Nos. 2009-5121, 2010-5029

In the United States Court of Appeals for the Federal Circuit

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ARKANSAS GAME AND FISH COMMISSION,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

On Appeal from the United States Court of Federal Claims, No. 05-CV-381 (Hon. Charles F. Lettow)

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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INTRODUCTION

The Supreme Court's holding in this case was narrow. The Court granted *certiorari* to address the question of "whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (*AGFC*). The Court ruled "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id.* at 522. The temporariness of the flooding here remains an important factor, however. *Id.* And when all of the relevant factors and facts are weighed, it is apparent that the United States did not take a flowage easement over the Arkansas Game and Fish Commission's (the Commission) Wildlife Management Area (WMA), as set forth in our prior briefs. The WMA is in an active floodplain that has always flooded during the growing season. At most there was a modest, unforeseeable, and incremental increase in flooding. The alleged impacts were indirect, causing only unrecoverable consequential damages, because the government's actions occurred 115 miles upriver of the WMA. And the allegedly increased flooding resulted from adjustments to a regulatory regime that necessarily yields varying benefits and burdens on downstream landowners as the United States Army Corps of Engineers (the Corps) adjusts the amount or timing of water releases. The Court of Appeals should reverse the Court of Federal

Claim's (CFC) decision that the United States has taken a flowage easement on the Commission's land without just compensation, as it did in its prior opinion.

ARGUMENT

I. The Supreme Court's narrow opinion did not substantially change the multi-factor analysis of takings claims.

While the Supreme Court rejected the proposition that temporarily-recurring flooding is automatically exempted from Takings Clause inspection, the Court did not transform the factors usually considered by this Court in the "situation-specific" analysis of whether a taking has occurred. *AGFC*, 133 S. Ct. at 518; *see also id.* at 522-23. The factors mentioned by the Supreme Court include (1) the duration of the flooding, (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action," (3) "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use," and (4) the "[s]everity of the interference." *Id.* at 522. These are essentially the same factors that we addressed in our initial briefs in this case, Op. Br. 26-41; Reply Br. 3-14, with the addition of the owner's reasonable investment-backed expectations regarding the land's use, which was drawn from the regulatory takings test in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001).

The Supreme Court necessarily rejected the argument that government-caused flood damage is always a taking. The Court explained that "temporary

limitations are subject to a more complex balancing process to determine whether they are a taking," including for "flooding cases." 133 S. Ct. at 521 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982)). The Court thus also rejected the Commission's argument in this Court (Response Br. 35-36) that any government-caused flood damage to its trees is a taking.

II. The government did not take a flowage easement over the WMA.

A. The deviations were temporary and ad hoc.

As the Supreme Court explained, "[w]hen regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking." *AGFC*, 133 S. Ct. at 522 (citing *Loretto*, 458 U.S. at 435 n.12, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002), and *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969)).[1]

The deviations here were temporary and varied, as were their effects on the downstream river stages. The deviations were in response to different requests, were for different times of the year, and provided for different water releases to target different river stages at Poplar Bluff (32 miles downriver from the dam and

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[1] *See also, e.g., Block v. Hirsh*, 256 U.S. 135, 157 (1921) (Holmes, J.) ("The [temporary tenant holdover] regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (citations omitted)); *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1357 (Fed. Cir. 2003) ("isolated invasions, such as one or two floodings, do not make a taking") (alterations and quotations omitted)).

83 miles upriver of the Commission's land). This Court accurately described the deviations as temporary, varied, and uncertain in its earlier decision: "all of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year." Supp. A 42 (panel op.); *see also* Supp. A 36-37 (chart of deviations); Supp. A 139-43. "[T]here was genuine uncertainty about the nature of the policies from year to year as the Corps responded to individualized concerns and individualized circumstances." Supp. A 26 (Dyk, J., concurring in rehearing denial). The temporary, varied, and uncertain nature of the deviations weighs heavily against finding a taking, even assuming that they led to increased flooding (discussed below at pp. 7-9, 13-18).

