

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MINISTERIO ROCA SOLIDA, INC.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 1:16-cv-00826-EDK

Judge Elaine D. Kaplan

PLAINTIFF'S REPLY IN SUPPORT OF ITS POST-TRIAL OPENING BRIEF

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ABBREVIATED TERMS

Ash Meadows	Ash Meadows National Wildlife Refuge
Church	Ministerio Roca Solida, a nondenominational Christian church founded and led by Pastor Victor Fuentes, and the Plaintiff in this case
cfs	Cubic feet per second
Environmental Assessment	Environmental Assessment for Fairbanks Spring and Soda Spring Restoration
Final Comprehensive Plan	Final Comprehensive Conservation Plan and Environmental Impact Statement
Fuentes Dep.	Exhibit 1 to Defendant’s Notice of Filing Dep. Designations, ECF 122
Gourley Dep.	Exhibit A to Plaintiff’s Mot. to Admit Certain Dep. Testimony of Chad Gourley, ECF 119
government	Federal government of the United States
Modified Diversion Project	The Government’s construction of a dam and channel that diverted water from its historic path through and to the southwest of the property to a new course north, east, and to an elevation above the property. Called the “Modified” Diversion Project in reference to its deviation from USFWS’s Final Comprehensive Plan.
NOAA	National Oceanic and Atmospheric Administration
Otis Bay	Otis Bay Ecological Consultants
Patch of Heaven	Plaintiff’s 40-acre parcel of land, located in the SW ¼ of the SW ¼ of Section 21, Township 17 South, Range 50 East, MDB&M in Nye County, Nevada
Project	Modified Diversion Project
property	Plaintiff’s 40-acre parcel of land, located in the SW ¼ of the SW ¼ of Section 21, Township 17 South, Range 50 East, MDB&M in Nye County, Nevada
Refuge	Ash Meadows National Wildlife Refuge
restoration project	USFWS’s broader Fairbanks/Soda Spring Channel Restoration Project, which includes the Modified Diversion Project, as well as additional construction upstream of the diversion dam
Tr.	Hearing transcript from trial proceedings held from May 11 through May 14, 2021
USFWS	United States Fish & Wildlife Service

INTRODUCTION

The government’s brief advances facts it wishes it could have adduced at trial, and law that it wishes applied to this case. But the actual evidence adduced through a Site Inspection and four-day trial on the merits, consisting of testimony from a dozen witnesses and the admission of more than 140 exhibits, establishes that all of the *Arkansas Game & Fish* factors support the finding of a taking here: the Church has a valid property interest, the government’s Modified Diversion Project caused the property to flood, and the government-induced flooding was severe and will continue into the future, was foreseeable and intended, interfered with the Church’s reasonable investment-backed expectations, and altered the character of the property to be more prone to flooding. The evidence also established that the appropriate just compensation under the Fifth Amendment is \$1 million, plus interest.

The Church and government both agree that “[r]hetoric cannot defeat substance,” *see* United States’ Post-Trial Br. [ECF No. 140] (“Gov’t Br.”) at 3, and the government’s efforts to suggest that the Modified Diversion Project had a “small” or “*de minimus*” impact on the topography is nothing but rhetoric. The overwhelming evidence established that USFWS undertook significant modifications to the current and historic path of flow—diverting the flow of both spring and flood flow from the existing off-ramps and braided channel that previously sent those flows safely and predictably to the west and south, ***downhill from*** the developed portion of the property, to the area to the east and north, ***uphill of*** the property. *See* Gov’t Br. at 32-34. And despite the government’s repeated characterization of the “temporary” and “intermittent” nature of the flooding that resulted from those changes, the undisputed evidence established that the property was not subject to flooding prior to the Modified Diversion Project, yet has flooded six times in the last ten years since USFWS completed the Project, and will continue to flood during

ordinary rainfall events. *See id.* at 4, 20, 42-43. No matter how much the government tries to suggest that the property was likely to have been subject to prior flooding, all of the actual evidence at trial establishes that the property was not. Moreover, even if there was some prior flooding, the law is clear that the government is not immunized from liability for a taking if its actions cause worse or increased flooding. *See id.* at 12-15, 37-38, 40. That is indisputably the case here.

The government's focus on construing the flooding it has caused as a tort because it is "repairable" is a red herring. *See id.* at 42-43. There is ample and undisputed evidence that flooding will continue to subject the property to the type of damage it has suffered thus far—including erosion, silt deposits, structural damage, and interference with the Church's access to and use of the property. Pl.'s Post-Trial Br. [ECF No. 139] ("Roca Br.") at 15-19, 25, 43-46. The law is clear that where, as here, the government subjects a property to "recurring flooding as a result of building a dam," the government has effected a physical taking of "the clearest sort." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021) (citations omitted).

The government's arguments suffer from four fatal flaws. **First**, the government wholly ignores the evidence—especially the testimony from Dr. Reely—about the effect of the diversion dam and the unrebutted evidence of the lasting and continuing damage to the property and the church camp. Roca Br. at 17-21, 34-37, 43-46, 51-53. **Second**, the government relies on speculative evidence of purported past flooding on the property to invoke inapposite legal standards. But under the correct standard, even if there were historic flooding on the property (which there was not), the government is still liable for a taking where, as here, the government's actions increased the propensity of the property to flood. **Third**, the government confuses evidence of flooding on the *refuge* with evidence of flooding on the *property*. By the government's own admission, it "did not have direct information about what flooding had previously occurred on this private parcel," Gov't Br. at 38—because there is none. **Finally**, the government offers no defense

of its eleventh-hour plan to construct the Modified Diversion Project, pointing only to its general planning process for the broader restoration project, *e.g., id.* at 41, and making clear that it wholly disregarded any meaningful consideration of the impact that changes to the topography in the Refuge (which had a propensity to flood, *id.* at 38) would have on the Church property (which did not, *id.*). The government comes nowhere close to overcoming the overwhelming evidence at trial establishing a taking for which the Church is owed \$1 million, plus interest.

ARGUMENT

I. The Government Caused and Will Continue to Cause Flooding.

The Church proved that the six floods were the “direct, natural, or probable result” of the government’s construction of the Modified Diversion Project through both fact and expert testimony. *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 146 Fed. Cl. 219, 254 (2019) (citation omitted). Before the government constructed the Modified Diversion Project, Ron Matheny and Pastor Fuentes testified that the property never flooded, despite heavy rainstorms that caused flooding elsewhere in Ash Meadows. By contrast, since the Project was completed, the un rebutted testimony proved that the property has flooded six times since 2010. *See Roca Br.* at 6-7, 15. Dr. Reely’s expert testimony confirms and explains that evidence: Dr. Reely testified in detail about how the government’s Modified Diversion Project caused the property to flood, and will continue to cause the property to flood, during relatively ordinary rainfall events. *See Roca Br.* at 34-37.

The government’s response to this evidence is premised on a combination of stricken testimony, mischaracterizations of the record, and a failure to account for the compelling photographic evidence and testimony addressing direct physical observations of the property relative to its hydraulic qualities, pre- and post-Project. This Court should find that the government’s construction of the Modified Diversion Project caused the Church’s property to

flood six times since 2010 and will continue to cause the property to flood in the future unless the diversion dam and channel are removed.

A. The Modified Diversion Project Caused Flooding.

The government's brief confirms that it has no response to the fundamental fact that the property did not flood prior to the Modified Diversion Project but has flooded six times in the ten years since the Project was completed. Ron Matheny and Pastor Fuentes, the two property owners who have collectively owned Patch of Heaven for nearly a quarter century, unequivocally testified at trial that the property never flooded before the government constructed the Modified Diversion Project. Tr. 67:20-23, 99:11-17, 173:7-9, 174:5-7, 174:25-175:2. And no one disputes that since the government completed the Modified Diversion Project, the property has flooded six times. Tr. 99:18-100:10, 105:23-106:2, 111:25-112:4, 114:13-16, 116:1-3.

1. The Government Relies On Cherry-Picked Testimony And Speculation.

The government's efforts to overcome the clear evidence about the lack of flooding on the property before the Project and the substantial, severe, and frequent flooding after the Project is unavailing, and in fact *confirms* the absence of evidence to the contrary.

DesRoberts testimony. The DesRoberts testimony the government cites to support the claim that he was "aware of" flooding on the Church's property in January 2008, Gov't Br. at 14, *was stricken from the record after a sustained hearsay objection.* Tr. 663:17-664:9. Even if that inadmissible hearsay were considered (and it should not be), it still does not amount to direct evidence of prior flooding on the property. Mr. DesRoberts admitted that he was not present on the Church property in 2008, and that his only "knowledge" of the alleged flooding was what he heard from others (*i.e.*, quintessential hearsay). And even then, he heard only that the "road leading to the property" had flooded. There is no evidence (hearsay or otherwise) that Mr. DesRoberts

either heard or actually witnesses the property itself actually having flooded prior to the government's completion of the Project. Tr. 656:23-657:14.

Andress Testimony. The government attempts to undermine Mr. Matheny's unequivocal testimony that the property never flooded prior to the Modified Diversion Project by citing to testimony from Mr. Andress (the former project manager for USFWS's contractor, Otis Bay), who testified that Mr. Matheny told him about a prior flood. Gov't Br. at 15. But Mr. Andress admitted that he "did not personally see the flood event that Mr. Matheny spoke about," and therefore conceded that he could not "contradict Mr. Matheny's own recollection of what happened during that flood." Tr. 701:10-17. Indeed, Mr. Matheny's testimony could not have been clearer: Mr. Matheny specifically testified that the prior flooding he witnessed was "in the vicinity of the turnoff going into Peterson Reservoir," *about "half mile" away* from the property. Tr. 174:5-15. Underscoring the point, Mr. Matheny testified that in his decade of ownership of the property, the ditches on the property never overflowed, and the buildings on the property never flooded. Tr. 173:17-174:4, 182:4-11. And if any doubt remained, when asked whether he had ever seen any flooding on the property during his ownership similar to the 2010 flood, he testified: "Never. Never[,] not even close." Tr. 189:21-190:4.

