IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically Filed November 13, 2018)

MINISTERIO ROCA SOLIDA, INC.,	)	
Plaintiff,	)	Case No. 1:16-cv-00826-EDK
v.	)	Judge Elaine D. Kaplan
THE UNITED STATES OF AMERICA,	)	
Defendant	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant's Motion for Summary Judgment ("Defendant's Motion") must fail because there are genuine disputes of material fact that affect the outcome of the case. Plaintiff, Ministerio Roca Solida Iglesia Cristiana ("Plaintiff" or "church"), makes two inverse condemnation claims for the taking of its property rights under the Fifth Amendment. It is well-established that takings claims are fact intensive and are best decided at the trial stage. This is particularly applicable when, as here, there is conflicting expert testimony.

Plaintiff's first claim is due to the repeated flooding of its property by Defendant. It is undisputed that: (1) Plaintiff possesses a valid property interest; (2) Defendant, FWS, diverted a stream which crossed through Plaintiff's property to a higher elevation above Plaintiff's property; and (3) Plaintiff's property has flooded on four separate occasions since Defendant diverted the stream in 2010—particularly the buildings on the property. The severity of the floods is also undisputed.

In dispute are Defendant's denials that: (1) its actions caused the flooding; and (2) the flooding caused by Defendant was foreseeable. Despite Defendant's denials, the record is replete with credible evidence that Defendant caused severe flooding to the portions of Plaintiff's property that had never before been flooded. There is also evidence that Defendant either foresaw, or did not care, that its actions would significantly increase the risk of flooding to Plaintiff's property.

Defendant's Motion improperly asks this Court to make factual findings on causation, foreseeability, and expert credibility at the summary judgment stage. Therefore, Defendant's Motion should be denied.

Plaintiff's second claim is for the taking of its vested water rights. It is undisputed that: (1) Defendant diverted the water that crossed Plaintiff's property; and (2) this water has crossed Plaintiff's property since at least the 1880s. In dispute, however, is the existence and amount of Plaintiff's vested water rights under Nevada law. Once again, the inquiry involves multiple issues of disputed fact. Plaintiff has pending Proof of Appropriation Applications awaiting adjudication from the Nevada Division of Water Resources. The Nevada State Engineer has already determined that Plaintiff's claim to vested water rights is plausible. Moreover, as recognized by the Nevada State Engineer, Defendant hypocritically asks this Court to discount the historical evidence supporting Plaintiff's water rights claim when Defendant's water rights claims in the exact same area are based on weaker evidence.

Given these key factual disputes, Defendant's Motion must fail.

FACTUAL BACKGROUND

A. History of Plaintiff's Property

Plaintiff's 40-acres lies in the SW ¼ of the SW ¼ of Section 21 Township 17 South, Range 50 East, MDM in Nye County, Nevada. Plaintiff's property is one of the few remaining private parcels within Ash Meadows National Wildlife Refuge. Ex. WW. In 1887, Alice Ober filed a state land application to purchase 640 acres that included Plaintiff's property. Ex. RR; Ex. R. The United States now owns the other 600 acres purchased by Ober. Ex. RR. The water Plaintiff's property comes from a spring channel, which includes irrigation ditches, and is part of the Carson Slough and has traversed Plaintiff's property since at least the 1880s. Ex. J; Ex. RR; Ex. SS.

In 1887, Ober first appropriated water from Carson Slough, paying Nye County taxes on 11 horses, 27 mustangs, 45 stock cattle, 75 hogs, 225 fowls, and 5 tons of grain. Ex. R; Ex. RR.

Ober forfeited the land back to the State of Nevada in 1900 due to nonpayment. *Id.* In 1903-1905, Key Pittman made a second land application to the State of Nevada for the exact 40 acres of Plaintiff's property. *Id.* Nye County assessment rolls show that starting in 1913 Pittman was assessed taxes for grazing on an annual basis until 1942. *Id.* From 1942-1998, the property was owned by the Carver/Conner family. *Id.*

In February 1998, the Carver family sold the property to Ronald D. Matheny. *Id.* Mr. Matheny grazed assorted livestock on the property until he completely moved off in 2008. *Id.* Mr. Matheny added the buildings to the property that Defendant has subsequently flooded. Ex. Z, Matheny Dep. 30:3-11. The property had an area at lower elevation where excess water from the irrigation ditches would run and pool up. Mr. Matheny cleaned the area up and turned it into a pond. Ex. Z, Matheny Depo. 32:2-33:21. During the eight years he owned the property, Mr. Matheny never so much as observed the water overflowing the ditches or the pond during rain events. Ex. Z, Matheny Dep. 36:25-37:3. In 2006, Ron Matheny sold the property to Plaintiff. Ex. R, Ex. RR; Ex. UU.

The records for Plaintiff's property and water rights were prepared by a licensed abstractor in the State of Nevada. Ex. RR, MRS0012. The Nevada State Engineer, after studying the record, "f[ound] a well documented history of annual tax payments verifies that over a period spanning many years, a variety of owners have retained an active interest in the subject parcel of land." Ex. R, US010377.

B. "Patch of Heaven" Church Camp

Plaintiff is incorporated as a nonprofit church under the laws of Nevada. The congregation initially met in a community center in Las Vegas, and now rents a theater in a local middle school in Las Vegas. Ex. XX, Pls. 2017 Dep. 20:11-23:24.

Pastor Victor Fuentes had a dream to do something to serve the community by helping the youth of Las Vegas. *Id.* at 25:15-19. In 2006, thanks to the generous gift of a woman who attended the church's bible study, Pastor Fuentes was able to make his dream a reality. *Id.* at 30:18-31:4. The church purchased the property from Mr. Matheny for $500,000. Ex. UU**.**

The church chose the property specifically because of the water that flowed through it. Ex. XX, Pls. 2017 Dep. 25:20-26:21. The property was a beautiful desert oasis complete with flowing streams, green abounding, and vibrant trees. Ex. VV, Pls. 2017 Dep. 40:1-4, 44:20-24. The church did not build any new structures on the property, but invested significant time and resources in refurbishing and upgrading the existing structures. Ex. E, Pls. 2017 Dep. 60:13-19; Def. Mot. at 13. The existing buildings were turned into a chapel, kitchen, dining hall, bunk houses, restrooms and shower facilities, and snack bar. Ex. E, Pls. 2017 Dep. 60:22-63:12. The church furnished the buildings and upgraded the electricity, septic system, drywall, and insultation. *Id.* at 63:20-65:17. After several years of labor, the church reopened the camp and named it "Patch of Heaven."

The camp was initially for the youth of the Las Vegas area, but it grew into much more. *Id.* at 69:10-20. Spiritual leaders from Nevada and California would ask the church to use the camp for retreats and baptisms. *Id.* at 69:10-70:9. The Salvation Army brought children to the camp on several occasions. *Id.* at 70:10-18. It was used for people to be restored, reborn, and healed from addiction and other problems. *Id.* at 69:21-70:2. Prior to the first flood, Patch of Heaven was reserved for a group nearly every weekend. *Id.* at 72:6-19.

C. Fairbanks and Soda Springs Restoration Project

Meanwhile, unbeknownst to Plaintiff, Defendant began a major effort to significantly change the hydrology of the Carson Slough and the area surrounding Plaintiff's property. In

2009, Defendant initiated construction of the Fairbanks/Soda Spring Channel Restoration Project. This project included the construction of extensive diversion channels and earthen dams, which directed spring-fed base flows and storm water related drainage away from natural, pre-existing channels into the newly constructed channels. Ex. A. The project was carried out for FWS by private contractor, Otis Bay Ecological Consultants ("Otis Bay"). Ex. F, Andress Dep. 44:23-45:10.