B. The Corps did not intentionally flood the WMA, and the flooding was not foreseeable.

The paradigmatic physical taking is when the government intentionally appropriates property for its use. For example, in *Loretto* and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), the government itself (or its designee) physically occupied private property. Such "direct government appropriation or physical invasion of private property" is uniquely disruptive to the landowner's property right, and therefore it is the "paradigmatic taking requiring just compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

This case does not concern such a direct and intentional occupation of property. U.S. Op. Br. 37-38. No government agent entered or occupied the Commission's land. The only government action challenged here occurred 115 miles upriver, and the Commission does not claim that the Corps intentionally flooded the WMA. Instead, the record shows that the Corps deviated from the Water Control Manual's "normal regulation" water releases in order to reduce downriver flood impacts. U.S. Op. Br. 7-8; A 1716 (Tr. 206-07); A 2387, 2392, 2447. Such alleged impact can only be described as "in its nature indirect and consequential," *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924), not the direct or intentional government action that is the archetype of a taking.

Consideration of foreseeability does not support the Commission's takings claim. *See AGFC*, 133 S. Ct. at 522 (citing *Ridge Line*, 346 F.3d at 1355-56); *see also John Horstmann Co. v. United States,* 257 U.S. 138, 146 (1921) (cited in *AGFC*, 133 S. Ct. at 522, and described as follows: "no takings liability when damage caused by government action could not have been foreseen"); *Cary v. United States*, 552 F.3d 1373, 1377 (Fed. Cir. 2009).[2] The flooding alleged to have occurred on the WMA because of the deviations was not foreseeable. U.S. Op. Br. 39-41; U.S. Reply Br. 13-14. The Commission's land is 115 miles downriver from

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[2] In addition and related to foreseeability, whether the government action is "authorized" is a relevant consideration. *AGFC*, 133 S. Ct. at 522. We do not dispute that the deviations here were "authorized."

the dam. When the Corps made the varied deviations, it believed that the effect from its water releases dissipated where the River crossed from Missouri to Arkansas; at that point the River drains more than 700 square miles of watershed below the dam. A 12, 29, 2393, 2456-57, 2469. And the CFC found that, when the Corps started the deviations, the Corps did not believe that the changes would substantially impact the WMA: The Corps "did not actually know in 1993 that the increased river levels caused by deviations from the water control plan would cause additional flooding in the Management Area. Indeed, the Corps' staff believed as late as February 2001 that the deviations had no effect on the Black River beyond the Missouri-Arkansas boundary." A 29.

The CFC, however, concluded that the Corps should have foreseen the additional flooding because the Commission complained to the Corps that it believed that the deviations were causing flooding. A 31. But the Commission's "warnings" alone do not make the flooding foreseeable. The complaints show only what the Commission believed. Because the Commission's floodplain lands regularly flooded during the growing season before the deviations took place (see pp. 7-9, 13-18 below), the Commission could not have established that flooding had increased just by observing water on the WMA during the growing season. The Commission failed to establish that the Corps should have foreseen an

increase when it started the initial deviation in 1993 or during the other deviations that followed. This factor, therefore, indicates that there has been no taking.

C. The character of the land – it is part of a floodplain that floods regularly – and the Commission's lack of reasonable investment-backed expectations indicate that there has been no taking.

The Supreme Court explained that "relevant to the takings inquiry * * * are the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use." *AGFC*, 133 S. Ct. at 522 (quoting *Palazzolo*, 533 U.S. at 618); *see also Penn Central*, 438 U.S. at 124. These related considerations strongly weigh against finding a taking here.

1. The WMA is part of a floodplain that floods regularly.

The WMA is in an active floodplain that regularly flooded before the dam was built, while the dam was operated pursuant to the Manual's "normal regulation" releases, and during the deviations, as detailed below. *See also, e.g.*, A 1892 (Tr. 1165), 2393, 9716; Supp. A 52 (Tr. 2763-64). As the Supreme Court noted, "the Management Area lies in a floodplain below a dam, and had experienced flooding in the past." *AGFC*, 133 S. Ct. at 522.