Fuentes testimony. Unable to point to any evidence of regular flooding on the property, the government asserts that the property flooded once, in 2007, by pointing to Pastor Fuentes's testimony that water "slightly overtopped" the man-made culvert on the property after several days of rainfall. *See* Gov't Br. at 13. But setting aside whether water "slightly overtop[ping]" a culvert amounts to flooding under any normal understanding of the word (much less under the applicable takings case law), that particular instance referenced by Pastor Fuentes is nothing close to the magnitude of flooding experienced repeatedly on the property since the government completed the

Modified Diversion Project. *See* Tr. 99:11-17, 143:5-21 (no evidence of even “overtopping” on any other portion of the property); Tr. 144:20-145:2 (no serious consequences from any prior events). Simply put, as Pastor Fuentes testified and the record evidence confirms, there had been “no flood like the 2010 and 2015.” Tr. 99:11-17.

Existence of a floodplain. Ultimately, the government is left relying on nothing but rank speculation—that because the property lies in a floodplain, it ***must*** have flooded, even if no one observed it. *See* Gov’t Br. at 20. But the government adduced no evidence to support the notion that the property flooded at some unspecified point in time without anyone noticing. *See* Gov’t Br. at 20, 29. Meanwhile, Mr. Matheny testified that when he owned the property, he lived on it and slept there “[a]ll the time.” Tr. 173:2-6. And Pastor Fuentes testified that since Mr. Matheny sold the property to Ministerio Roca Solida, and before the government caused the property to flood, he regularly used the property for church camps and frequently spent the night on the property. Roca Br. at 8; ECF No. 122-1, Tr. of Pl’s Dep. 32:11-16, 33:6-9. It simply is not conceivable that the property somehow sustained major flood damage without anyone noticing. And the extensive historic evidence on which the government relies to support the fact that there was evidence of flooding ***elsewhere*** in the region, *see, e.g.*, Gov’t Br. at 20 (“Physical evidence, such as channels on the property, refutes the notion that flooding has not been a long-time feature of the Carson Slough in and around the property.”); *id.* at 22 (“[The property] is located in a flood zone in the Carson Slough with the majority of the watershed located upstream from the property.” (emphasis omitted)), only serves to highlight the significance of the ***absence of any evidence*** that the property at issue ever experienced prior flooding.

In all events, the government’s strained efforts to prove the existence of prior flooding on the property are for naught. The location of the property in a designated flood plain, and even the

historic presence of some flooding on the property, does not provide the government with *carte blanche* to flood the Church's property. As this Court has made clear, where "the flooding that caused the alleged taking before the court was different in kind from that which had occurred naturally and from what plaintiffs had reason to anticipate"—especially where "it was more severe than any prior flooding and it was not the result of natural conditions but rather of deliberate government action"—the government has effected a taking. *Upstream Addicks*, 146 Fed. Cl. at 261. That is exactly what happened here.

2. The Church Can Prove Causation by Comparing Pre- and Post-Project Flooding.

Finally, the government's effort to dismiss the compelling cause-and-effect evidence of the nature and frequency of flooding in the periods before and after the government's Project as amounting to the "post hoc, ergo prop[t]er [sic] hoc" fallacy falls flat here. Gov't Br. at 20 (quoting *Loesch v. United States*, 645 F.2d 905, 914 (Ct. Cl. 1981)). There is no serious dispute that causation can be established by comparing the nature and frequency of flooding in the period after the government action with the period before government action. That is exactly what the Federal Circuit relied on in *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1371 (Fed. Cir. 2013), and what the court relied on in *Upstream Addicks*, 146 Fed. Cl. at 251, too.

The government's principal authority—*Loesch v. United States*—does not suggest otherwise. There, the court expressly acknowledged that its holding was fact-based, limited to the "context of th[at] record," and does not set forth a principle generally applicable to all takings cases. 645 F.2d at 913 ("The erosion issue in these cases is not legal, it is factual."); *see also* Gov't Br. at 29 (citing *Loesch*). Specifically, in *Loesch*, the Court found that: "[t]he record suggests that plaintiffs generally were really not attentive to river action on their banks prior to construction of the involved dams," 645 F.2d at 914 n.8, and thus the record evidence *in that case* regarding

pre-government action flooding was not compelling. In stark contrast, the two owners of the property at issue for the past quarter century both testified specifically and definitively that there had been no prior flooding of the type or degree that has been experienced repeatedly since the government completed the Project.

B. Expert Testimony Also Established That the Government Caused Flooding.

The Church's experts also confirmed that the government caused the Church's property to flood. *See Ark. Game & Fish Comm'n*, 736 F.3d at 1371 (recognizing that expert testimony that the government action was the proximate cause of the flooding can also establish causation). Dr. Reely explained in great detail, and illustrated with photographic evidence, what the hydrological drainage system looked like before the government constructed the Modified Diversion Project, the changes that Project made to it, how those changes caused the Church's property to flood, and why those changes will continue to cause the Church's property to flood in the future. *See Roca. Br.* at 19-25, 33-37, 41-42.

In response, the government resurrects its unsuccessful *voir dire* arguments, asking the Court to disregard Dr. Reely's analysis because he "performed no modeling" and instead "chose to eyeball the property and look at a few historic photographs and maps." Gov't Br. at 24. But Dr. Reely's opinions are methodologically sound and amply supported by physical observations from four site visits, study of topographic and soil maps, and substantial photographic evidence—all of which were consistent with this Court's own first-hand observations from the Site Inspection.

As Dr. Reely explained during his testimony, the Modified Diversion Project "fundamentally changed" the surface flow of the area because the dam and diversion channel "diverted the natural flow of the Carson Slough" "to the east" causing "a condition where floodwaters are finding their way across the ... church camp property that otherwise would not have happened." Tr. 335:22-336:17, 311:16-312:9, 363:21-364:3. The dam USFWS constructed

prevents water from entering the Carson Slough's previously existing, natural drainage channels and from exiting *via* the significantly sized "off-ramps" to the southwest, where—as had been the case for decades prior to the Project—flood flows would have posed no threat to plaintiff's property. Tr. 342:13-343:6, 344:4-14, 352:8-354:15, 355:7-24. Instead, following the Project, the newly constructed dam routes floodwaters away from these previously existing natural channels along the newly constructed diversion channel, to the east and to an *elevation 6-to-10 feet above* the property. Tr. 351:8-17, 364:8-365:7, 369:21-370:17, 380:24-382:2, 382:10-12. Because the restoration channel cannot accommodate those increased flows—indeed, Mr. DesRoberts and Mr. Andress admitted that it was not designed to accommodate flood flows—since the Project, water breaks out of the diversion channel at several locations and flows into the intervening braided channel system without access to any of the previously existing "off-ramps" to the west, channeling the full force of these floodwaters directly toward the Church property. Tr. 344:15-345:11, 356:4-14.

Dr. Reely testified at length about the ample physical observations that informed and supported his conclusions. *See e.g.*, Tr. 342:22-343:6 (one of the off-ramps was about 40 feet wide), 347:20-349:20 (white silt deposits and "alligator cracking"), 351:8-352 (6-10 foot elevation difference), 355:25-356:14 (path of the braided channels "tracking right at the church camp property"), 356:15-357:5 (braided channel network to the northeast of the Church property "getting deeper" and "getting wider"), 365:8-366:4 (evidence of water breaking out of the diversion channel), 365:24-366:16 ("scour marks" demonstrating erosion), 378:5-379:16 (direction of floodwater flow based on his physical observations); PX-77, PX-108, PX-150, PX-151, PX-276, PX-278, PX-575, PX-561. And it is telling that after visiting the site in 2013 and observing the physical evidence of the 2010 flood, Dr. Reely correctly predicted that the floods

would repeatedly occur. Tr. 335:22-336:17, 368:8-19. Dr. Reely did not need a computer model to prove what was obvious based on his years of training and experience.

This Court's precedents are in accord. In *Upstream Addicks*, this Court credited expert analysis based on physical observations **over** expert analysis based on computer modeling, finding the former "more persuasive." 146 Fed. Cl. at 257. In particular, the Court noted that, unlike the observation-focused expert, the modeling-based expert analysis "suffered from a major flaw—a failure to fully capture what **actually** occurred." *Id.* Unsurprisingly, the Court found for plaintiffs and determined that the government caused the plaintiffs' properties to flood and that the government took a flowage easement over plaintiffs' properties. *Id.* at 258, 264.

Contrary to the government's argument in its brief, neither *Leeth v. United States*, 22 Cl. Ct. 467, 485 (1991), nor *Rohm & Haas Co v. Brotech Corp.*, 127 F.3d 1089 (Fed. Cir. 1997), are apposite. *See* Gov't Br. at 25. In *Leeth*, the critical flaw was the expert's admission that his analysis required "a highly sophisticated computation because of the many variables which must be taken into account." 22 Ct. Cl. at 485. Here, no such computations are needed. Dr. Reely explained that, though he uses hydrologic modeling on at least a weekly basis, he determined in this case that it was not necessary to employ modeling because "there's sufficient physical evidence ... on the ground." Tr. 308:20-24, 383:7-384:5. There is simply "no value in developing a HEC-RAS model of [the behavior of flood flow] when you can actually physically see that." Tr. 383:7-384:5.