D. Carson Slough Diversion Channel

Part of the Fairbanks and Soda Springs Restoration Project was construction of the Carson Slough Diversion Channel ("diversion project"). As part of this diversion, Defendant constructed a dam upstream from Plaintiff's property, created a new water channel, and re-routed two spring-fed streams that traversed Plaintiff's property into a single flow just 500 feet to the east of and to an elevation above Plaintiff's property, including the newly-refurbished buildings. *See* Ex. A, Ex. G; Ex. J; Ex. M. This new, artificial channel re-routed the water that formerly traversed Plaintiff's property, consisting of two spring-fed streams now combined, just 500 feet to the east of and to the higher elevation side of, Plaintiff's property and the church camp buildings, but ultimately returned the water to its historic path beyond Plaintiff's property. Defendant completed work on the diversion project in August 2010.

The major decisions for this project, including the diversion of Plaintiff's water, were made by a group called the Ash Meadows Recovery Implementation Team ("AMRIT"). Ex. F, Andress Dep. 42:20-43:10. These meetings were conducted in secret—they were not open to the public, not publicized, and no records exist for the meetings. *See* Ex. H, Defs. Resp. to Interrog. No. 2, Defs. Resp. to Reqs. for Prod. Nos. 2, 3. No one at the meetings represented the

interests of the few private property owners remaining within Ash Meadows. Ex. F, Andres Dep. 43:1-44:13.

Ash Meadows Refuge Manger Sharon McKelvey finally contacted Plaintiff in 2009 about the project. Ex. K, Pls. 2017 Dep. 95:25-96:7. McKelvey told Pastor Fuentes that Plaintiff did not own the water right to the spring and that Ash Meadows was diverting water to protect a fish. *Id.* at 96:4-23. At one point, FWS Ranger Shane Nalen at Ash Meadows contacted Pastor Fuentes with concerns about flooding. Ex. L, Pls. 2017 Dep. 105:14-106:13. Ranger Nalen told Pas that FWS was planning to reroute the river and that FWS was "afraid that they're going to flood you up." *Id.* at 106:6-13.

Plaintiff was subsequently involved in meetings with McKelvey, Otis Bay President Chad Gourley, and other refuge employees in 2009 to plead with Defendant to not take its water. Ex. K, Pls. 2017 Dep. 99:21-100:11. Pastor Fuentes was told by hydrologist Rob Andress, Otis Bay's Project Manager for Phase I, that he saw no reason why Ash Meadows could not complete its objectives and leave water for Plaintiff to enjoy. Ex. K, Pls. 2017 Dep. 98:3-23. Andress also told Pastor Fuentes that there was "plenty of water for all of us" but that FWS did not want to do it. Ex. K, Pls. 2017 Dep. 98:18-23.

1. Diversion Project Failed to Satisfy FEMA Floodplain Requirements

During design and construction of the Carson Slough Diversion Channel, Defendant failed to comply with Federal Emergency Management Agency ("FEMA") standards and requirements "intended to prevent loss of life and property, as well as economic and social hardships that result from flooding."[1]

[1] https://www.fema.gov/txt/floodplain/nfip_sg_unit_5.txt (last visited Nov. 12, 2018): *see also* 44 CFR Parts 59.1 and 59.2

Development, "*dredging*, *filling*, grading, paving, *excavation*, or drilling operation or *storage of equipment or material*," of the Carson Slough, which lies within a FEMA-designated flood plain, requires compliance with Nye County, Nevada's FEMA-certified Flood Damage Prevention Ordinance and a Letter of Map Revision ("LOMR"). Nye County Nevada Ordinance 15.12.040, .050, and .130, *et seq.* (emphasis added).

Defendants were issued a letter of violation by Nye County Floodplain Administrator Richard Johnson on February 3, 2010, because Defendant's diversion project made major changes in the drainage pattern from the historical flow. Ex. N; Ex. P, Richard Johnson Dep. 68:14-23. Defendant never complied with the Nye County Ordinance, and thus, never complied with FEMA regulations.

2. Defendant Failed to Carry out its Project in Accordance with the Stated Purpose of the Historic Restoration of the Watershed, EIS-published Alternatives, Record of Decision, or Comprehensive Conservation Plan

The Carson Slough Diversion failed to follow Defendant's own Comprehensive Conservation Plan ("CCP") and/or published goals when stating the purpose was "to restore historic spring flow."

No map or aerial photography ever produced by Defendants depicts spring flow to the area of Defendant's artificially-created waterway. Ex. J. Every map produced by any party, including maps dated as early as 1881, depicts water traversing Plaintiff's property. Ex. J. The Nevada Division of Water Resources considered the evidence and determined that the historic flow of the stream went through Plaintiff's property. *See* Ex. R; Ex. S.

Indeed, Defendant publicly noticed three Alternatives (A, B, and C), for the so-called "historic water restoration" project in their CCP and Environmental Impact Statement ("EIS"). Yet, none of these Alternatives depicted that water would no longer flow through Plaintiff's

property. Ex. T, U. None showed the combining of Fairbanks and Soda Springs Flow into a single and new waterway. *Id.* The diversion dam above Plaintiff's property was not included in any of the published Alternatives within the EIS but rather was installed well after initiation of the waterway relocation project. Ex. T, Ex. U, Ex. V.

Additionally, Defendant chose Alternative C, yet the required Finding of No Significant Impact ("FONSI") was applied only to Alternative B. *See* Ex. T.

Moreover, Defendant knew about periodic and sometimes heavy rainfall in the watershed. Ex. W; Defs. Mot. at 11. The design of the diversion project, however, intentionally did not account for rainwater or flood flow. Ex. X; Ex. PP, David Thompson 2014 Dep. 73:3-7.

Defendant also cut corners by failing to secure a Section 404 Permit from the Army Corps of Engineers. Prior to the project, Plaintiff contacted Christine Hanson at the Army Corps of Engineers to inquire about the permitting process. Ex. Y, Pls. 2017 Dep. 102:9-103:5. Ms. Hanson told Pastor Fuentes that FWS did not possess the proper permit, but that the Corps would allow them to do it anyway. *Id.* at 103:16-104:5.

E. Flooding of Plaintiff's Property

On or about December 23, 2010—approximately 4 months after Defendant finished their artificial channel and with the first occurrence of any measurable, post-project rainfall—large amounts of water from Defendant's newly erected dam and waterway relocation project overflowed the Defendant's man-made channels, and for the first time (to the best of anyone's knowledge), flooded the area of Plaintiff's property occupied by structures. Ex. A; Ex. Z; Ex. AA; Ex. VV. There have been three additional floods since: one in late October-early November 2015; one in early to mid-January 2016; and one in early to mid-July 2016. *See, e.g.*, Ex. A.

Each time the camp floods, there is more destruction as the floodwater water rips through the camp and seeks to return to its natural and historically-verifiable flow pattern. *See* Ex. VV, Pls. 2017 Dep. 45:5-51:22; Ex. A at 6.

With this factual history, the following material facts are in dispute:

- Whether Defendant's project significantly changed the hydrology of the watershed around Plaintiff's property;
- Whether Defendant's project caused flooding on Plaintiff's property in areas that had never before flooded;
- Whether Defendant knew, or should have known, that its project would subject Plaintiff's property to an increased risk of flooding;
- Whether the rainfall that occurred prior to the four flooding events was statistically excessive;
- Whether Plaintiff, and previous owners of the property, made beneficial use of the water crossing Plaintiff's property;
- Whether Plaintiff has maintained beneficial use of its water;
- The amount of water Plaintiff possesses under Nevada law; and
- Whether Defendant has complied Plaintiff's water permit.

LEGAL STANDARD

Defendant's Motion asks this Court to decide causation, foreseeability, and witness credibility on summary judgment—each of which involves a fact-intensive inquiry and would affect the outcome of the case. Takings claims are fact-specific, particularly those that involve expert opinions on scientific matters such as hydrology.