The Commission also intentionally floods portions of the WMA annually to facilitate duck hunting. A 9; A 1680-81, 1907-08 (Tr. 65-66, 1227-28). As a result of the Commission's intentional flooding activities, natural flooding that occurred for decades before these deviations were made, insect damage, and

beaver dam activity, "significant" problems with timber on the WMA were noted by the Commission itself well before 1993. U.S. Op. Br. 49-51. These pre-deviation problems occurred largely in the *same* areas where the Commission found post-deviation damage, demonstrating that the Commission could not have expected either dry conditions or a healthy forest ecosystem. *Id.*

Using the Commission's own expert testimony and data, during the "critical months" of the growing season (June-August), the most that can be said is that, on average, the WMA was flooded about a dozen days each month and that the deviations increased that flooding by a few days per month. The Commission's experts based their theory that the deviations increased flooding on the WMA on the fact that, on average, a few more days with certain river stages were noted during seven (of the eight) deviation years than during the twelve years prior (there is no justification for the Commission's chosen periods of comparison). The Commission's experts' data characterized the size of the effect of the Corps' operational decisions in the following ways:

- During the important growing-season months of June, July, and August, the Corning gauge registered 5 feet or higher an average of 14.2 days per month between 1993 and 1999 versus an average of 11.4 days per month in the twelve years prior (1981-1992). A 13772.

- During the growing season (approximated as April through September), the Corning gauge registered 5 feet or higher an average of 17.3 days per month between 1993 and 1999 versus an average of 14.7 days per month in the twelve years prior (1981-1992). A 13772.

- During a different "growing season" (early April through mid-October),[3] the Corning gauge registered 5 feet or higher an average of 15.6 days per month between 1993 and 1999 versus an average of 11.0 days per month in the years after the dam's construction (1949-1992). A 13755; A 15-16.

- During the "growing season" (early April through mid-October), the Corning gauge registered 6 feet or higher an average of 14.6 days per month between 1993 and 1999 versus an average of 10.4 days per month in the years after the dam's construction (1949-1992). A 13755; A 15-16.

Thus, the Commission's experts' testimony was that the Black River was already subject (depending on what months and years of comparison are used) to an average of 10-15 days of higher stages each month before the deviations, and then an average of 14-17 days per month of higher river stages between 1993 and 1999. Because the Commission's floodplain land flooded regularly before and during the deviations, the character of the land weighs heavily against finding a taking.

2. The Commission could not have reasonably expected its land to be dry or that the Corps would not adjust its water releases.

As to the Commission's "reasonable investment-backed expectations' regarding the land's use," we have already explained that the land is in an active floodplain that has always flooded regularly. The data discussed above – supplied

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[3] The Commission's expert who compiled these data testified the "growing season" was "approximately mid-March to approximately mid-October," Supp. A 51 (Tr. 2672), with critical months "generally from June through early September," A 2176 (Tr. 2673). None of these dates correspond with the Commission's preferred comparative period. The per-month figures for the full timber-growing season of early April through mid-October were calculated by dividing the total number of days for that period by 6.25.

by the Commission's experts – establish that the Commission could not have expected that its land would be dry during the growing season or that the flooding was predictable from year-to-year.

The Commission also could not have reasonably expected that its land located in the floodplain downriver from the Corps' flood-control project would not be subject to a changing flooding regime. The Commission acquired its land in the 1950s and 1960s, after the Corps built and then began operating the flood-control dam in the 1940s. A 9, 9854; Supp. A 145. The point of a flood-control dam is to vary the timing of water releases in an effort to reduce flooding impacts. The Commission thus reasonably had to know that the Corps released water from the dam, and that the Corps might not always release water in exactly the same way.

