinstated.

E. Reinstating Plaintiffs' Takings Claims Will Strengthen, Not Weaken, the Tort-Taking Distinction In Fifth Amendment Jurisprudence

The Government wrongly asserts that "if a single, impermanent and non-recurring trespass by flooding could be litigated as a taking, the distinction between taking and tort would become largely meaningless." Gov. Br. at 12. In fact, the opposite is true. In *Hansen,* this court engaged in a lengthy historical investigation about the parameters and origins of the distinction between torts and takings. *Hansen* concluded that, while where there was little or no confusion about the existence of a taking when there exists evidence of appropriative intent by the government, there was some confusion about the line between torts and takings where intent was lacking but there was nonetheless evidence of significant and foreseeable interference with use and enjoyment of property. *See Hansen*, 65 Fed. Cl. 76. *Hansen* explained how the *Ridge Line* analysis harmonized and synthesized the tort-takings case law in its concise two-pronged test. *Id.* at 119.

If this Court were to apply a "single flood" exemption to takings inquiry, even where there is an explicitly pled government intent to appropriate an interest in Plaintiffs' land (in addition to a significant and foreseeable interference with its use and enjoyment), then the distinction between tort and taking would become meaningless as clear takings would be swept into the realm of "mere tort." Instead, the Court must examine the crucial jurisprudential

hallmarks that distinguish takings from torts under *Ridge Line* and *Arkansas Game*—intent, foreseeability, and severity of interference.

The Government segues from its expression of concern regarding the diminution of the distinction between tort and takings to a discussion of the express disclaimer in the Flood Control Act of *tort* claims arising from related activity. Gov. Br. at 12. This is a red herring. There are no instant causes of action for tort and the government cannot declare its immunity from the Fifth Amendment. Moreover, the Flood Control Act expressly orders proceedings for the inverse condemnation of flowage easements that would be "needed" to carry out the Act in recognition that the government must compensate owners of properties that will be subject to additional "destructive floodwaters."[6] At issue in this case is whether the government must, as envisioned in the Act, pay for the right to inundate that it has already availed itself of, and, where it has negotiated easements, whether it will be bound to their express terms.

F. The Government Offers a Distinction Between "Permanent" and "Temporary" Takings Analysis For Flooding Cases That Is Inconsistent with *Arkansas Game*

The Government asserts that, even after *Arkansas Game*, any valid "permanent" physical takings claims must still allege "permanent flooding" or "inevitably recurring overflows." Gov. Br. at 14-16 (stating that, in fact, *Arkansas Game* "reaffirmed" this rule). This misapprehends *Arkansas Game*, which rejects the notion, in flooding cases as in other types of takings cases, that government action must be permanent to qualify as a taking. *See* 133 S. Ct. at 519; *see also*

[6] Section 4 of the 1928 Flood Control Act states, "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: Provided, that in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid. The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project…." *See* Flood Control Act of 1928, 33 U.S.C. § 702.

*First English Evangelical Lutheran Church of Glendale v. LA Cnty., Cal.*, 482 U.S. 340, 321 (1987) ("no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective"); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337 (2002) ("[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.")

The Government's error traces to putting an undue emphasis on the doctrinal distinction between "temporary" and "permanent" physical intrusions. While the duration of a government interference with property is a relevant factor in the analysis, *Arkansas Game* instructs that there is no distinct standard for analyzing takings involving physical invasions that continue in perpetuity versus those that are limited in duration. *See Arkansas Game*, 133 S. Ct. at 519; *see also First English*, 482 U.S. at 318 ("'[T]emporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."); *id.* at 331-32 (Stevens, J., dissenting) (explaining that the proposition "that there is no distinction between temporary and permanent takings" is well-recognized in the context of physical takings and that "the state certainly may not occupy an individual's home for a month and then escape compensation by leaving and declaring the occupation 'temporary.'").

In *Arkansas Game* itself, although the government's action and the presence of the water on the land was of limited duration, some of the burdens it placed on the Commission's property were undeniably permanent in nature: "The Commission maintained that the deviations caused sustained flooding during tree-growing season, and that the cumulative impact of the flooding caused the *destruction* of timber in the Area and a substantial change in the character of the terrain, necessitating costly reclamation measures." *Arkansas Game*, 133 S. Ct. at *513

(emphasis added). The permanent takings claims in the instant case also involve the destruction of plants grown on productive land and a substantial change in the character of the terrain, necessitating reclamation measures. If those takings claims did not require permanent or inevitably recurring flooding in *Arkansas Game*, then they do not require such a showing here. It is hard to imagine a more "permanent" taking that when the Government intentionally destroys an individual's property for the public good, and that is precisely what Plaintiffs allege in this case.

Indeed, *First English* concluded that the only meaningful difference between a permanent and temporary taking was that a temporary taking puts private property to public use for a limited period of time after which it is returned to the owner. 482 U.S. at 318. This distinction, however, does not change the test that is applied to determine whether a taking has occurred—it only bears on the substantiality of damage and how much compensation is due if a taking is found. *Id.*; *see also United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582-83 (Fed. Cir. 1993) (duration of a taking is only relevant to how much compensation will be due); *Hendler v.United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (duration of physical invasion is not relevant to the question whether a taking has, in fact, occurred).[7]

In the instant case, some taken property was eventually returned to the Plaintiffs for their future use and enjoyment and other taken property that was destroyed. In this respect, there are both "temporary" and "permanent" takings at issue here. While these facts will bear on the

[7] To the extent the Government reads *Bryant v. United States*, 216 Ct. Cl. 409 (1978), and *Fromme v. United States*, 412 F.2d 1192 (1969) to hold that a completely different test applies to "permanent" takings by flood as opposed to "temporary" takings by flood, *see* Gov. Br. at 15, that reading cannot be reconciled with *Arkansas Game*, which is now controlling authority.

compensation owed, they do not warrant a parsing and application of different standards of what constitutes a taking in violation of the Fifth Amendment.

## III. CONCLUSION

For the reasons set forth herein, Counts I and II should be reinstated.[8]

Date: March 8, 2013 Respectfully submitted,

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[8] If the Court does not reinstate Plaintiffs' claims, Plaintiffs respectfully request that it grant them leave to amend their complaint.