Rohm & Hass is even farther afield. There, the court determined that "R&H rested its case for infringement on the summary evidence of its expert witness," who failed to provide the basis for his opinion, but instead simply generally opined on the legal conclusion at issue in the case, *i.e.*, "that the accused product or process infringed the patents." *Rohm and Hass*, 127 F.3d at 1092. Here, by contrast, the Church established causation through fact testimony, record evidence, **and**

expert testimony. *Supra*, § I.B; *see also* Roca Br. at 32-43.

Next, the government asserts without citation that “[p]hysical evidence, such as channels on the property, refutes the notion that flooding has not been a long-time feature of the Carson Slough in and around the property.” Gov’t. Br. at 20. Dr. Reely addressed this specific point, however, explaining how the government’s construction of the dam and diversion Project changed the topography of the area surrounding the Church’s property, altered the existing drainage pattern that protected the property from flooding, and thereby increased the likelihood the property would flood. *See supra*, § I.B; *also* Roca Br. at 19-25, 33-37, 41-42. The government has no serious response to that testimony.¹ Indeed, the government’s *only* response is to maintain that the *dam does not exist at all*, Gov’t Br. at 30—despite the multitude of testimony, photographic evidence, and Site Inspection that included physical observation of the very dam at issue.²

The government’s effort to minimize the significance of the dam by branding it a “berm,” is more than a semantic battle. The government claims that because the capacity of the restoration channel is only about 35 cfs, it “could not possibly convey the amount of floodwater during any of these floods,” and therefore the Modified Diversion Project cannot be the cause of the flooding.

¹ The government cannot argue that Cory Lee’s testimony refutes Dr. Reely’s analysis. Mr. Lee is not an expert and did not begin working at Ash Meadows until January 2015. Furthermore, the bulk of Mr. Lee’s testimony was about flooding on the Refuge, not on the Church property, and is irrelevant. *See, e.g.* 727:10-728:9, 734:23-735:23. *Contra* Gov’t Br. at 29.

² *See* Tr. 221:19-222:12, 310:4-311:13, 336:1-17, 338:8-18, 339:13-341:7, 341:8-344:3, 344:15-345:11, 347:8-19, 352:8-354:15, 354:19-355:5, 359:1-18, 364:8-365:7, 368:20-369:13, 369:14-370:20, 373:23-374:4, 264:13-22, 380:20-382:12, 427:9-23; PX-77, PX-108, PX-150, PX-151, PX-276. The government asserts that the dam cannot exist because Dr. Reely’s definition of a dam included that a dam impounds water, and “the restoration channel does not impound water.” Gov’t Br. at 30 n.7. But Dr. Reely explained that the dam USFWS constructed *does* impound water: The dam was “constructed across the natural flow of the Carson Slough ... there actually is a pool that has been created here. It’s filled with cattails and reeds and things like that, but that creates a small pond right there. And then water flows out of that pond, impounded there, into the restoration channel.” Tr. 359:5-18.

Gov't Br. at 22. But that is the point. The restoration channel *cannot convey* the floodwater. Thus by re-routing *both spring and flood flows* into that inadequate newly constructed channel, the dam has caused the Church's property to flood. As Dr. Reely explained, the diversion dam is a far greater culprit than the diversion channel, because it "obstruct[s] and divert[s] flood flows up above and beyond the spring flow volume." Tr. 369:21-370:17. By contrast, if USFWS had only built the restoration channel and not the dam, the "small spring flow might have been turned, but flood flows would have been allowed to keep on going where they've always gone"—out the off-ramps to the southwest and away from the Church's property. Tr. 369:21-370:17, *see id.* at 343:12-344:3. Therefore, even if the government is right that the capacity of the restoration channel is limited, it only confirms that the government's actions caused the flooding.

Further, the government's argument that the "property is being flooded by stormwater flowing through the watershed, not spring flow from the restoration channel," Gov't. Br. at 22, advances a distinction without a difference. As Dr. Reely explained at length, the government's diversion dam re-routed the flow of spring waters *and* floodwaters, cutting off the old hydrologic system's off-ramps that discharged waters off to the west of the property and ensuring that the property remained free of flooding.

When it did acknowledge the role of the dam in re-routing both spring and flood flows to the new channel, the government failed to address the impact of the dam in cutting off access to the previously existing paths for flood flow that avoided flooding of the property. The government's argument that "[p]laintiff failed to demonstrate that the restoration channel or, more specifically, the berm prevented flows from exiting along the western edge of the floodplain," Gov't Br. at 27, ignores and fails to address Dr. Reely's detailed testimony about how the diversion dam blocked off the off-ramps that discharged floodwater to the southwest and away from the

Church's property. Tr. 380:20-383:6. Dr. Reely illustrated his testimony with photographic evidence from the 2015 flood, which clearly showed no "milky white" floodwater in the blocked-off exit ramp. Tr. 380:20-382:2; PX-150. Even Dr. Thompson agreed with this point—testifying that he, too, saw no floodwater in that blocked-off exit ramp. Tr. 889:1-891:5; PX-150. Regardless of the term used to refer to the dam, by ignoring its existence, the government ignores reality and fails to refute the Plaintiff's significant evidence of causation.

C. Dr. Thompson's Testimony Does Not Undermine the Church's Causation Evidence.

The government hinges its causation rebuttal on Dr. Thompson's testimony, yet it was forced to admit that the one-dimensional HEC-RAS model that Dr. Thompson employed is complex and prone to potential errors: "Dr. Thompson acknowledged that the one-dimensional HEC-RAS model was limited in its ability to make computations with energy in the lateral direction." Gov't Br. at 26 (quoting Tr. 869:6-19). Even setting aside the structural critiques of Dr. Thompson's models—of which there are many, *see* Roca Br. at 37-38—testimony from individuals who witnessed the floods and contemporaneous photographic evidence proved his analysis to be faulty. Dr. Thompson's testimony cannot, and does not, undermine the Church's clear evidence of causation.

The government complains that "Plaintiff's alleged error that the modeling failed to capture what actually occurred makes no sense as Dr. Thompson was not attempting to model what actually occurred," Gov't Br. at 28, but that is no response at all. As Dr. Thompson admitted, his models sought to show what would have occurred during conditions matching the 2010 and 2015 floods if USFWS never constructed the Project. Tr. 869:20-870:4. The Government intended to use those models to prove that the property would have flooded even without the Modified Diversion Project, and therefore that the flooding could not have been caused by the Project. Tr.

870:1-22. As such, it was critical to the government's argument that Dr. Thompson's models matched what "actually occurred"; otherwise his model would be useless to determining the effect of the Modified Diversion Project on the flooding that no one disputes actually occurred.

Dr. Thompson admitted at trial three key distinctions between his models and reality. *See* Roca Br. at 38-41. **First**, Dr. Thompson admitted that his model predicted that, during 2015 flood conditions, there would be no flooding to the northeast of the Church's snack bar, but photographic evidence showed standing floodwaters in that precise area. Tr. 878:12-24, 882:11-884:6; PX-561. **Second**, Dr. Thompson admitted that his model predicted that in 2010 conditions, no water would be present in the culvert bisecting the Modified Diversion Project and the property's access road—yet the evidence showed that floodwater was so strong that it entirely washed out that culvert. Tr. 891:18-895:23; PX-481, PX-484. **Third**, Dr. Thompson admitted that his 2015 model predicted that approximately 75 cfs—a substantial amount of water—would flow laterally (westward) out of the off-ramp, just south of where the government constructed the diversion dam. But when confronted with photographic evidence of the 2015 flood, Dr. Thompson admitted that no water appeared in that same off-ramp. Tr. 884:11-885:24, 889:1-7, 890:1-22.

These three discrepancies between Dr. Thompson's model and reality are critical because they precisely track the changes the Modified Diversion Project made to the landscape that Dr. Reely credited as causing the property to flood. Flooding to the northeast of the Church's snack bar is notable because it is where the braided-channel system, which is located between the diversion channel and the property, empties floodwaters. As Dr. Reely explained, the diversion dam diverts water to the east, where it enters the braided-channel network, flows southwest through those channels, and exits "right at the church camp property." Tr. 344:15-345:11, 356:4-14. That Dr. Thompson's model predicted *no* water where the braided channel system exits

just northeast of the property shows at the very least that his model is inaccurate, but more significantly, it suggests that without the Modified Diversion Project, floodwater would not have been forced through that network and towards the Church's property.

That the culvert under the property's access road was in fact washed out is similarly important because it shows the significant quantity of water that the diversion dam diverts to the east. Dr. Reely explained that, once water is diverted to the east of plaintiff's property, it flows back towards the property rather than south along the banks of the diversion channel, because "the general elevation grade" is "from east to west." Tr. 345:12-25. Contrary to the government's representation that "the restoration channel is at roughly the same elevation as Plaintiff's property," Gov't Br. at 3, Dr. Reely testified that the elevation drops by about "6 to 10 feet" between the channel and the property. Tr. 351:8-17. That Dr. Thompson's model predicted *no* water where the culvert is located demonstrates that, without the Modified Diversion Project, floodwater would not have been directed to an elevation above the Church's property—and therefore would not have flowed back downhill. Further, Dr. Thompson admitted that it was essential to his opinions that the restoration channel would carry *no more* than 75 cfs of water. Tr. 890:13-18. The fact that floodwater in excess of 75 cfs destroyed the restoration channel's culvert during a flood evinces the inaccuracy of his model. *See* Tr. 881:4-895:23, 895:20-23.