"The Court of Federal Claims may grant summary judgment only if the record shows 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Argent v. United States*, 124 F.3d 1277, 1280 (Fed. Cir. 1997) (quoting RCFC 56(c)). The party moving for summary judgment bears the evidentiary burden to show that there are no genuine issues of material fact regarding the matter on which summary

judgment is sought. *Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 466 (2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "In considering a motion for summary judgment, all justifiable inferences are to be drawn from the underlying facts in favor of the party opposing summary judgment." *Turner v. United States*, 901 F.2d 1093, 1095 (Fed. Cir. 1990) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "Therefore, a court [] must deny a motion for summary judgment if there are any factual disputes that would affect the outcome of the case." *Res. Investments*, 85 Fed. Cl. at 466 (citing *Liberty Lobby*, 477 U.S. at 249). To defeat summary judgment, "[t]he party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

It should be "emphasized that '[w]hether or not a taking has occurred is a question of law based on factual underpinnings.'" *Res. Investments*, 85 Fed. Cl. at 466 (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)). The Supreme Court has clearly expounded that "most takings claims turn on situation-specific factual inquiries." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). "Furthermore, due to the fact-intensive nature of takings cases, summary judgment should not be granted precipitously." *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (citing *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed. Cir. 1983)). Thus, "courts are typically reluctant to decide such claims at the summary judgment stage, preferring to wait for a trial to fully develop the factual record." *Res. Investments*, 85 Fed. Cl. at 466 (citing *Moden*, 404 F.3d at 1346 (Fed. Cir. 2005); *Yuba*, 723 F.2d at 887; *Sartori v. United States*, 67 Fed. Cl. 263, 266–67 (2005)).

Importantly, the nature of a takings claim due to flooding, which involves expert opinions on hydrology, is also such that courts are even less likely to grant summary judgment. *See Banks v. United States*, 62 Fed. Cl. 778, 779 (2004) ("When an underlying factual question arises in a case involving 'complex scientific principles' or requiring expert witness testimony, summary judgment may be improper.") (citing *Howes v. Med. Components, Inc*., 814 F.2d 638, 643 (Fed. Cir. 1987)); *Loesch v. United States*, 645 F.2d 905, 914 (1981) (observing in inverse condemnation cases that expert testimony "is particularly appropriate" where "the trier of fact is presented with evidence of a highly technical nature involving geotechnical, hydrologic, hydraulic, geological and climatic matters")); *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs*, 138 Fed. Cl. 658, 672 (2018) (deferring ruling on motion to dismiss until trial due to the intensely factual nature of takings cases in flooding situations); *see also Quebedeaux v. United States*, 112 Fed. Cl. 317, 324 (2013) (noting "multi-factored, factually-intensive nature of the takings analysis [was] well-evidenced in . . . *Arkansas Game & Fish*").

ARGUMENT

I. PLAINTIFF'S TAKING BY FLOODING CLAIM INVOLVES GENUINE DISPUTES OF MATERIAL FACT

The physical invasion of Plaintiff's property by floodwater is undisputed. Defs. Mot. at 25. The severity of the flooding is undisputed. *Id.* Defendant also does not dispute the likelihood that the flooding will recur. Defendant only disputes that its artificial combination and diversion of two stream flows to a newly created channel at an elevation above Plaintiff's property caused the flooding or made such flooding foreseeable. Plaintiff has satisfied its burden to provide evidence to support its claims.

The causation and foreseeability of the flooding are heavily disputed in the record. Plaintiff's expert hydrologist, Dr. Blaine Reely, Ph.D., P.E., has offered opinions regarding the

hydrologic and flooding impacts to the Plaintiff's property as a direct consequence of the modifications to the existing surface water drainage system by FWS. Ex. A. Dr. Reely has directly contradicted opinions offered by Defendant's experts. *Id.* Moreover, Dr. Reely's opinions and predictions have proven to be prescient, and empirically more credible than the explanations offered by Defendant's experts in 2014 and 2018. Ex. A; Ex. B; Ex. C.

Additionally, there is substantial lay testimony showing that Defendant's diversion project subjected the inhabited areas of Plaintiff's property that had never been flooded before to severe flooding. Ex. Z; Ex. II; Ex. VV; Ex. YY. There is also evidence that Defendant knew its project would cause flooding on Plaintiff's property or simply did not care. Ex. L; Ex. V; Ex. X; Ex. PP. The evidence creates genuine disputes of material fact as to whether Defendant caused the flooding. This dispute is for the Court to decide at trial with the benefit of live testimony.

A. Legal Framework: Inverse Condemnation

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. Amend. V ("Takings Clause"). The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). A physical taking generally occurs by "a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (citations omitted).

When the government conducts no formal exercise of eminent domain, the claim becomes one for "inverse condemnation." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). For an inverse condemnation claim, a plaintiff needs to show that treatment under takings law is appropriate and that the plaintiff possessed a protectable property interest in what it alleges that the government has taken. *Moden*, 404 F.3d at 1342. Here, it is undisputed that Plaintiff owned possessable property interest in its church camp.

1. Taking By Flooding

To prove that government-induced flooding constitutes a taking, a plaintiff must establish that: (1) government action caused the injury to its property, and (2) the invasion was "foreseeable" because it was the direct, natural, or probable result of an authorized activity. [2] *See Moden*, 404 F.3d at 1343.[3] Once the court determines that there has been a taking, it then proceeds to determine the extent of the taking—i.e., whether the taking is permanent or temporary. *See, e.g.*, *Waverley View Inv'rs, LLC v. United States*, 135 Fed. Cl. 750, 797, *judgment entered*, 136 Fed. Cl. 593 (2018) ("Having determined that the Army's activities . . . amounted to a compensable taking, the court must next determine whether this taking is a 'permanent physical occupation [ ]' or a 'temporary [physical] invasion[ ].'") (citing *Ark. Game*

[2] In *Moden*, the Federal Circuit opined that "foreseeability" is technically part of the causation element. *See* 404 F.3d at 1342-43 (discussing relationship between causation and foreseeability).

[3] This court has also mentioned a related "severity" element requiring Plaintiff to prove "the injury constituted a sufficiently severe invasion that interfered with the landowner's reasonable expectations as to the use of the land." *See Ideker Farms, Inc. v. United States*, 136 Fed. Cl. 654, 678 (2018) (quoting *Arkansas Game & Fish III,* 736 F.3d at 1370). However, "at [the liability] stage of the litigation, for purposes of establishing severity, it is sufficient for plaintiffs to show that government-induced flooding has interfered with plaintiffs' ability to use their land for its intended purposes." *Ideker Farms*, 136 Fed. Cl. at 679. Moreover, Defendant concedes that "the extent of water on Plaintiff's property during storms . . . is not the basis for [Defendant's] motion." Defs. Mot. at 25.

& Fish, 568 U.S. at 36)); *see also John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006) ("[T]he determination of whether government occupancy is "permanent" is highly fact-specific"). Once again, this inquiry requires fact-intensive findings.

"The United States Supreme Court has held that where 'real estate is actually invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution.'" *St. Bernard Par. v. United States*, 88 Fed. Cl. 528, 551 (2009) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871)). "Following *Pumpelly*, the Court recognized that seasonally recurring flooding could constitute a taking." *Arkansas Game & Fish*, 568 U.S. at 32 (citing *United States v. Cress*, 243 U.S. 316, 328 (1917)). In *Cress*, the Supreme Court made clear that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." 243 U.S. at 328; *see also United States v. Kan. City Life Ins. Co*., 339 U.S. 799, 801, 811–12 (1950) (taking occurred when construction of federal lock and dam raised water level in a river and caused flooding); *Ridge Line* v. *United States*, 346 F.3d 1346, 1351 (government facility that increased storm water runoff onto the plaintiff's property could form the basis for an inverse condemnation claim).

2. Permanent Takings

Government-induced flooding rises to the level of a "permanent" taking when the "'intrusion is a substantial physical occupancy of private property.'" *See Waverley View Inv'rs, LLC v. United State*s, 135 Fed. Cl. 750, 791, *judgment entered*, 136 Fed. Cl. 593 (2018) (quoting *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006)). This does not require that the occupation be exclusive, continuous, or uninterrupted. *Id.*

Defendant incorrectly cites *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)—a regulatory takings case—for the proposition that Plaintiff must show loss of all economic value for a permanent taking by flooding. *See Ideker Farms, Inc. v. United States*, 136 Fed. Cl. 654, 675 (2018) (rejecting government's reliance a regulatory takings case in flooding claim); *Chittenden v. United States*, 126 Fed. Cl. 251, 262, *aff'd*, 663 F. App'x 934 (Fed. Cir. 2016) ("Although the government may take private property by either physical occupation or regulation . . . these two categories of takings are subject to different analyses.") (quoting *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1135 (Fed. Cir. 2004)).