Moreover, the Commission could not have reasonably expected that the Corps would never adjust how it released water from the dam in an effort to minimize the total impact of downriver flooding. When the Commission acquired the WMA, the Corps' 1953 Water Control Manual already governed the operation of the dam. A 9, 11, 9845; Supp. A 145. The Manual provided for "normal regulation" releases, but even the "normal regulation" releases varied with hydrologic conditions beyond the Corps' control. A 9900-05; *see also* A 9865 (Corps experimented with release levels for the first two years of the dam's

operation from 1948-1950). But it also provided for "deviations" from those releases in order to minimize the total impact of downstream flooding. A 9907-08; A 9898 (Manual: "During the agricultural season, deviations from the normal regulation plan have often been approved due to agricultural needs between Poplar Bluff and the Missouri-Arkansas state line."). And the Corps' regulations provided for the revisions and adjustment of water control plans. Supp. A 34; 33 C.F.R. § 222.5(f)(2), (3) (Corps Eng'r Reg. No. 1110-2-240). When the Commission bought the property, it was thus on notice that the Corps would adjust the water releases either temporarily or permanently. It had no reasonable expectation that the Corps would never temporarily deviation from the "normal" operations.

Arkansas state law also reinforces that the Commission could not have reasonably expected that its riparian land would remain dry in a particular way. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-29 (1992) (noting that "the property owner necessarily expects the uses of his property to be restricted" under, for example, "background principles of the * * * law of property and nuisance"); *AGFC*, 133 S. Ct. at 522. No landowner in the Commission's position has a vested property right to have its land wet on particular days of the year and dry on others, or to have its land drain on a predictable schedule after it floods. That is particularly true in a "riparian rights" water-law jurisdiction, like Arkansas, that generally recognizes no rights in riparian landowners to a flow of

particular volumes of water at particular times. *See, e.g., Harris v. Brooks*, 283 S.W.2d 129, 133 (Ark. 1955).

Finally, someone located far downriver from a flood-control project who is impacted by operation of the project is in a very different position from property owners who are upriver and whose property is impacted by the reservoir. The reservoir *occupies* the property upriver from the dam, and the Corps uses such upriver property to store floodwaters in order to provide flood-control benefits to the downriver property owners.[4] That situation is a quintessential case of the government "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, 49 (1960) (quoted in *AGFC*, 133 S. Ct. at 518).

In contrast, downriver property owners' land is not occupied by the flood-control project. Instead, their land is impacted by the floodwaters that would be coming down the River regardless of the project, which the Corps manages for the purpose of *reducing* flooding impacts. The mass of downstream landowners like

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[4] Accordingly, Corps policy requires acquisition in fee of backwater land that lies below the level that will be permanently inundated by a flood control reservoir (plus an appropriate margin above that level) and provides for acquisition of easements in more remote upstream areas where backwaters may form. 43 C.F.R. § 8.3(b); 32 C.F.R. § 644.4(b)(2)(iii), (v). The Corps also obtains the appropriate interest in land that is immediately below a dam and impacted by, for example, the spillway. Here, the Corps acquired in fee some 18,606 acres of backwater lands and secured easements for upstream areas that the Dam has rendered permanently liable to intermittent but inevitably recurring flooding. A 9861.

the Commission are properly regarded as members of the public affected by a flood-control program designed to adjust "the benefits and burdens of [riparian] life to promote the common good." *Penn Central*, 438 U.S. at 124. Such readily-anticipated adjustments are ordinary and beneficial acts of government, and should not be held to constitute a taking, for "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *accord Lingle*, 544 U.S. at 538.

D. The increased flooding attributed to the deviations did not severely interfere with the Commission's land.

The "[s]everity of the interference figures in the calculus" of whether a taking has occurred. *AGFC*, 133 S. Ct. at 522. Flooding must be sufficiently severe to warrant treatment as a taking. *See Danforth v. United States*, 308 U.S. 271, 286-87 (1939) (rejecting a takings claim based on the construction of a levee that channeled additional floodwaters onto the claimant's floodplain lands because it did not create "a burden, actually experienced, of caring for floods greater than it bore prior to the construction," and explaining that "the retention of water from unusual floods for a somewhat longer period or its increase in depth or

destructiveness by reason of the set-back levee" is not a taking).[5] Because the flooding was not severe, this factor weighs against finding a taking here.

1. Even assuming that the Commission established an increase in flooding, it was incremental and non-severe.

As detailed above, at most the government caused a small and incremental increase in the average number of days of higher river stages during the growing season. Even if an average number of days of particular river stages equates to an average number of days of flooding on the WMA, that claimed incremental increase in flooding is far from severe (plus, it improperly equates river stage with days of flooding of the WMA, see pp. 16-18).