Finally, Dr. Reely explained that pre-existing off-ramps were important features of the Carson Slough's historical drainage system because they "allow[ed] the water to essentially exit the system and discharge to the southwest of the church property" so that flow "never actually made it on the church property. Tr. 344:4-14, 355:7-24. In fact, Dr. Thompson agreed with Dr. Reely's analysis on that score. *See* Roca Br. at 35. The fact that Dr. Thompson's model predicted that water would flow laterally (westward) out of an off-ramp that the Project blocked off shows

that, in the absence of the Project, a substantial amount of water would have exited the drainage system long before it ever reached the Church's property.

The Government has no serious response to these arguments. Regarding flooding at the base of the braided-channel network, the government resorts to inventing testimony out of whole cloth, claiming "if you compare the model for the larger flows of approximately 1,600 cfs to what Plaintiff stated flooded during the 2015 flood, it looks nearly identical." Gov't Br. at 26. But those images reveal that the flooding pattern is *not* "nearly identical," Gov't Br. at 27. This new argument also contradicts what Dr. Thompson admitted at trial—that his model predicted no water where the photographic evidence showed floodwater to exist. Tr. 882:11-884:6. Next, the government defends Dr. Thompson's analysis regarding the bone-dry culvert by asserting, "[i]f anything, the model shows that without the Project, more flow would have gone to the west...." Gov't Br. at 28. On this core point, the parties agree. As Dr. Reely explained, if the diversion dam and channel did not exist, floodwaters would have exited the drainage system through the exit ramps and been "discharged out to the southwest or out to the west"—long before those waters ever made it to the Church's property. Tr. 339:13-341:7, 343:12-344:3. The government fails entirely to respond to the evidence regarding the effect of the diversion dam in circumventing the existing off-ramps.

In the end, Dr. Thompson's HEC-RAS models showed that the Modified Diversion Project routed floodwaters to the east—through the braided-channel network and down the diversion channel—and blocked off exit ramps that would have discharged waters out of the drainage system and away from the Church's property. Far from proving that the Church's property would have flooded if the Modified Diversion Project had never been constructed, Dr. Thompson confirmed

the opposite: that the Modified Diversion Project *caused* the property to flood.³

D. The Modified Diversion Project Will Continue to Cause the Property to Flood During Rainfall That Is Not Statistically Excessive.

The evidence at trial established that the Modified Diversion Project will continue to cause the property to flood during relatively ordinary rainfall events. Dr. Reely testified at length regarding his work to determine the statistical probability of the 2010, 2015, and 2016 floods, and he ultimately opined that none of the flood events was statistically excessive, and that none come close to a 100-year rainfall event. *See* Roca Br. at 21-25. Unsurprisingly, therefore, Dr. Reely explained that the property will continue to flood during relatively ordinary rain events unless the dam and diversion channel are removed. Tr. 368:8-19, 392:7-18.

The government attempts to undermine this argument by pointing to Mr. Rosenthal's testimony and asserting that the Project is not the direct cause of the six floods because "the relevant flood events were directly caused by considerable rainfall." Gov't Br. at 21. The evidence refutes that assertion. Dr. Reely explained that the December 2010 flood was "something like a 5-year event," while the October 2015, January 2016, and July 2016 events were merely a less-than-1-year event, a 1-to-2-year event, and a less-than-1-year event, respectively. Tr. 415:20-418:15; *see also* Pl.'s_Demo_152; Tr. 992:14-995:5. The government alleges that the Church "manipulated the classification of the statistical probability of rain events" by "ignoring rain that contributed to flooding but fell outside of their designated window of time," Gov't Br. at

³ The government argues that it could not have caused the flooding because "the amount of flooding depended on the amount of rain," Gov't Br. at 18, or because the government "added no water to the watershed," *id.* at 34. *See also id.* at 21. Unsurprisingly, the government cites no authority for its argument that the Church must prove that the government controlled the amount of water in a watershed or, for that matter, the rain, in order to prove causation. Putting aside that such a standard would be absurd, it has certainly not been applied in any of the numerous takings cases granting judgment in favor of a plaintiff.

21, but the record does not support that argument, either. It is the watershed's time of concentration that determines the relevant time period for the statistical analysis. Tr. 392:22-393:22, 399:21-403:22, 406:10-18. Dr. Reely concluded that 24-hour rainfall was the appropriate measure after calculating the watershed's time of concentration and, ultimately, adopting *Dr. Thompson's* calculation of 6.6 hours. Tr. 394:13-15, 401:9-14; *see also* Roca Br. at 22-23. Dr. Thompson, the only other hydrologist to testify at trial, did not dispute that 24 hours was the appropriate measure to use in this case. *See generally* Tr. 786:11-856:13.

The government instead relied solely on the testimony of Mr. Rosenthal. As a threshold matter, Mr. Rosenthal conceded that his opinions do not matter to the relevant question in this case—*i.e.*, what happens when the precipitation hits the land. Tr. 979:10-12. (Q. “What’s going to happen once it hits the land, that’s for other people to step in; right?” A. “Correct.”). Rather, “it’s the science of hydrology” that “addresses the properties of water and its movement in relation to land,” Tr. 979:13-16, and Mr. Rosenthal is not a hydrologist or civil engineer, and therefore his expertise is limited to “the weather itself, not the effect or interaction of that weather on or with the land,” Tr. 978:13-979:9.

It makes no difference to this case whether the storm causing precipitation to fall on the plaintiff's property was or was not “a significant weather event” stretching across “California, Southern Nevada, Arizona, and Utah.” Gov’t Br. at 21 (citations omitted). Indeed, it makes no difference whether the precipitation was caused by a hurricane, El Niño, a blizzard in July, or any other meteorological event—routine or unique—or if that event lasted for 10 minutes, three days, six months, or any other length of time. Instead, what matters to this case is how much water fell in the watershed *during the hydrologically relevant period*. Mr. Rosenthal admitted he is unqualified to provide hydrological opinions such as that, and although Dr. Thompson is a

hydrologist, he failed to provide an opinion on that topic. The only relevant testimony in the record is Dr. Reely's.

The government notes in a passing that the April 2020 flood—which none of the experts studied—“does not appear to have been a significant event” because the UFSWS “was not aware of flooding on the refuge at that time.” Gov't Br. at 21 n.4. But that proves the Church's point once more: the property continues to flood when other, historically flood-prone areas of the Refuge have *not* experienced flooding. If that is not evidence of causation, it is hard to imagine what is.

Bartz cannot save the government's argument on this score. *Bartz v. United States*, 633 F.2d 571, 593 (Ct. Cl. 1980). Like *Loesch, supra*, at 7-8, *Bartz* is fact-bound, proving only that causation was not established in that case and on those facts. *E.g., id.* (“*For factual reasons heretofore detailed* the operation of the dam and Reservoir had no influence in producing the conditions of which the plaintiffs complain in the Marengo area upstream from the Reservoir...”) (emphasis added). It says nothing about whether causation was established in *this* case on *these* facts. Here, the government failed to undermine Dr. Reely's opinion that the property will continue to flood during relatively ordinary rain events absent removal of the dam and diversion channel. This Court should find that the government's construction of the Modified Diversion Project caused the Church's property to flood six times in a decade and will continue to cause it to flood in the future absent intervention.

II. Plaintiff Has Established A Taking Under *Arkansas Game & Fish*.

Nothing in the government's brief undermines the evidence at trial establishing that the post-Modified Diversion Project flooding of the property has been (and will continue to be) frequent and severe, that this flooding was foreseeable and was intended by the government, that the flooding interfered with the Church's reasonable investment-backed expectations, and that the property itself was not previously subject to the type of post-Project flooding at issue here. *Roca*

Br. at 43-54; *see Ark. Game & Fish Comm'n v. United States* (“*Ark. Game & Fish*”), 568 U.S. 23, 38-39 (2012).⁴ Each of the actual *Arkansas Game & Fish* factors weighs in favor of a takings.

A. The Nature and Magnitude of the Flooding Amounts to A Takings, Not A Tort.

The government does not dispute that to assess the nature and magnitude of the government interference (i.e., flooding), courts evaluate the severity of the invasion, the duration of the interference, and the benefit to the government. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356-57 (Fed. Cir. 2003). The government also does not dispute that the restoration project and resulting flooding are benefits to the government—a factor that supports the finding of a taking. *Id.* In response, however, the government raises three arguments: (1) the severity and duration of the flooding weigh in favor of a tort because the floodwaters only remained on the property for a period of days; (2) repairable damage cannot support a taking; and (3) the Church did not proffer sufficient evidence to establish a diminution in the value of the property. Each of these arguments relies on a misunderstanding of the law and a misapplication of the facts.

The Severity and Duration of Flooding Supports a Taking. The government incorrectly cabins the Court’s analysis of the duration and severity of the flooding by focusing exclusively on how long the floodwater remained on the property. Gov’t Br. at 42-43. This is incorrect as a matter

⁴ It is telling that the government does not even address the *Arkansas Game & Fish* factors until discussing the “character of the governmental action” under *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978), a regulatory takings case. Although there is some overlap between *Penn Central* and *Arkansas Game & Fish*, the “character of the governmental action” is not one of those factors. It thus does not matter that the restoration plan was well-intentioned to save endangered species. *See* Gov’t Br. at 35-37. The focus of *Arkansas Game & Fish* is “to determine whether a taking (as opposed to a tort) occurred by looking at the nature of the underlying land,” *not*, as was the case in *Penn Central*, on whether “a non-categorical regulatory taking occurred” (i.e. whether the government went “too far”). *Caquelin v. United States*, 140 Fed. Cl. 564, 581 (2018), *aff’d*, 959 F.3d 1360 (Fed. Cir. 2020). In other words, the focus of the Court’s inquiry here is on the character of the Church’s property and whether the *effects* of the government’s action (i.e., the flooding) was sufficiently severe, foreseeable, and disruptive.

of law and fact. When, as is the case here, the evidence at trial establishes that the government-induced flooding will continue into the future, the duration of the government interference is considered permanent in nature, and supports a taking. *Upstream Addicks*, 146 Fed. Cl. at 249-50 (Lettow, J.) (rejecting this same argument and finding that “when the taking is one of a permanent nature, as it is here, the time and duration of the invasion is essentially undisputed and manifestly supports the finding of a taking.”); accord *Ideker Farms, Inc. v. United States*, 151 Fed. Cl. 560, 585 (2020) (Firestone, J.) (“The permanent nature of the increased flooding also indicates that the duration factor weights in favor of finding a taking.”), *appeal filed*, Case No. 21-1849 (Fed. Cir. Apr. 14) and Case No. 21-1875 (Fed. Cir. Apr. 22, 2014). The unrebutted evidence at trial established that the government-induced flooding will continue into the foreseeable future. *See supra* § I.D. The government fails to address this point and provides no evidence that it plans to mitigate the probability of future flooding.