3. Temporary Takings

Government-induced flooding can constitute a taking even if it is temporary in duration. *Arkansas Game & Fish*, 568 U.S. at 38–39. The Supreme Court noted that temporary takings occur when government action outside the property gives rise to "a direct and immediate interference with the enjoyment and use of the land." *Id.* at 33 (citing *United States v. Causby*, 328 U.S. 256, 266 (1946) (frequent overflights from a nearby airport resulted in a taking, for the flights deprived the property owner of the customary use of his property as a chicken farm); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (flooding was a taking even though owner successfully "reclaimed most of his land which the Government originally took by flooding").

4. De Facto Takings

The Federal Circuit has also recognized the concept of a "de facto taking," which is "generally defined as a taking that results either from physical invasion or the imposition of some restraint that substantially deprives the property owner of the use and enjoyment of its

property." *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013).[4] As a result, this Court can consider the cumulative effect of the diversion of water and the resulting floods. *Id.* at 759 (noting courts have found de facto takings where "the government had taken steps that directly and substantially interfered with the owner's property rights to the extent of rendering the property unusable or valueless to the owner") (citing *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970) (government action denied access to landowner's property and otherwise rendered it valueless); *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir.1977) (because of agency actions, property became unsaleable and "its use for its intended purposes became severely limited")).

B. The Cause of the Flooding is a Disputed Material Fact

Defendant argues it is not liable because the project was "designed to direct water away from – not onto – Plaintiff's land." Defs. Mot. at 26. Defendant then makes a hollow argument that "Plaintiff's flooding claim is in obvious tension with the claim that the United States took Plaintiff's water rights by 'diverting' the flow of Carson Slough."[5] *Id.* Defendant continues with the irrelevant defense that "[b]ut for the project, *all the water in Carson Slough would have passed over Plaintiff's land*." *Id.* (emphasis added).

It is true that, but for the diversion project, the water in Carson Slough would have passed through Plaintiff's property—*BUT at lower elevation to the west and south of the structures and through the natural channels and wetland*. Defendant's Motion chooses to obfuscate the fact that its project diverted water away from its excess flow path—the path through which such

[4] The plaintiffs in *Stueve Bros. Farms* did not allege a regulatory taking. *See* 737 F.3d at 753 n.1.

[5] This is, of course, analogous to saying that a bully cannot be liable for stealing a child's carton of milk because the bully eventually returned the milk by dumping it over the child's head.

water has traversed Plaintiff's property since at least as early as 1881—to an artificial path at an elevation above Plaintiff's property. Plaintiff's expert hydrologist, the owners of the property, the Nye County Floodplain Administrator, and Defendant's own agents establish that the pre-diversion spring-flow channel prevented major flooding to the property. Ex. A; Ex. P; Ex. Z; Ex. II; Ex. YY. The diversion project re-routed the natural hydrology of Carson Slough, and accompanying runoff and excess rainwater, to higher elevation above Plaintiff's property and almost immediately subjected the existing camp buildings, road, and livestock to dangerous flooding. *Id.*

1. The Testimony of Plaintiff's Expert Hydrologist Establishes Causation

The testimony of Plaintiff's expert hydrologist, Dr. Reely, directly establishes causation and creates an obvious dispute of material fact. Ex. A. Dr. Reely specializes in storm water drainage and flood control. *Id.* at 2. He has relevant experience with storm water drainage and flood control projects that includes design, engineering analysis and inspection of embankments, channels, and drainage structures similar to those which were installed by Defendant within Ash Meadows. *Id.* at 2. Dr. Reely concluded that, due to the diversion project, "[t]he historic surface water hydrologic regime was significantly changed." Ex. A at 4; Ex. B at 3. Nye County Floodplain Administrator Richard Johnson also concluded that Defendant's diversion project made major changes in the drainage pattern from the historical flow. Ex. P, Richard Johnson Dep. 68:14-23.

The significant change in this hydrologic regime occurred as a direct result of the construction of the dam and the channel located north and east of Plaintiff's property that were constructed by Defendant. Ex. A at 4. **This project, "resulted in a condition whereby [Plaintiff's] property was subjected to a significantly increased risk of flooding."** Ex. A at

4-5. Defendant's project **"directly resulted in the flooding of Plaintiff's property."** Ex. A at 5.

Dr. Reely correctly predicted, in his 2014 expert report, that Plaintiff's property was "at an increased risk for significant flood related damage in the future unless the Carson Slough Diversion Channel located to the north and east of the [Plaintiff's] property, including the previously referenced earthen diversion dam, are removed." Ex. B at 5. Plaintiff's property was then impacted by floodwaters on three additional instances. Ex. A at 5. Thus, Defendant's statement that the "uncontroverted evidence refutes any causal link between the Project and Plaintiff's flooded" is false. Defs Mot. at 26.

2. The Cause of the Flooding Was Not Excess Rainfall

Dr. Reely concluded that the rainfall which resulted in the first flooding event December 2010 was not statistically excessive. Ex. A at 5; Defs. Mot. at 27. Dr. Reely specifically rebutted opinions provided by Defendant's expert regarding the magnitude of the December 2010 rainfall. Ex A; Ex. C. Dr. Reely pointed out that much of the regional data Defendant's expert relies on is irrelevant to the amount of rain that fell within the Carson Slough watershed. Ex. C at 2.

Dr. Reely explains that the rainfall was relatively common for this area at this time of year. Dr. Reely consulted precipitation gauges from the three closest sites to the Plaintiff's property. Ex. A at 5. The rainfall that fell during a 24-hour period ranged from 1.67 inches to .89 inches. *Id.* Viewing this data in the light most favorable to the Plaintiff—which assumes the average 24-hour rainfall amount over the entire watershed was near the low end of this range—it would represent approximately a 2-year statistical event. *Id.* Even viewing this data in the light most favorable to the Defendant—which assumes the average 24-hour rainfall amount over the

entire watershed was near the high end of this range—it would still only represent a 10-year statistical event. *Id.*

Dr. Reely performed the same analysis for the three subsequent floods. For the second flood in late October-early November 2015, the maximum amount of rainfall that fell was .60 inches—which equates to a storm frequency of less than one year. Ex A at 6. For the third flooding event in mid-January 2016, the maximum amount of rainfall that fell was .83 inches—which equates to a storm frequency of between one year and two years. *Id.* The maximum amount of rainfall that fell in a 24-hour period in July 2016 was .49 inches—which equates to a storm frequency of less than one year. *Id.*

Dr. Reely argues that Defendant's reliance on the occurrence of an "atmospheric river" is merely conjecture based on heavy rainfall measured sizeable distances away from the actual watershed in which Plaintiff's property lies. Ex. A; Ex. C at 2. Mr. Rosenthal's theories are also largely undermined by the fact that greater rainfalls occurred, including one as recently as 1998 with no flooding of the improved portions of Plaintiff's property. Ex. Z; Ex. YY.

In 2014, Mr. Rosenthal tried to categorize the rain that occurred in December 2014 as an "anomalously large amount of rainfall." Ex. I. (Depo. Ex 1, Rosenthal 2014 Report at 3). Mr. Rosenthal's analysis concluded that the return periods for the weather event "were probably in the hundreds of years." *Id.* Mr. Rosenthal's said that this was the result of an occurrence known as an "atmospheric river." *Id.* at 3-4. Mr. Rosenthal's theory for the likelihood of the storm, even as a one hundred-year event, lacks credibility given that this 100-year event has now occurred four times in less than eight years. When asked why the allegedly 100-year event had occurred five times in less than five and a half years, Mr. Rosenthal had no answer. *See* Ex. I, Rosenthal 2018 Dep. 154:19-159:22.