The Commission attempts to avoid that conclusion by claiming that the increase in flooding interfered with how it uses the WMA. As set forth above, however, the Commission had no reasonable expectations to be able to put the WMA to a particular use that depended on maintaining the existing flooding regime. But regardless, that claim is unsupported by the trial record. The trial

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[5] *See also, e.g., Bedford v. United States*, 192 U.S. 217, 224-25 (1904) (holding that, even if increased flooding resulted from a revetment constructed by the government to slow down erosion of the river bank, the flooding on the claimant's property was at most "an incidental consequence," not a taking); *Nat'l By-Prods., Inc. v. United States*, 405 F.2d 1256, 1273-75 (Ct. Cl. 1969) ("The essential inquiry is whether the injury * * * is in the nature of a tortious invasion * * * or rises to the magnitude of an appropriation of some interest in his property permanently to the use of the Government."); *Ridge Line*, 346 F.3d at 1357 ("The second-prong of the taking-tort inquiry * * * requires the court to consider whether the government's interference * * * was substantial and frequent enough to rise to the level of a taking.").

record establishes that the Commission uses the land in two relevant ways: for timber sales and for duck hunting. A 9. As for timber sales, the evidence at trial proved that the Commission continued to conduct timber sales during the deviation years. A 1898, 1910, 2012 (Tr. 1188-89, 1236-37, 1858-59); A 4777-817, 5618-41, 5642-43, 5648, 10924-26; U.S. Op. Br. at 38. Nothing in the record reveals that those timber sales were blocked by any flooding. As for duck hunting, nothing in the record indicates that the WMA was less productive for hunters as a result of the deviations, either when the deviations were occurring (unlikely because the duck hunting occurred over the winter when the Commission intentionally floods large areas of the WMA) or in the years following the deviations before the Commission brought suit.

In its attempt to demonstrate severity, the Commission has glossed over these facts and claimed that the flooding caused by the deviations changed the ecosystem, shifting it from one where a hardwood forest could survive to a swamp where one could not. The first problem with this argument is that the data do not support it. The data show a modest incremental increase in the days of flooding, if any, not a dramatic increase that would change the ecosystem.

The second problem is that, even if one assumes that a modest incremental increase in days of flooding did change the ecosystem, that does not demonstrate a severe *interference* with the property. The few additional days of flooding are

merely a "somewhat longer period" of flooding, *Danforth*, 308 U.S. at 286, than the WMA already experienced. Any changes in the land demonstrate only that the land was poised at a tipping point, so that a modest change in the number of days of flooding could have a dramatic change in the landscape. But the relevant factor is not whether the *impact* is severe; it is whether the *interference* is severe.

2. The CFC erred in finding increased flooding.

As detailed in our earlier briefs (U.S. Op. Br. 31-37; U.S. Reply Br. 14-17), the Commission did not establish that the Corps' deviations caused any significant increase in flooding and the CFC erred in finding one. The CFC seriously erred in analyzing the critical factual questions of whether and to what extent the Corps' actions increased the burden of flooding on the Commission's lands. The CFC erred in two significant ways.

First, the CFC erroneously adopted the Commission's fundamentally flawed comparisons between the average pre-deviation (but mostly post-project) measurements of the River's stage at the Corning gauge, using the Commission's conveniently-chosen twelve-year period of comparison, and average river gauge measurements between 1993-1999 (the CFC ignored river levels in 2000, a year where the Corps approved a deviation). That oversimplified and limited analysis mistakes correlation for causation because it fails to control for other variables affecting the River including, most obviously, precipitation. The WMA begins

115 miles downriver of the dam. A thousand square miles of watershed drain uncontrolled into the River below the dam and above the WMA – a larger area than the approximately 900 square miles of watershed above the dam. A 2260 (Tr. 3041), 2393, 9860, 9868, 9872-74, 11123. That separation, and the resulting opportunity for intervening causes and effects, coupled with the fact that the WMA has always experienced extensive growing-season flooding (see pp. 8-9), makes it far from simple – as the Commission's river level comparison would have it – to say what effect particular operations at the dam had on flooding on the WMA.