The government ignores the lasting flood damage and instead focuses on the length of time the water remained on the property, *see* Gov’t Br. at 42-43, but the government’s selective reading of the record should be rejected. The six floods have caused significant and lasting damage on the property. Tr. 111:8-11 (erosion making area to the west of the buildings “completely demolished, completely transformed” and now, “[c]ompletely useless”); Tr. 104:4-9 (describing flooding stripping topsoil and vegetation); Tr. 104:10-17 (describing structural damage); PX-529, PXs-547-48, PXs-550-51, PX-554. As a result, the Church has been unable to use the property for weeks at a time, Tr. 119:2-6, and groups have been deterred from returning to the property, Tr. 118:6-17. Indeed, Pastor Fuentes testified that he fears that the continued flooding will destroy Patch of Heaven because hosting a camp will become too dangerous. Tr. 123:23-124:8. And the unrebutted evidence at trial established that it would cost \$266,826 to \$277,943 to repair the

damage, Roca Br. at 18-19 (citing Tr. 237:8-12)—most of which would be spent repairing the erosion, Tr. 230:9-234:1—which quantifies the substantial change to the character of the terrain. Therefore, the fact that the floodwaters receded after a few days does not mean that the ill effects of flooding disappeared with them.⁵

Repairable Damages Are Not Exempt from Takings. Further, the government’s attempt to diminish the severity of the flooding by arguing that the Church has only suffered “repairable” damage is untethered to the law. Gov’t Br. at 42. As even the government quotes, *Arkansas Game & Fish* recognized that the “destruction of timber ... and ... substantial change in the character of the terrain” could be repaired through “***reclamation efforts.***” *Id.* (citing 568 U.S. at 29, 30) (emphasis added). Rejecting this same argument, the court in *Upstream Addicks* explained:

Under the government’s theory, seemingly any takings claim based on government-caused damage to property could not be sustained if the damage were susceptible to repair. Even catastrophic damage can often be mended by enough time and expense, but the mere capacity for repair in no way mitigates the severity of the harm itself.

Upstream Addicks, 146 Fed. Cl. at 253. Additionally, the government’s argument is “heedless of the recurrent nature of the flooding involved here,” which will continue to cause damage. *See id.* Thus, the fact that the Church would require a vast sum of money—over \$250,000—to repair the damage from the flooding underscores the severity of the flooding and weighs in favor of a taking.

Continued Flooding Renders the Property Valueless. The government’s argument that the Church did not provide “competent evidence establishing the diminution in value of the

⁵ The government repeats its ill-founded causation argument that that “[t]here has been no evidence presented that the presence of floodwaters was longer in duration as a result of the Project.” Gov’t Br. at 43. But this is not an issue about whether flooding lasted longer on the property than without the government action: Dr. Reely testified that the flooding would not have occurred at all in the absence of the government action. *See supra* § I.B.

property” is both conclusory and contradictory. Gov’t Br. at 41-42.⁶ For support, the government merely states, without more, that Kimmel’s testimony “is not a market-based determination of diminution in value and is not credible.” *Id.* To the contrary, based on his fifty years of experience, Kimmel explained that frequent flooding—meaning “three or four [floods] in ... five years”—diminishes the value of a property because it interferes with an owner’s utilization of the property, Tr. 521:14-18, by prohibiting an owner from “plan[ning] ahead,” “caus[ing] damage to the improvements,” and “mak[ing] access a problem.” Tr. 521:23-25. And the government offered *no* contrary evidence about the value of the property with repeated flooding. Thus, the *only* expert who opined on the value of the property with continued flooding was Kimmel.

Further, the government contradicts its own conclusory argument by urging the Court to ignore Kimmel, an expert appraiser, and instead rely on Pastor Fuentes’s subjective belief that the property is worth more than one million dollars. Gov’t Br. at 41-42. Pastor Fuentes purchased the property to fulfil his dream of ministering youths. Tr. 55:17-56:11. He and his congregation transformed it into a church camp by investing hundreds of thousands of dollars and through substantial volunteer labor. Tr. 69:23-70:4, 81:1-3; PX-46, PXs-382-411, PXs-415-421, PXs-425-431. Thus, it is not surprising that Pastor Fuentes does not want to sell the property—at any price. Fuentes Dep. 103:12-19. Indeed, he testified that, since he rejected the government’s offer to purchase the property for \$700,000, he has not even “entertained that idea” of selling the property.

⁶ For the avoidance of doubt, the diminution in the value of the property is a consideration *within* the Court’s analysis of the severity of the interference, along with whether the flooding has interfered with plaintiff’s “normal use and enjoyment” of the property and whether the property suffered “substantial and frequent damage.” *See* Roca Br. at 43-45 (citing *Ridge Line*, 346 F.3d at 1355; *Upstream Addicks*, 146 Fed. Cl. at 252). It is not, as the government posits by misquoting *Arkansas Game & Fish*, a standalone consideration under *Arkansas Game & Fish*. Compare Gov’t Br. at 41 (“‘**Severity**’ of economic impact ‘figures in the [liability] calculates as well.’”) (quoting *Ark. Game & Fish*, 568 U.S. at 39) with *Ark. Game & Fish*, 568 U.S. at 39 (“**Severity of the interference** figures in the calculus as well.”).

Fuentes Dep. 105:20-106:6. His desire to keep the property—regardless of the offering price—reflects his passion for his ministry rather than the fair market value of the property. It is illogical to argue, as the government does, that a plaintiff’s subjective value of his property—or, rather, his unwillingness to sell the property—provides a “market-based determination” that the government purports to seek. *See* Gov’t Br. at 41. Instead, the Court should rely on Kimmel’s *expert* analysis as to the diminished value of the property, which demonstrates the severity of the flooding.

B. The Taking Was Foreseeable and Intentional.

The government does not dispute that the Church may establish a taking by proving either intent or foreseeability. *See Ridge Line*, 346 F.3d at 1355. And the Church has established both. Roca Br. at 46-51. In response, the government attempts to persuade this Court otherwise by holding up a single hydrological study as a fig leaf for its ill-planned and poorly executed project and by muddying the record through mischaracterization and post-trial evidentiary objections.

1. The Flooding was Foreseeable.

The government argues that the flooding was not foreseeable because USFWS “moved spring flow *away* from Plaintiff’s property” and “underwent a very detailed restoration planning process.” Gov’t Br. at 32-34. But these arguments ignore or mischaracterize evidence from trial.

First, in arguing that USFWS did not foresee that the property would flood because it “moved spring flow *away* from Plaintiff’s property,” *Id.* at 34, the government ignores the fact that it constructed a dam of “dredged spoils,” Gourley Dep. 213:19-214:6, and placed that dam in the middle of an existing channel where floodwater used to travel, *see supra*, § I.B. And government ignores that it moved spring flow *uphill* from the property, resulting in the predictable outcome that “gravity takes over.” Tr. 345:12-25.

Second, the government cites to several witnesses to support the notion that the government underwent a robust planning process for the Modified Diversion Project. Gov’t Br. at 32-34. But

the government only adduced *one* hydrological analysis from 2006 and *one* HEC model from 2009. DX-35. The fact that multiple witnesses from Otis Bay or USFWS can testify to the one analysis and one model does not transform this limited review into a robust planning process.

Third, the government admits that its hydrological analysis focused more on the effect of flooding on the pupfish and speckled dace instead of private inholdings. Gov't Br. at 32; *see also* Tr. 610:2-14. But that analysis should have put the government on notice that adjusting water flow in a flood plain required particular care. The hydrological analysis contained a disclaimer that “[c]aution should be exercised when viewing” model outputs and that “[i]t is likely that some areas that the model shows as dry would actually be flooded from upstream during large flood events.” DX-35 at US000341. The government ignored that warning then, and has no explanation now.

In all events, the government cannot now point to that analysis as proof of its diligence when it disregarded that very analysis in planning the Project. Instead of heeding the warnings of potential flooding from its analysis, USFWS proceeded with designing the channels to only carry spring flow, Tr. 713:19-25 (Andress), despite the fact that it could have designed the channel to carry flood flow, Tr. 663:11-16 (DesRoberts). And instead of consulting with a registered professional engineer—which the government’s expert witness testified that the government should have done, Tr. 805:3-11, 866:24-867:9 (Thompson)—the government opted instead to rely on fish biologists to determine where to construct streamflow channels, Gourley Dep. 118:19-25. During construction, Otis Bay relied on substantial “field direction,” Gourley Dep. 40:7-41:1, and departed from the little plans Otis Bay did have by changing the location of the channel up to 30 feet, Tr. 708:7-709:3 (Andress). And it did all of this while knowing it was altering the flow of water in a floodplain. Tr. 654:6-9 (DesRoberts).