3. Defendant Offers No Evidence of Prior Flooding of Plaintiff's Buildings

Defendant makes the misleading claim that "it is undisputed that Plaintiff's property has previously flooded." Defs' Mot. at 29.[6] Notably, Defendant offers no evidence that the *structures* on Plaintiff's property flooded prior to completion of Defendant's project. *See Arkansas Game & Fish III*, 736 F.3d at1374 ("The point is not that there was flooding before the deviations; the point is that after the deviations began the flooding lasted for significantly longer periods of time and had much more serious consequences than the flooding of the pre-deviation period.").

The post-diversion flooding ran through *new* areas of Plaintiff's property and through its *buildings*. Ex. BB, Pls. 2017 Dep. 160: 24-161:14; Ex. A; Ex. Z. Pastor Fuentes' testimony contrasts where excess water would drain prior to Defendant's diversion project with the massive post-project flooding of the improved-upon areas. Ex. CC, Pls. 2017 Dep. 45:10-51:22. In fact, the irrigation ditch running through the property never so much as overflowed its banks during the time the church owned the property prior to the diversion. Ex. DD, Pls. 2017 Dep. 84:21-25.[7] Mr. Matheny testified to the same. Ex. Z, Matheny Dep. 36:25-37:3.

Defendant's own expert hydrologist admits that whether the church camp was ever flooded prior to the December 22, 2010 flood would be relevant to his causation analysis, but

[6] Defendant's broad generalizations about the "well documented history of flooding" at Ash Meadows, 24,000-acre area, are also irrelevant to Plaintiff's specific 40-acre parcel. Defs. Mot. at 11.

[7] Defendant contends that Pastor Fuentes admitted he saw the ditches overflow on the property in 2008. Defs. Mot. at 11-12. Defendant's question confusingly came at the end of the deposition, after Mr. Fuentes had clearly answered that he had not seen water overflow the ditches prior to Defendant's project. Ex. DD. Mr. Fuentes, whose first language is not English, was being asked by Defendant about observing rising water levels in those ditches in 2008 and then was immediately asked a variation of the same question with the word "out" inserted, to which he replied "correct." *See* Defs. Ex. 7.

that he never investigated that data. Ex. EE, Thompson 2018 Dep. 129:7-130:3. He admits that his 2014 and 2018 reports did not take prior flooding of the property into account because "it was not part of [his] direction" from the Defendant. Ex. EE, Thompson 2018 Dep. 134:12-20. It was also not part of Dr. Thompson's directive to study a flood frequency curve for the site or determine the average recurrence interval. Ex. QQ, Thompson 2014 Dep. 44:9-18. When asked whether it would be industry standard for other expert hydrologists to inquire into the history of the topography or prior flooding when addressing the issue, Dr. Thompson merely stated that he didn't know. Ex. EE, Thompson 2018 Dep. 135:22-136:2.

Dr. Thompson also did not attempt to quantify the flooding that occurred on any of the four occasions. He could not describe the magnitude of the floods. Ex. EE, Thompson 2018 Dep. 131:17-19. He did not investigate any events of prior flooding. Ex. EE, Thompson 2018 Dep. 132:19-133:2. He admits he knows nothing about the precipitation in Ash Meadows in February 1998 or September 2008. Ex. QQ, Thompson 2014 Dep. 45:2-13. Thus, he was unable to compare the December 2010 rainfall to an event two years earlier in 2008. *Id.* He recalls no evidence of any specific flooding of the property prior to the constriction of the diversion project. Ex. EE, Thompson 2018 Dep. 131:20-132:3.

Dr. Thompson cannot establish with certainty what the width and depth of the stream was just to the north of the Plaintiff's property or within the Plaintiff's boundaries before Defendant's diversion dam was built. Ex. GG, Thompson 2018 Dep. 123: 8-23. He admits he did not analyze the capacity of the natural water flow channels prior to the restoration project. Ex. HH, Thompson 2014 Dep. 22:1-3.

The only evidence of "prior flooding" offered by Defendant comes from Sharon McKelvey and concerns minor flooding in the natural and historic flood channels on the

property—not the occupied structures. When asked if she was aware of flooding that resulted in the structures on the property being flooded prior to completion of the project, Ms. McKelvey said, "I have no idea." Ex. II, McKelvey Dep. 72: 8-10.

Ms. McKelvey testified that during the winter of 2004-2005 there was "quite a bit of rain." Ex. II, McKelvey Dep. 71:11-12. But even Ms. McKelvey admitted that the alleged instance of "flooding" she witnessed occurred near the pond that Mr. Matheny constructed on the property. Ex. II, McKelvey Dep. 71:11-72:10. The pond is located along the natural channel for flood flow—south and west—and downstream from the occupied structures. *See* Ex. Z. Thus, minor flooding around the pond—where flood flow had historically been located—is irrelevant to whether Defendant caused the flooding of Plaintiff's buildings.

Otis Bay hydrologist Robert Andres testified that December 2009-February 2010 "was kind of a wet winter" and that Plaintiff's property was not flooded during this period. Ex. JJ, Andress Dep. 68:12-23. Mr. Andress also admitted he would have known if the property had been flooded during that period. *Id.*

Pastor Fuentes and his wife were on the property several times during heavy rain events without witnessing flooding of the occupied structures. Ex. KK, Pls. 2017 Dep. 149:20-150:20. In the days after the December 2010 flood, Pastor Fuentes risked his own safety to investigate where all the water submerging the church camp was coming from. Pastor Fuentes observed that the water was coming from Defendant's new channel into the camp. Ex. LL, Pls. 2017 Dep. 194:11-17. Mr. Matheny visited the property after the first flood and came to same conclusion. Ex. YY.

4. Defendant's Hydrologist Did Not Analyze Elevation Data for the Property

Dr. Thompson also did not measure or ascertain the elevations of the structures on the Plaintiff's property when creating his model. Ex. QQ, Thompson 2014 Dep. 46: 6-20. Dr. Thompson admits that no one measured any elevations at the church camp. Ex. MM, Thompson 2018 Dep. 66:1-4. In preparing his 2014 report, Dr. Thompson never even visited Plaintiff's property. Ex. NN, Thompson 2018 Dep. 33:23-34:18. Dr. Reely, in his 2014 rebuttal report, points out that the elevation data Dr. Thompson relied on from LiDAR to create his hydraulic model has inherent vertical accuracy problems and that it would have been prudent to perform field verification. Ex. C at 3. Dr. Reely asserted that, without field verification of the ground elevations, it was impossible to ensure that Dr. Thompson's model was valid. Ex. C at 3. The only elevation data Thompson used for his report came from Otis Bay, and supposedly had been "provided by U.S. Fish and Wildlife Service, or whomever had those data." Ex. FF, Thompson 2018 Dep. 41-43. Dr. Thompson admits that when he receives data from a source he would normally include it in his expert report, yet the source of his elevation data is nowhere in his reports. Ex. FF, Thompson 2018 Dep. 42:11-43:3.

5. "Excessive Rainfall" is Not Enough Defeat Flooding Liability

Assuming *arguendo* that the area did experience "statistically excessive" rainfall during the flooding, Defendant's reliance on *Bartz v. United States*, 633 F.2d 571 (Ct. Cl. 1980) is misplaced.[8] *Bartz* does not stand for the proposition that statistically excessive rainfall grants the government a *per se* exemption from takings liability in flooding cases.