Second, the CFC erred in equating gauge level data at one point in the River with a blanket increase in the duration of flooding on the WMA. Simply inventorying the average number of days the River is above a certain stage over one twelve-year period and comparing that sum with the average number of days the River is above that stage between 1993 and 1999 (as the Commission's experts and the CFC did) does not answer the question of when the relevant areas of the WMA were inundated or whether the deviations increased flooding on the WMA. Riparian land takes time to drain after a flooding event, and the Commission's expert testified that tree roots would remain saturated until Corning gauge levels fell below three feet and the water could drain off the WMA. A 9752, 13753-74. This point is critical because in any particular year, river levels rise and fall during the summer months depending on a myriad of inflows into the watershed. In order

to assess whether the deviations prolonged flooding during any year, one would have to consider what would have happened in terms of flooding, taking into account drainage, but for the deviations. The CFC failed to do so. Because a small number of evenly spaced high-water days may leave land continuously inundated in a way that a cluster of high-water days may not, the Commission's and the CFC's simplistic analysis is plainly insufficient. U.S. Op. Br. 33; A 2277-79 (Tr. 3109-13), 11139-41, 13753-54; Supp. A 152-53. Once the proper analysis is undertaken and drainage issues are considered, the United States' experts showed timber on the WMA would have been significantly flooded during the growing seasons between 1993 and 1999 even without the deviations. U.S. Op. Br. 34-37.

E. When all the factors are weighed, it is apparent that no taking occurred here.

In summary, the deviations were temporary, in response to different requests, were for different times of the year, and provided for different water releases. The government did not intend to invade the Commission's land, and any impacts on the WMA were not foreseeable. The WMA is in an active floodplain that has always flooded regularly. The Commission lacked any reasonable expectation that the Corps would not adjust the water releases from the dam at some point, as provided by the then-existing Manual and consistent with Arkansas riparian law. The Commission's own evidence showed only an incremental and modest increase in flooding, and the government's better evidence undermined

even that incremental and modest increase. The CFC's decision is itself internally inconsistent, fails to account for drainage issues, and does not provide a reasonable basis to conclude that the deviations caused any increased flooding in the WMA.

III. The CFC should have excluded certain Commission evidence because of evidence spoliation and under *Daubert*.

Two other issues, not affected by the Supreme Court's opinion, justify reversal and a remand here for further proceedings. First, the CFC should have excluded testimony from the Commission's forestry experts because of evidence spoliation: the Commission's forestry experts either lost or destroyed the information that provided the basis for their opinions – the records of their survey of timber damage in the WMA, called "cruise maps." The Commission prepared these maps in anticipation of litigation (A 1870, 1879 (Tr. 1010, 1045)), and the information contained in those maps was critical to a fundamental factual dispute in the case: Were the dead and declining trees in locations affected by the deviations? Without the cruise maps, it was impossible to assess where dead or damaged trees were located. And without that information, it was impossible to determine whether trees were damaged by flood waters or some other cause. U.S. Op. Br. 42-53; U.S. Reply Br. 17-27.

Second, the Commission's timber appraiser testimony concerning declining timber should have been excluded under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702 because there was no basis

for valuation. At trial, the Commission's timber appraiser testified that he based his valuation of declining trees on the assumptions that one-half of the damaged trees would die within five years and that the living-but-damaged trees were worth one-half their original value. The CFC relied on this testimony to award approximately $3.5 million in damages for declining or damaged timber. The expert's two "one-half" assumptions were simply random guesses – he admitted that they were a "subjective determination" – not based on any market data, statistical analysis, or scientific literature. U.S. Op. Br. 53-55; U.S. Reply Br. 28-30.

CONCLUSION

For the foregoing reasons and those set out in our earlier briefs in this case, the CFC's decision and judgment that the United States has taken a flowage easement on the Commission's land without just compensation should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2013, two copies of the foregoing supplemental brief were served by Federal Express, next business day delivery, on the following:

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