Had USFWS actually undertaken a reasonable investigation, then it would have revealed

that the Modified Diversion Plan would cause flooding on the property. *Ark. Game & Fish*, 736 F.3d at 1373. Indeed, Dr. Reely conducted such an investigation in 2013 (after only the 2010 flood), and concluded that the Modified Diversion Project caused the property to flood and that the flooding would continue to occur because of the Modified Diversion Project. Tr. 335:22-336:17, 368:8-19. He was correct. As were the multiple witnesses who testified that they predicted the Modified Diversion Project would flood the property, too. Roca Br. at 49.

2. The Government Intended to Flood the Property.

The evidence at trial established that the government intended to flood the property. *See* Roca Br. at 49-51. The government resists this conclusion by re-litigating the Court's evidentiary rulings and mischaracterizing testimony.

First, the government does not deny its restoration project was intended to create more flooding on the refuge by restoring the refuge to its pre-agricultural state. Instead, the government hones in on Mr. DesRoberts's statement that USFWS "didn't create the environment. It [*i.e.*, the restoration project] was designed within the environment of flooding." Gov't Br. at 33-34 (citing Tr. 656:18-19). According to the government, USFWS did not "change the environment" of the refuge because—at worst—it flooded an area that had a history of flooding (despite the evidence to the contrary, *see supra* § I.A). But the government misses the point. The relevant question is whether the government increased the propensity of the Church property to flood because of the Project. *See Ark. Game & Fish*, 568 U.S. at 39 (holding that a taking may occur where government action increases the propensity of a flood-prone area to flood). The answer to that question is yes.

Other parts of Mr. DesRoberts' testimony confirms the government's intent. Mr. DesRoberts testified that the agricultural use in the Carson Slough during the 1950s and 1960s interfered with the periodic flooding that occurred prior to the agricultural development. Tr. 654:18-656:1. And he further testified that "part of the restoration project was to undo this damage

from agricultural use.” Tr. 656:5-9. In other words, USFWS wanted the refuge to be back to preagricultural use “as close as possible,” Tr. 656:20-22, which Mr. DesRoberts admitted involved more flooding, Tr. 655:23-656:1. This testimony establishes that the restoration project was designed to increase flooding in the refuge.

Further, the evidence at trial established that USFWS’s prior project manager, Sharon McKelvey, wanted the Project to flood the Church off the property. Roca Br. at 50-51. The government tries to undermine the force of that evidence by re-litigating its hearsay objection to Mr. Johnson’s testimony. Gov’t Br. at 32-33. But the Court already ruled it was not hearsay at trial. Tr. 273:16-18.⁷ And the Ms. McKelvey was *not* only discussing the *pre-restoration* project ditches that ran towards the property and the “regular flooding that occurs in the area, including the Plaintiff’s property.” Gov’t Br. at 33. Mr. Johnson repeatedly used the word “trenching” to describe the newly completed diversion channel. Tr. 269:22-270:12. So when Mr. Johnson testified that he asked Ms. McKelvey about “the trenching that went down toward the Fuentes property,” and Ms. McKelvey responded that water from the summertime thunderstorms “would flow the Fuentes property,” she was describing her understanding that the Project would cause the property to flood, as she wanted. Tr. 273:19-274:8.

In short, the evidence at trial established that “a reasonable investigation ... would have revealed” that the Modified Diversion Project would cause flooding on the property, *Arkansas Game & Fish*, 736 F.3d at 1373, and that the government “kn[ew] that a specific act [would] caus[e] identifiable harm or kn[ew] that the harm [was] substantially certain to result,” *Upstream*

⁷ Ms. McKelvey was employed as a refuge manager at the time she was speaking with Mr. Johnson, the Nye County Flood Supervisor, about the restoration projection. Tr. 272:12-24, 273:19-274:8. There is no doubt that Ms. McKelvey was USFWS’s “employee on a matter within the scope of that relationship and while it existed.” Fed. R. Evid. 801(d)(2)(d).

Addicks, 146 Fed. Cl. 258-59 (citation omitted). The Church thus has proven that the flooding on the property was foreseeable—indeed, intended—by the government.

C. The Government-Induced Floods Interfered with the Church’s Reasonable Investment-Backed Expectations.

A court evaluates a property owner’s reasonable investment-backed expectations by considering: (1) an objective analysis of whether the landowner’s expectations were reasonable, *Chancellor Manor, Gateway Invs., Ltd. v. United States*, 331 F.3d 891, 904 (Fed. Cir. 2003); and (2) the “extent to which the [government action] interferes” with those expectations, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The government’s efforts to recast this standard in favor of the four-step analysis from *Cienega Gardens v. United States*, 503 F.3d 1266, 1289 (Fed. Cir. 2007), is misguided. Far from being “made-up,” Gov’t Br. at 39, that is the same standard used in *Upstream Addicks*, 146 Fed. Cl. at 219. And in all events, the Church satisfied *Cienega Gardens*, as its opening brief made clear. *See* Roca Br. at 51-52 (describing Church’s investment of \$500,000 for property and over \$300,000 on improvements); *id.* at 51 (describing basis for the Church’s reasonable belief that it could enjoy and use the property as a Church camp); *id.* at 52 (describing how the government-induced flooding interfered with the Church’s use of the property as a camp); *id.* at 7, 51-52 (describing that the Church was motivated to buy and improve the property to utilize it as a church camp).

Nothing in the government’s brief calls into question that the Church had a reasonable investment-backed expectation that the government would not cause its property to flood. The government suggests, without citation, that the Court should disregard that interest, *see* Gov’t Br. at 39, but the law provides otherwise. In *Arkansas Game & Fish*, the Supreme Court explained that, while the subject property was in a floodplain and had experienced flooding the past, the trial court found that the property had not been “exposed to flooding comparable to the” alleged

government-induced flooding. 568 U.S. at 39; *see also Ideker Farms*, 151 Fed. Cl. at 591; *Upstream Addicks*, 146 Fed. Cl. at 260. And the Church's opening brief provided three reasons why the property's location in a floodplain does not relieve the government from liability, *see Roca Br.* at 52-53, all of which the government ignores.

The Church's Reasonable Expectation. The government cannot argue that the Church's expectations were unreasonable because it should have foreseen the flooding at issue here. Gov't Br. at 40. Under the government's logic, Pastor Fuentes should have not only foreseen the government-induced flooding of the property, but he should have predicted this flooding years before the government publicly announced the construction of the Modified Diversion Project in September 2009. That is baseless, especially in light of the government's (implausible) argument that even USFWS did not foresee the dangers of flooding on the property. Gov't Br. at 31-35. As in *Upstream Addicks*, this Court should "perceive[] the irony of the government's simultaneous contentions that the Corps could not have anticipated [the flooding] but that plaintiffs ought to have foreseen the risk." 146 Fed. Cl. at 263 n.24.

The government also argues that the Church should have been aware of potential flooding because there was a "history of planning and public involvement" concerning the restoration project starting in the 1990s. Gov't Br. at 40-41. The government proclaims that "Plaintiff would have the Court believe that the Project was first announced in September 2009 and then promptly constructed a couple of months later, but there's no evidence, even from Plaintiff, to support that assertion." *Id.* But the record says otherwise. Indeed, the government's own party representative, Mr. DesRoberts, testified—nearly verbatim—to the proposition that the government claims is unsupported by evidence. He testified that the Environmental Assessment from September 2009 was "the first time [USFWS] show[ed] a channel around plaintiff's property," and "Fish and

Wildlife started the project, started moving dirt for that phase of the project in November 2009.” Tr. 659:17-25 (discussing JX-20); *see* Roca Br. at 9-10, 48, 51 (citing testimony). The government, once again, has no response except to protest (incorrectly) that such evidence not exist.⁸

The Church’s Investments. The government’s attempt to minimize the Church’s investments because the Church relied on donations and volunteer labor finds no support in the law. Gov’t Br. at 39. The government cites no authority that would support its position that the Church’s use of donations are categorically different from funds derived by other means, and the Fifth Amendment certainly has no such limitation. U.S. Const. amend. V. Further, the government’s discussion of the Church’s inability to repair damages caused by the flooding (i.e., damages that occurred ***after the taking***), Gov’t Br. at 40 (citing Tr. 123:10-22), is irrelevant to the Court’s inquiry of reasonable-investment backed expectations. *See Cienega Gardens*, 503 F3d at 1288 (assessing “reasonable investment-backed expectation in the property at the time [the owner] made the investment”). It is the testimony and documentary evidence admitted at trial concerning the over \$300,000 that the Church spent improving the property before the Modified Diversion Project, Roca Br. at 51, which ***is*** relevant to this analysis—and on which the government is silent.

Government-Induced Flooding Interfered with Church’s Expectations. Finally, the government’s argument that the flooding has not frustrated the principal basis for the Church’s investment in the property relies on a reading of the record that is, at best, selective. Gov’t Br. at 41. The Church agrees that, when looking for a property to host a church camp, Pastor Fuentes

⁸ The government also conflates the restoration project writ large with the Modified Diversion Project (i.e., the diversion channel and dam at issue). Gov’t Br. at 40-41. The Church does not contest that USFWS was working on ***other components*** of the restoration project prior to the Church’s purchase of the property. But the Modified Diversion Project was first announced in September 2009, and USFWS began construction two months later. Tr. 659:17-25. No amount of diligence would have revealed the Modified Diversion Project or its impact on the property when the Church purchased and invested in it.

was looking for a “peaceful environment, close to nature where [visitors] can relax and calm down and be ministered,” Tr. 56:7-11. *See* Gov’t Br. at 41. But the government’s conclusion that “[t]he property has continued to provide these things to Plaintiffs, so there has been no interference” ignores the impact of the flooding on the property. Gov’t Br. at 41. As the Church explained repeatedly in its opening brief, “the flooding caused visitors to stop returning to the camp, Tr. 118:6-17, limited or entirely curtailed the Church’s access to parts of the camp used for visitors, Tr. 119:10-20, and wholly prohibited the Church from using the property for weeks at a time, Tr. 119:2-6. The prospect of future flooding has also deterred the Church from undertaking the substantial repairs the camp needs. Tr. 123:15-22.” Roca Br. at 52; *see also id.* at 25, 44-45 (same). And the “peaceful environment, close to nature” that Pastor Fuentes found in Patch of Heaven when the Church purchased the property has been substantially altered by the floods. *See id.* at 44 (describing damage from flooding); *see also supra* § II.A (same). As a result, the evidence at trial established that the flooding interfered with the very purpose the Church purchased the property, disrupting its reasonable investment-backed expectations.