Bartz involved a flooding claim from a group of riparian plaintiffs from both upstream

[8] It is also noteworthy that the *Bartz* decision came following a *trial* where the court made detailed *factual findings* on *causation*. *See* 633 F.2d at 574–78.

and downstream of a dam along the Iowa River. Although their experiences varied based on location, they each claimed "water lingered on their properties for longer periods and interfere[d] with their farming procedures and production" as well as caused "excessively high water tables" and "floods occurring later in the growing season." *Id.* at 573. The Army Corps of Engineers, in regulating the discharges from the dam and controlling the levels of the accompanying reservoir above the dam, "endeavor[ed] to maximize the efficiency of the one and optimize the storage capacity of the other by a constant juggling process." *Id.* at 573. The Corps' regulatory scheme was based on a quantitative precipitation forecast, where rainfall predictions were added into streamflow data by use of a unit hydrograph to determine estimated reservoir levels resulting from runoff and precipitation directly into the reservoir. *Id.*

Disputing causation, the government argued that the downstream plaintiffs' flooding problems occurred "despite and not because of the dam." *Id.* at 576. The court agreed, but noted that "[f]aced with the need to reduce the high levels of the Reservoir because of actual or impending heavy rainfalls in the area the Corps had no alternative to increasing the rate of discharge from the dam, despite temporary consequences to downstream farmers." *Id.* at 577. For one group of downstream plaintiffs, the court found that "occasionally" their properties became too wet to farm, but that "a great majority of [those] conditions occurred in excessively wet years and would in all likelihood have happened without the existence of an upstream dam." *Id.* at 577.

Citing a cost-benefit analysis that went unchallenged by the plaintiffs, the *Bartz* court concluded that "[t]he Fifth Amendment does not make the government an insurer against all damages from floods which may be incidental to projects conferring major benefits far outweighing detriments." *Id.* at 578. Defendant does not assert or provide any evidence that

Plaintiff, or any other party, received flood control or other benefits from the Carson Slough Diversion Project.

Whatever the rainfall, the material fact at issue in this case for this Court to weigh is if Defendant's project significantly increased the risk of flooding to Plaintiff's property—particularly those area containing structures and improvements which lie between Defendant's newly-relocated and higher-elevation diversion channel and the historic, lower-elevation channels through which water had previous, and always, traversed Plaintiff's property that had no history of flooding.

C. The Foreseeability of the Flooding is a Disputed Material Fact

It was entirely foreseeable, probable, predictable, and natural that Defendant's diversion project would flood Plaintiff's property. Defendant has put its chips all in on the fact that part of Plaintiff's property is in a flood plain. It asks this Court to accept, without considering contradictory evidence, that improved areas of Plaintiff's property would have simply flooded anyway, despite no evidence of prior flooding there. Defendant admits that it never considered an increased risk to flooding on Plaintiff's property when it designed the project.

Further, Defendant admits that the diversion channel was never designed to handle even moderate rain events. Despite knowing the risk of flooding in the area, Defendant cut corners in its preparation and execution of the diversion project. The record demonstrates that Defendant violated NEPA procedures, FEMA requirements, Nye County requirements, and Army Corps of Engineers requirements**.**

1. The Flooding was the Direct, Natural, and Probable Result of Defendant's Project

"In order for a taking to occur, it is not necessary that the government *intend* to invade the property owner's rights, as long as the invasion that occurred was 'the foreseeable or

predictable result' of the government's actions." *Moden*, 404 F.3d at 1343 (emphasis added); *see also Liebman v. United States*, 2018 WL 4090890, at *5 (Ct. Cl. 2018) (finding taking despite no evidence suggesting NASA intended to project fast-moving water onto plaintiffs' property and interfere with their property rights because "it was predictable that by building outflow pipes that projected water landing at plaintiffs' property line would have that effect" and "[i]t was a direct and natural consequence of building such a structure."). A government invasion can also effect a taking when the result was "within the contemplation of or reasonably to be anticipated by the government."' *Vaizburd v. United States*, 384 F.3d 1278, 1283 (Fed.Cir.2004) (quoting *Ridge Line v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003)). Foreseeability in flooding by takings claims is judged on an objective basis. *Ideker Farms*, 136 Fed. Cl. at 678 (citing *Moden*, 404 F.3d at 1344 n.3).

Defendant either knew, or simply did not care, about the increased risk of flooding to Plaintiff's property. Defendant's statement that FWS and Otis Bay, conducted a "review, [which] confirmed that the Service's Project would not impact flooding on private properties within the Refuge for a two-year to a 100-year rain event" and that the spring channel is "inconsequential" is highly misleading. *See* Defs. Mot. at 31-32. Otis Bay engineers testified that flood water was never taken into consideration when designing the new channel. Ex. X, Gourley Dep. 53:18-52:2, Andress Dep. 67:4-69:5. Defendants and their agents have admitted that, despite knowing of the existence of heavy rainfall in the watershed, they made absolutely no accommodations or calculations for even moderate rainwater and/or flood flow. Ex. X, Andress Dep. 67:4-69:5; Ex. W (Ash Meadows Rainfall Records); Ex. PP; *see also* Defs. Mot. at 11, 27. Additionally, Ash Meadows Ranger Shane Nalen told Pastor Fuentes in 2009 that

Refuge Manager Sharon McKelvey was "afraid that they're going to flood you up." Ex. L, Pls. 2017 Dep. 105:19-106:13.

Moreover, Defendant's expert concedes it is reasonable to assume "even moderate rain events" would result in a flow higher than the channel's designed capacity of 10 to 15 cfs. Ex. PP, Thompson 2014 Dep. 72:23-73:2. Thus, by Defendant's own admission, the diversion channel was not adequate to handle even those rain events that were not statistically excessive.

Defendant's comparison to the facts in *Saguinetti v. United States*, 264 U.S. 146 (1924), widely misses the mark. Most importantly, the government's engineers in *Sanguinetti* attempted to account for floodwaters when designing the canal, yet no liability was found due to a lack of accurate weather information, heavy rains, and the resulting extremely high water. *Id.* at 147-48. Here, Defendant admits it never intended the diversion project to carry surface runoff waters and that the diversion channel was not adequate for moderate rain events. Ex. X; Ex. PP, Thompson 2014 Dep. 73:6-7.

The *Sanguinetti* Court noted that the land in question had been subject to the same periodical overflow prior to construction of the canal. *Id.* at 149. And, even if the severity of the periodic flooding was increased by the dam, "the extent of the increase [was] purely conjectural." 264 U.S. at 149. In this case, however, new damage to Plaintiff's improved-upon structures is unrefuted. Plaintiff has offered uncontroverted evidence that Defendant caused never-before-seen flooding of its property. The *Sanguinetti* Court also noted that the owner was not prevented the customary use of his land nor was there any permanent impairment of value. *Id.* Plaintiff has established both. *See* Ex. A; Ex. AA; Ex. VV, Pls. 2017 Dep. 46:9-51:22.

This case is much more analogous to *Arkansas Game & Fish III*, where the Federal Circuit upheld this Court's finding that the flooding was foreseeable because "a reasonable

investigation by the Corps of Engineers prior to implementing the deviations during the 1993–2000 period would have revealed that the deviations would result in a significant increase in the number of days of flooding in the Management Area during the growing season." 736 F.3d at 1372–73. The record shows Defendant made no such reasonable investigation.

a. NEPA Violations

Defendant's reliance on the NEPA proceedings as evidence to show that flooding was unforeseeable is unpersuasive and ironic. *Cf. Baley v. United States*, 134 Fed. Cl. 619, 674 (2017) ("Defendant cannot circumvent [the Just Compensation Clause of the Fifth Amendment to the United States Constitution] by resorting to the circular logic that by conceding the legality of the government's action in order to maintain a takings claim, plaintiffs must also concede that the government was correct in all of its determinations . . . . "). The record actually undermines Defendants case by demonstrating that the NEPA process was inadequate and cut corners on multiple occasions.

First, Defendant did not follow its own Comprehensive Conservation Plan and/or published goals when stating the purpose was "to restore historic spring flow." No map or aerial photography ever produced by Defendants depicts spring flow to the area of Defendant's artificially-created waterway. Every map produced by any party, including maps dated as early as 1881, depicts water traversing Plaintiff's property. Ex. J.

Second, Defendant publicly noticed three Alternatives in June 2009 (A, B, and C), for the so-called "historic water restoration" project in their Comprehensive Conservation Plan and Environmental Impact Statement. Ex. T. However, none of these Alternatives depicted that water would no longer flow (as it historically had since 1881) through Plaintiff's property. *See id*. None of the Alternatives showed the combining of Fairbanks and Soda Springs Flow into a

single and new waterway. *Id.*; Ex. U. Finally, Alternative C was chosen, but the Finding of No Significant Impact was conducted only for Alternative B. Ex. T.

Defendant's make-shift dam was also not included in the published Alternatives within the EIS and was neither planned nor designed. Ex. T, Ex. U; Ex. V. Rather, it was installed without notice to the public and well after initiation of the waterway relocation project that was only partially depicted in the EIS. *Id.*

b. LOMR Revisions

Further corroding Defendant's false narrative that the diversion project considered the impact to private landowners is the uncontroverted evidence that it failed to obtain a FEMA Letter of Map Revision prior to implementing the diversion project. Defendant's Motion attempts, on several occasions, to make hay out of the point that Plaintiff's property is located in a flood plain. *E,g.,* Defs. Mot. at 2, 29. Nye County Floodplain Administrator Richard Johnson concluded, however, that Defendant's diversion project made major changes in the drainage pattern from the historical flow. Ex. P, Richard Johnson Dep. 68:14-23.

As a result, Defendant should have gone through the process of obtaining a FEMA Letter of Map Revision prior to performing any construction related activities. Ex. A at 7. Dr. Reely opined that, had Defendant followed the procedure for obtaining a LOMR, the increased risk of flooding to Plaintiff's property would have been identified, and the LOMR would not have been issued. *Id.* Nye County agreed. Ex. P.

II. PLAINTIFF'S VESTED WATER RIGHTS ARE A DISPUTED MATERIAL FACT

It is undisputed that Defendant undertook a waterway relocation project that ultimately resulted in the erection of a dam upstream from Plaintiff's property, the creation and excavation of a new water channel, and a rerouting of the waterflow that previously traversed Plaintiff's

property since the 1880s. Defs. Mot. at 33–35. Contrary to Defendant's argument, it is immaterial to takings laws that Defendant claims it did not know about Plaintiff's water right when it diverted the water. In any event, Defendant still had reason to know Plaintiff possessed vested water rights.

Defendant disputes Plaintiff's property right in surface water that had flowed over Plaintiff's land since the late 1800s. Plaintiff possesses pre-statutory vested rights through appropriation and beneficial use. No adjudication dictates otherwise. Such rights were "proofed" to the Nevada Division of Water Resources on several occasions, including most recently in August 2018. Ex. D; Ex. RR. The proofs are sworn affidavits to the facts and evidence relative to the appropriation of water from the Carson Slough in 1887. To date, the Nevada State Engineer has not yet entered an order for the determination of the relative rights to the use of water of any stream or stream system in the relevant hydrologic basin. Nor has the State Engineer commenced taking of proofs for such adjudication. Accordingly, Plaintiff's Proofs were filed timely with supporting evidence. Importantly, no such proofs have been disclosed by Defendant to suggest that Defendant has vested rights to the surface water that has, since at least 1881, traversed Plaintiff's property. Moreover, the historical evidence provided in support of Plaintiff's vested water rights is stronger than evidence used by Defendant to support water rights claims in the exact same 640 acres of land. Ex. R.

Defendant admits that Plaintiff possesses a "colorable" claim to a vested water right in a small volume of water. Defs. Mot. at 36. The proofs submitted by Plaintiff provide historical factual evidence for Plaintiff's property right to a much greater volume of water. Defendant's actions have kept Plaintiff from the use and enjoyment of the full measure of its water. Finally,

in these circumstances, Defendant cannot show that Plaintiff has not made beneficial use of its water or intentionally abandoned it.

A. Legal Background

1. Takings Law

The government's diversion of water is a physical taking. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008). "[T]he taking of water to which the landowners are entitled is clearly a physical invasion that is effective as soon as the water is taken." *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 757 (Fed. Cir. 2013).

2. Nevada Water Law

In Nevada, there are three different types of water rights: vested, permitted, and certificated. *Andersen Family Assocs. v. Hugh Ricci, P.E.*, 179 P.3d 1201, 1204–05 (Nev. 2008). "Vested" water rights are those that existed under Nevada's common law before the provisions currently codified in N.R.S. Chapter 533 were enacted in 1913. *Id.* "Permitted" rights refer to rights granted after the State Engineer approves a party's "application for water rights," which grant the right to develop specific amounts of water for a designated purpose. *Id.* at 1205. "Certificated" rights are statutory rights granted after a party perfects his or her permitted water rights. *Id.* In order to perfect permitted water rights, "an applicant must file proof of beneficial use with the State Engineer." *Id.*

Vested rights are established by appropriation and beneficial use. *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 826 P.2d 948, 951 (Nev. 1992). Vested water rights are real property rights and protected from any impairment by later statutes. N.R.S. 533.085; *Town of Eureka*, 826 P.2d at 951; *Carson City v. Lompa's Estate*, 501 P.2d 662 (Nev. 1972).

a. Beneficial Use

Beneficial use is the only indispensable requirement to appropriate water and create a vested water right. *State v. Morros*, 766 P.2d 263, 266 (Nev. 1988). Nevada law and longstanding custom recognize stockwatering as a beneficial use of water. *Id.* at 268 (citing NRS 533.490(1); *Waters of Horse Springs v. State Eng'r*, 671 P.2d 1131 (Nev. 1983); *Steptoe Live Stock Co. v. Gulley*, 295 P. 772 (Nev. 1931). In 1969, Nevada enacted N.R.S. 533.030(2), which also recognizes recreation as a beneficial use. *Morros*, 766 P.2d at 267; *see also* N.R.S. 533.030(2) ("The use of water, from any stream system as provided in this chapter and from underground water as provided in N.R.S. 534.080, for any recreational purpose, is hereby declared to be a beneficial use."). Further, wildlife watering is encompassed in the NRS 533.030(2) definition of recreation as a beneficial use of water. Nevada law recognizes the recreational value of wildlife, N.R.S. 501.100(2), and the need to provide wildlife with water. *See* N.R.S. 501.181(3)(c); 533.367; *Morros*, 766 P.2d at 266.

b. Vested Water Rights Can Only Be Lost Through Intentional Abandonment

Rights acquired before 1913 can only be lost in accordance with the law in existence at the time of the enactment of Nevada's statutory water rights provisions, namely, by intentional abandonment. *Andersen Family Assocs.*, 179 P.3d at 1205 (quoting *In re Waters of Manse Spring*, 108 P.2d 311, 316 (Nev. 1940)). "Prior to 1913, the law said that the water users of that day would have and hold the use of such water until the same should be abandoned, and, as we have seen, in abandonment the intent of the water user is controlling." *In re Manse Spring*, 108 P.2d at 316. Whether a vested water right has been intentionally abandoned involves the court determining, under the case-specific circumstances, the intent of the claimant. *Id.* at 316. Courts take into consideration the circumstances of the particular case and will not cause to be forfeited

or taken away valuable rights when the non-use of water was occasioned by justifiable causes. *Id.* This is especially true of rights which became vested prior to 1913. *Id.*

Nonuse of a vested water right is not dispositive of abandonment. *Revert v. Ray*, 603 P.2d 262, 264 (Nev. 1979); *United States v. Alpine Land & Reservoir Co.*, 340 F.3d, 903, 916 (*Alpine VI*") ("[U]nlike in most Western states-in Nevada non-use alone does not create a rebuttable presumption of an intent to abandon a water right."). "Abandonment [] requires a showing of subjective intent on the part of the holder of a water right to give up that right." *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 944–45 (9th Cir. 2001); *Revert v. Ray*, 603 P.2d 262, 264 (Nev. 1979).

"Clear and convincing evidence is required to prove that a water right has been forfeited or abandoned." *Town of Eureka,* 826 P.2d at 952. A "showing of some evidence of abandonment requires evidence of what the State Engineer determines to be a substantial period of nonuse on the parcel to which the rights were attached, but mere nonuse on that parcel is not enough to demonstrate abandonment." *United States v. Alpine Land & Reservoir Co*., 510 F.3d 1035, 1043 n.5 (9th Cir. 2007) ("*Alpine VII*"). Nonuse may only create an inference of abandonment. *Id.* at 945. The shorter the period of nonuse, the smaller the legal inference. *Id.* at 945 (quoting *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir.1992) ("*Alpine III* ").