D. The Character of the Land Was Not Otherwise Susceptible to Flooding.

The government ignores the Church’s arguments (and proposed legal standard) about the character of the property and instead asserts its own standard. But the government’s citation to *United States v. Sponenbarger*, 308 U.S. 256, 265 (1939), for the standard the Court should apply is inappropriate. Gov’t Br. at 37. *Sponenbarger* concerns the relative benefits doctrine, 308 U.S. at 266-67, which is a liability defense not at issue here. And *Sponenbarger* says *nothing* about the proper analysis for the character of the land in a flooding case.

Contrary to the government’s attempt to focus exclusively on historic flooding (or lack thereof), courts assess the character of the land by evaluating whether an *increase* in flooding “was great enough to change the character” of the land. *Ark. Game & Fish*, 736 F.3d at 1371. Indeed,

“[e]ven if this geographical area is generally susceptible to flooding during extreme weather events, the character of plaintiffs’ land would not be *especially* susceptible to flooding without the construction of the dams.” *Upstream Addicks*, 146 Fed. Cl. at 248 n.18.

As for the character of the land before the Project, the government fails to establish that the property was subject to prior flooding. The government repeats its flawed argument that “the absence of direct observation in the past does not somehow establish that no flooding on this one low-lying parcel was not occurring.” Gov’t Br. at 37. But in contrast with the government’s assertion elsewhere in its brief, Gov’t Br. at 2, 14, ***the government admits that “the Service did not have direct information about what flooding had previously occurred on this private parcel,”*** *id.* at 38 (emphasis added). And the government acknowledges that Mr. Matheny and Pastor Fuentes testified that there had not been prior flooding on the property. *Id.*; *see also* Tr. 173:7-9, 174:5-7, 174:25-175:2 (Matheny); Tr. 99:11-17 (Fuentes). For the same reasons described above, the government’s reasoning should be rejected: its claim of prior flooding is unsupported by the factual record, *see supra* § I.A, and ignores Dr. Reely’s testimony about the historic drainage channels that permitted flood flow to move within the channels to the “off-ramps” to the west of the property, *see supra* § I.B. The ***most*** the government has proven is that the property lies partially in a floodplain, which is not enough as a matter of law to defeat a takings claim.

As for the character of the property after the Project, Dr. Reely explained that the Project—specifically the diversion dam—caused flooding on the property that would not have occurred otherwise. *See supra* § I.B. That flooding has been frequent and severe, Roca Br. at 43-46, and will continue into the foreseeable future, *see supra* § I.D. Thus, “[i]t cannot be the case that land that experiences a new and ongoing pattern of increased flooding does not undergo a change in character.” *Ideker Farms*, 151 Fed. Cl. at 587. The character of the land thus supports a taking.

III. The Church is Due Just Compensation of \$1 Million.

Ministerio Roca Solida is owed just compensation of \$1 million. Mr. Kimmel’s testimony showed that the value of the property at the time of the taking was \$1 million. He also established, unrebutted, that recurring flooding will render the property valueless. Thus, whether the government’s action is classified as a categorical taking, a partial taking, or a flowage easement, just compensation is \$1 million plus interest. Alternatively, if the Court finds that less than all of the value of Patch of Heaven was taken, the Church is due the value of the land that has been taken plus all repair costs resulting from the government’s intrusion.

A. Plaintiffs Established a Compensable Taking.

As shown above, the facts at trial have established a taking under the *Arkansas Game & Fish* factors. The government’s citation to *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982), is misplaced; *Arkansas Game & Fish* controls here. But even under *Loretto*, the government’s Diversion Project has “empt[ied] the right of any value,” resulting in a categorical taking. *Loretto*, 458 U.S. at 436; Gov’t Br. at 44. Alternatively, the extent of the partial taking and flowage easement has been elucidated: at minimum, the useable parts of the property have been taken due to the flooding caused by the Modified Diversion Project.

That is confirmed by the only expert who testified at trial about the value of the property with repeated flooding—that continued flooding will “make the property pretty nominal in value.” Roca Br. at 50; Tr. 530:11-531:4. Put another way, the current rate of flooding will render the property “almost valueless.” Tr. 522:7-15. As Dr. Reely confirmed, the government’s Modified Diversion Project will result in continued flooding. Tr. 363:21-364:3. As a result, all of the Church property has been taken, whether viewed as a complete taking, partial taking, or flowage easement. The government’s arguments do not address the simple fact that it offered *no* evidence to rebut Dr. Kimmel’s opinion that continued frequent flooding will make the property valueless. The

government's assertion that the Church's use of the property after the initial flood precludes a complete takings claim is at odds with the central holding of *Arkansas Game & Fish*, where the Supreme Court held that temporary flooding can give rise to a taking. 568 U.S. at 38.

The government's arguments to overcome the evidence establishing a flowage easement are mostly efforts to re-litigate its already-denied motion in limine. Gov't Br. at 45. Its only substantive "argument" is an attempt to muddle the record as to which part of the Church property frequently floods. Gov't Br. at 46. But the evidence is clear that the northeast portion of the Church property has flooded in each of the flood events. Tr. 106:22-107:1 (floodwaters in the October 2015 flood came from the new diversion channel, which is at the northeast portion of the Church property); Tr. 100:11-15 (same for December 2010 flood); Tr. 112:20-22 (same for January 2016 flood); Tr. 113:12-15 (same for July 2016 flood); Fuentes Dep. at 72:3-4, 72:7-8 (same for March 2019 flood); Tr. 116:19-22 (same for April 2020 flood). And the northeast portion of the property is the usable part of the property: it contains the property's access point and all of the improvements on the property. *See* PX-531; Pl's_Demo_72. That other parts of the property also flooded during some events does not preclude the finding of a flowage easement; it only means that potentially *more* of the property is subject to the easement. Tr. 106:12-21; Tr. 111:8-11 (area to the west of the building structures is "[c]ompletely useless").

B. The Date of the Taking is December 2010.

Ignoring four days of trial and the Church's post-trial brief, the government argues that "Plaintiff neglected to put forward a date of taking in its case or in its post-trial brief." Gov't Br. at 46. Not only did the Church identify December 2010 as the date of the taking in its post-trial brief, Roca Br. at 27, but the Church has consistently maintained that the first flood during the Church's ownership took place in December 2010. As the government itself admits, "where the United States permanently takes an interest in real property, the date of a taking generally is the

date the United States enters into possession of the property.” Gov’t Br. at 47 (citing *United States v. Dow*, 357 U.S. 20, 22 (1958)). For intermittent flooding cases, that date is the date “when flooding attributable to the [government begins].” *Ideker Farms*, 151 Fed. Cl. at 598. Here, that date is December 2010.

In another attempt to muddle the record, the government references for the first time in its brief one of Defendant’s interrogatory responses from four years ago. Gov’t Br. at 46. But the response never introduced into evidence, and the government neglected to ask any witnesses about it. The Church called its own pastor and party representative to testify live at trial, and the government could have asked him about the response if it intended to rely on it. Instead, the government seeks to invoke this discovery response post-trial *even after* its own expert appraiser presented valuation testimony relative to the 2010 taking date. That is inappropriate and does nothing to undermine what the trial evidence established.

C. The Property was Worth \$1 Million in December 2010.

Mr. Kimmel’s \$1 million valuation of the Church property is reliable and consistent with the market. Unlike Mr. Anderson, Mr. Kimmel did not make arbitrary adjustments to artificially decrease his appraisal value, but instead relied on market considerations that accurately represent the fair market value of Patch of Heaven in December 2010.⁹

Land value. The government offers no persuasive rebuttal to Mr. Kimmel’s valuation of the property. Unable to criticize his actual methodology, the government suggests that he

⁹ In a footnote, the government argues that because Mr. Kimmel valued Patch of Heaven as of August 2010, his appraisal should be rejected. Gov’t Br. at 52 n.20. Putting aside the fact that Mr. Anderson appraised the property as of **January** 2011, after the date of the taking, Tr. 1004:22-1005:6, an appraisal need not value the property as of the **exact date at issue** to be probative evidence as to its value. See *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 127 F.3d 1390, 1396-97 (11th Cir. 1997) (appraisals one year before and three years after the date at issue are probative).

overvalued Patch of Heaven due to the state of the United States housing market in 2008. But that argument is without any citation or evidentiary support, and ignores the fact that Mr. Kimmel’s appraisal is more consistent with the real market comparators presented at trial. The government is notably silent on the relevance of Ron Murphy Sr.’s sale of a nearly identical parcel of land. While Mr. Anderson agreed that Mr. Murphy’s land was “similar” to Patch of Heaven, he valued the Church property, unimproved, as \$300,000—less than *half* the price the government paid for a nearly identical parcel within Ash Meadows. Tr. 1057:13-17. “[T]ransactions further removed from the September 2008 crash naturally showed higher prices as the real estate market recovered.” Gov’t Br. at 54. By the government’s own logic, Mr. Kimmel’s August 2010 valuation (\$566,000) of the unimproved land is a *significant underestimate* when compared to Ron Murphy Sr.’s sale of nearly identical land for \$760,000 in July of 2009. Tr. 209:8-16, 509:14-510:11. Moreover, the government’s criticism of Mr. Kimmel’s consideration of the original \$500,000 purchase price is contradicted by their own expert, who testified that the purchase price was a “good indicator” of value. Tr. 1057:13-17, 1028:23-1030:23.