B. Defendant Intended to Take Plaintiff's Water

It is undisputed that Defendant intentionally diverted the water that crossed Plaintiff's property. Defs. Mot. at 33-35. "[A] deprivation of water amounts to a physical taking . . . ." *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 320 (2001). It is not necessary that the government know it is interfering with private property. *See Palm Beach Isles*

Assocs. v. United States, 231 F.3d 1354, 1357 (Fed. Cir. 2000) (defining the inquiry in a physical takings case as whether the plaintiff owned the property at the time of the taking). Citing no caselaw, Defendant erroneously argues that the United States is not liable for a taking of putative water rights that were unadjudicated at the time of taking. *See* Defs. Mot. at 34-35.

C. Plaintiff Has Made a Plausible Claim for Vested Water Rights to the Nevada State Engineer

1. Proof V-10092 and Change of Use Application 85417

To protect its rights, Plaintiff first filed Proof V-10092 with the Nevada Division of Water Resources in October 2011. Ex. RR. Proof V-10092, and the supporting evidence provided for Application 85417, establish the chain of title for Plaintiff's property and provide evidence of historical beneficial use for a small volume of water. Ex. R; Ex. RR. Defendant's objections to Plaintiff's water rights claim, made by FWS hydrologist Tim Mayer, Defendant's Ex. 17, were rejected by the Nevada State Engineer. Ex. R.

The evidence demonstrates that, prior to Defendant's water diversion project, these stream waters were used by Plaintiff to water animals, to water plants, for camp recreational purposes, as a baptismal stream, and for religious meditational purposes. Ex. R; Ex. RR. Previous owners of the property, dating back to the 1880s, used the subject water for livestock watering and/or irrigation, which constitute beneficial use. Ex. R; Ex. RR. Defendant offers no evidence to rebut the validity of Application V-01092 or the Accompanying Proof. Defendant's arguments were rejected by the Nevada State Engineer in Ruling 6347. *See* Ex. R.

Plaintiff filed a Change of Use Application with the Nevada State Water Board in August 2015 to change point of diversion and manner of use of .003 cfs, not to exceed an annual duty of 2.24 acre-feet, of the waters of Carson Slough previously claimed to be appropriated under claim of vested right under Proof V-10092. Ex R; Ex. SS. The change of use application was from

stock watering purposes to recreation and domestic purposes. *Id.*

Defendant protested the Application and had its claims soundly rejected by the State Engineer. As part of the investigation, the Office of the State Engineer requested that Plaintiff provide additional evidence to support its claim of historic use, which became part of the official record. Ex. R at 2, US010377. In June 2016, Nevada State Engineer Jason King entered his report overruling Defendant's protest and approving the change of use permit. Ex. R, File No. 85417, Official Records in the Office of the State Engineer, Ruling No. 6348.

The State Engineer first found that Plaintiff presented sufficient evidence that the pre-statutory appropriation of water claimed in Proof V-10092 was plausible. Ex. R. *The State Engineer noted that Plaintiff's proof of appropriation was almost exactly the same three of Defendant's applications to change un-adjudicated pre-statutory vested water rights claims in almost the exact same area in 1989. Id.* at 4, US010374.

The State Engineer then found evidence of beneficial use by all prior owners of the property. *Id.* at 6, US010376. The State Engineer found that livestock watering occurred on the property prior to 1905. *Id.* Plaintiff provided more evidence than was ever provided by Defendant under its applications for change of use in the exact same area. *Id.* This evidence included Nye County tax assessment rolls showing taxes were initially paid on livestock in 1887. *Id.* It further supported its claim by showing another owner of the property, Key Pittman, was assessed taxes on the property for grazing from 1913-1942. *Id.* From 1943 to 1997 different owners continued to pay the grazing assessments. *Id.* In 1997, Ron Matheny began grazing livestock on the property until Plaintiff purchased the property in 2006. *Id.* It is undisputed that Plaintiff continued to make beneficial use out of the water until Defendant cut it off in 2010.

2. Proof V-11308

In August 2018, Plaintiff submitted Proof V-11308 and supporting documentation to the Nevada Division of Water Resources for 8.95 cfs, a significantly larger volume of water. Ex. D. A proof of appropriation of water contains sworn statements attesting to the validity of the water rights. *Id.* This application includes a true and correct copy of hydrologist map to accompany proof of appropriation establishing a minimum 25 acres of irrigation, as requested by the Nevada Division of Water Resources on June 12, 2018. *Id.* It also includes a true and correct copy of an 1881 Map designating the historic perpetual flow of the waters of the Carson Slough through, over, across, and upon Plaintiff's property. *Id.* This application related back to the chain of title for the property established by the records in Proof V-10092. *Id.* at 1. Plaintiff's claim in this proof remains unadjudicated and viable.

3. Defendant Provides No Evidence of Intentional Abandonment

Defendant claims it is not responsible for a taking because Plaintiff has not put the water in Proof V-10092 to beneficial use. Plaintiff has attempted to use the "returned" water but has been frustrated by Defendant's actions. Defendant's provision of Plaintiff's undisputed volume of water has been inconsistent, at best. Ex. S (Declaration of Victor Fuentes); Ex. SS; Ex. TT, Pls. 2017 Dep. 305:23-308:3. The adherence by Defendant to the State Engineer's edict to return the water is, of course, yet another disputed issue of fact.

After the Nevada State Engineer granted Plaintiff's change of use application for 2.24 acre-feet annually (afa), Plaintiff contacted the Nevada Division of Water Resources with a complaint, which then conducted a field investigation in September 2016 of Defendant's conduct. Ex. SS. On November 4, 2016, the State Engineer determined that Defendant was "in violation of the terms of its permits by failing to ensure a conveyance system that will provide

continuous diversion of . . . water to the point of diversion of Permit 85417." Ex. SS, US010386. It ordered Defendant to cease the full diversion of water. *Id.* The Division did not close the investigation until January 2018.

Defendant did not promptly "modify[] the project to deliver the requisite water" so as to adhere to the State Engineer's edict to return the water. Defs. Mot. at 3. Indeed, Defendant has not returned the surface water as required, but rather intermittently pumps only a trickle of groundwater from a nearby well onto Plaintiff's property. *See* Ex. S. Defendant prefers to label this intermittent trickle of water dribbling out of a small plastic pipe into a dry creek bed into the desert as "water flowing into a ditch," Defs. Mot. at 21, but "flowing water" is hardly an apt descriptor. Ex. S.

Defendant's claim that the system to comply with Permit 85417 "has operated continuously since [March 2017], with only limited issues, which the Refuge addressed promptly" is not accurate. Defendant's Ex. 41 at 1. Defendant's water delivery mechanism has consistently failed to comply with Defendant's obligations under Permit 85417 and frustrated Plaintiff's ability to make beneficial use of its water. *See* Ex. S.

D. Defendant Had Reason to Know Plaintiff Possessed Vested Water Rights

Regardless of the *amount* of water Plaintiff legally possesses under Nevada law, Defendant had reason to know that Plaintiff possessed at least *some* vested rights. In Ruling 6348, the State Engineer found "great irony" in the arguments made by Defendant because Defendant had relied on the same relevant evidence as Plaintiff in proving the validity of three un-adjudicated pre-statutory water vested water rights claims in almost the exact same area in 1989. Ex. R. Thus, Defendant cannot credibly claim that it had no reason to know of Plaintiff's water rights or that it conducted objective research. *See* Defs. Mot. at Ex. 17.

CONCLUSION

Defendant incorrectly asks this Court to make fact-intensive findings on Plaintiff's takings claims at the summary judgment stage. Specifically, the Court is asked to find that the causation and foreseeability of the flooding are not disputed facts. Likewise, Defendant asks the Court to ignore the disputes over the volume of Plaintiff's vested water rights. Because there are genuine disputes of material fact that affect the outcome of the case, this Court should deny Defendant's Motion.

Dated this 13th day of November 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served upon the following counsel of record through the Court's electronic service system (ECF/CM):

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