The government ultimately falls back on its refrain that the property lies in a flood zone. But Mr. Kimmel testified that the property’s location in a one-hundred-year flood zone has “no impact on value.” Tr. 521:1:522:6.¹⁰ Patch of Heaven is not unique: in Northern Nevada, there are “a lot of properties that are in [a] 1 percent flood zone” and “buyers and sellers don’t take it into consideration.” *Id.* at 519:10-520:7. That testimony is un rebutted. Mr. Kimmel’s testimony that the “propensity of the property to flood, is a significant factor in determining the value of a

¹⁰ The government once again mischaracterizes testimony. Mr. Kimmel admitted that while he neglected to mention flood zones in his expert report, he clarified that omission in his deposition. Tr. 520:16-21. The government never claimed prejudice or moved to exclude this testimony under Federal Rule of Civil Procedure 26(a)(2), since it was fully aware of Mr. Kimmel’s opinion.

property” is consistent with that opinion. *Id.* at 535:7-11. The government conflates the propensity of Patch of Heaven to flood due to the Project with the fact that Patch of Heaven—like many other properties, such as the Department of Justice, Tr. 422:13-19—is located within a flood zone. Patch of Heaven has a high propensity to flood, not because it is located within a flood zone, but because it has been (and will continue to be) subject to recurring flooding as a result of the government’s Modified Diversion Project. *See supra* §§ I.A, I.D. That **recurring flooding**, not the **flood zone**, is what renders the land valueless. Tr. 522:7-15. And it makes no difference that the Church property is in an AO2 flood zone rather than just an A zone. Gov’t Br. at 55. The only difference between zone A and zone AO is the potential **depth** of flooding, not the **propensity** of flooding. *See* Tr. 269:18-21. And no one testified that such a difference affects value.

The government also failed to rehabilitate Mr. Anderson’s appraisal of the land value. In the government’s own words, “standard appraisal practice is to determine what an objective and reasonable market participant would pay,” Gov’t Br. at 50 n. 18. Mr. Anderson knew that the United States was a reasonable market participant in the Amargosa Valley. Tr. 1040:5-1041:21. Yet Mr. Anderson thought it was justified to ignore the government’s “extraordinary motivation” to purchase land within Ash Meadows, meaning he thought that Patch of Heaven—one of the few remaining pieces of privately owned land within Ash Meadows—was somehow also not subject to that extraordinary motivation. Gov’t Br. at 50; *see also* Roca Br. at 56-57. Similarly, while the government characterizes Mr. Anderson’s testimony about adjusting Pahrump properties vs. Amargosa Valley properties differently, the result is the same: Mr. Anderson accounted for relative sale prices only when they would decrease the ultimate value of Patch of Heaven. He did not consider nor adjust for the fact that the Church property is within the Refuge, where properties typically sell higher than other Amargosa Valley properties. Tr. 1037:25-1039:5.

Improvements. The government also offers no persuasive response as to the value of the improvements to the Church's property. Mr. Kimmel appropriately valued those improvements at between \$500,000 and \$600,000. The government does not dispute that the receipts introduced at trial showed improvements of \$303,000, Tr. 81:1-3; Pl.'s_Demo_71, and Mr. Kimmel explained that his valuation took account of the enhanced value of the commercial well, Tr. 510:18-511:16, and countless hours of unpaid volunteer labor, Tr. 562:20-563:8.

Anderson's valuation of the improvements—and in particular his application of depreciation—is not justified. The government's claim that "most of [the property's] buildings were not built in 2008" is contrary to the unrebutted evidence at trial. Gov't Br. at 51. Mr. Kimmel testified that "most of [the Church's] structures were built in 2008," Tr. 515:14-22, and Pastor Fuentes detailed the extensive remodeling the Church undertook after it purchased the property. *See, e.g.*, Tr. 68:1-23 (work done to the structures); PX-382-PX-410, PX-415-PX-421 (receipts). Mr. Anderson did not even know the age of any of the improvements on the property when he decided to depreciate them as if they were 10 years old. Tr. 1055:9-12. But he still chose an extreme depreciation number, once again depressing his total value of Patch of Heaven.

At bottom, Mr. Kimmel's appraisal corresponds to market benchmarks such as Mr. Murphy Sr.'s sale and, indeed, even the government's \$700,000 valuation of Patch of Heaven after it was subject to repetitive flooding. Fuentes Dep. 105:20-106:11. Mr. Anderson's appraisal, on the other hand, is a severe underestimate. This Court should find that the property is worth \$1 million.

D. The Evidence Shows the Damages Attributable to a Flowage Easement.

Mr. Kimmel was the only witness to offer testimony on the impact of the government's flowage easement. While Mr. Anderson valued Patch of Heaven as of the time of the taking, he did no analysis and offered no opinion quantifying the value of the land after repetitive flooding. As a result, Mr. Kimmel's opinion is unrebutted, and the Church is due \$1 million. In a partial

taking, “compensation may include the diminished value to the remaining portion of land, called ‘severance damages’ *as well as* the value of the portion of land taken.” *Ideker Farms*, 151 Fed. Cl. at 607 (citing *United States v. Miller*, 317 U.S. 369, 375-76 (1943); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 336 (Ct. Cl. 1980)) (emphasis added).

Mr. Kimmel was clear: continued flooding “will make the property pretty nominal in value.” Tr. 530:11-531:4. Three or four floods in a five-year period—as is the case here—will make the property “almost valueless.” Tr. 522:7-15. The government focuses on the fact that Mr. Kimmel did not conduct an explicit “before-and-after analysis.” Gov’t Br. at 59. But quantifying the impact of a flowage easement does not require a particular appraisal methodology; it merely requires the Court to determine the “difference between the value of the property before and after the Government’s easement was imposed.” *Liebman v. United States*, 139 Fed. Cl. 653, 661-62 (2018) (emphasis added). Mr. Kimmel provided undisputed testimony on that: he established the value of the property before the easement (\$1 million) and the value after the easement (\$0).

If the Court finds that less than the full value of the land was taken, then the Church is also due the undisputed repair costs it must incur to repair flooding damage. These are not “consequential” damages, as the government suggests. *See* Gov’t Br. at 8, 21. They are damages *directly* attributable to the flooding caused by the government. And indeed, the repair costs represent the “diminished value to the remaining portion of the land” resulting from the flooding. *Ideker Farms*, 151 Fed. Cl. at 607. In partial taking cases, Plaintiffs are due *both* the value of the portion of the land that was taken and “severance damages,” which is the diminished value to the land that was *not* taken. *Id.* The government itself admits that in partial takings cases, courts may fashion compensation based on considerations other than the fair market value. Gov’t Br. at 8. And courts have been creative in awarding damages in flowage easement cases. *See, e.g., Ridge Line,*

346 F.3d at 1355 (awarding cost of preventing harm); *Stockton v. United States*, 214 Ct. Cl. 506, 519 (1977) (awarding “cost of riprapping for protection”). Those damage awards have included repair costs. *See, e.g., Ideker Farms*, 151 Fed. Cl. at 608 (awarding repair costs to a levee). Here, the undisputed repair costs are between \$266,826 and \$277,943.¹¹ *See* Roca Br. at 59-60. The Church is due those costs if the Court finds part of its land was not taken.

E. Interest Should Be at the Moody’s Rate and Compounded Quarterly.

The government, without any support, argues that “the proper interest rate should reflect the complete lack of any market risk, as if the money had been held in a safe escrow since the date of taking.” Gov’t Br. at 61. The law says otherwise. The appropriate interest rate here is the Moody’s Rate. *See, e.g., Tech. Coll. of the Low Country v. United States*, 147 Fed. Cl. 364, 371 (2020) (applying Moody’s rate in a takings case); *Sears v. United States*, 124 Fed. Cl. 730, 736 (2016) (same); *Adkins v. United States*, Nos. 09-503L, 09-411L, & 09-1581, 2014 WL 448428, at *2 (Fed. Cl. Feb 4, 2014) (same).¹² And countless cases from this Court compound interest quarterly. *See, e.g., Tech. Coll. of the Low Country*, 147 Fed. Cl. at 370; *Hardy v. United States*, 138 Fed. Cl. 344, 357 (2018); *Sears*, 124 Fed. Cl. at 737. Thus, prejudgment interest should be set at the Moody’s Rate and compounded quarterly.

CONCLUSION

For the foregoing reasons, the Court should hold that the government effected a taking and that the Church is entitled to just compensation of \$1 million plus prejudgment interest.

¹¹ The government argues that damages associated with the 2015 flooding would be inappropriate for a flowage easement, since they would be after the taking date. *See* Gov’t Br. at 61. But *Ridge Line* rejected that very argument. 346 F.3d at 1359.

¹² The lone case that the government *does* cite also uses the Moody’s rate. *See Textainer Equip. Mgmt. Ltd. v. United States*, 115 Fed. Cl. 708, 718 (2014).

Respectfully submitted, August 6, 2021.

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CERTIFICATE OF SERVICE

On August 6, 2021, the foregoing document was submitted to the Court and thereby served on counsel for the United States by the CM/ECF system.

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