IN THE U.S. COURT OF FEDERAL CLAIMS

CASE NO. 1:14 –CV-00183-NBF
Senior Judge Nancy B. Firestone

IDEKER FARMS, INC., et al.

Plaintiffs,

v.

UNITED STATES

Defendant.

BELLWETHER PLAINTIFFS' RULE 42.02(c) MOTION FOR RECONSIDERATION

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PLAINTIFFS' RULE 42(c)(2) MOTION FOR RECONSIDERATION OF TRIAL OPINION (ECF NO. 422)

Pursuant to **RCFC 42(c)(2)**, Plaintiffs respectfully move this Honorable Court to reconsider certain rulings in its Trial Opinion,[1] ECF No. 422. Plaintiffs allege that with respect to the Court's rulings: (1) dismissing Plaintiffs' 2011 claims; (2) dismissing Plaintiffs' claims from the failure of the Middle ("Hamburg") and Upper ("Percival") L-575 levees; (3) dismissing Plaintiffs' claims from the failure of the Union Township Levee; and (4) dismissing the Sargent claims from the failure of a private levee, the Court misstated or misinterpreted Plaintiffs' alleged theories of causation and foreseeability and overlooked or misinterpreted material matters of law and fact such that reconsideration by the Court of its rulings is necessary to prevent manifest injustice to Plaintiffs.

I. Dismissal of Plaintiffs' 2011 Claims

The Court dismissed Plaintiffs' 2011 claims for what it found were two "primary reasons." The first and "foremost" reason found was that Plaintiffs, in accordance with their alleged theory of causation, had failed to establish that the Corps' System Changes in 2011 were in furtherance of the "'single purpose' [Plaintiffs had] relied upon to establish causation for the other flood years," which the Court narrowly characterized as complying with the Endangered Species Act ("ESA"). **Trial Op. at 80.** The second primary reason found was that Plaintiffs, in accordance with their theories of causation and foreseeability, had failed to establish that the 2011 flooding was caused by the combined and cumulative effects of the Corps' System and River Changes and that such flooding was foreseeable. ***Id.*** **at 82.** For the reasons discussed

[1] The Parties intend to seek reconsideration of other rulings in the Court's Trial Opinion, but those rulings are not yet final in that the Court has not yet finally addressed the remaining liability issues regarding severity, reasonable investment-backed expectations and the ***Sponenbarger*** Doctrine. Accordingly, the fourteen-day time period to seek reconsideration of such rulings under Rule 42(c)(2) has not yet begun to run as to those issues.

below, the Court's reliance on these two primary reasons to dismiss Plaintiffs' 2011 claims is misplaced.

A. Plaintiffs' Macro Theory of Causation as to System and River Changes

While Plaintiffs' theory of causation is discussed in greater detail in their Opening Post-Trial Brief (**ECF No. 374**) and their Response to the United States' Opening Post-Trial Brief (**ECF No. 381**), Plaintiffs highlight below certain aspects of their theory of causation which are implicated by the Court's findings and conclusions dismissing Plaintiffs' 2011 claims.

As the Court well knows, Plaintiffs' theory of causation is a macro theory of causation predicated on the Corps' Record of Decision ("ROD") of March 19, 2004, and the Missouri River Recovery Program ("MRRP"), a multi-year plan, authorized by the ROD, to retransform the River back to a more natural state. It is macro in nature because Plaintiffs allege that the flooding in question was not caused by localized and isolated incidents, but due to a broader change to the River over time. Plaintiffs' macro theory alleges that in implementing the MRRP, the Corps made changes in its overall River management policy ("RMP") for operating the System *and* operating and maintaining the BSNP. As the Court found, the Corps coordinated its operation of the System and its operation and maintenance of the BSNP to provide for flood control and the other purposes of the Flood Control Act ("FCA"). **Trial Op. at 6, 9-13.**

As found by the Court and as the record reflects, Plaintiffs' macro theory of causation alleges that but for the *combined* and *cumulative* effects[2] of the Corps' changes in its "Old RMP" to implement the MRRP, the flooding in question would not have occurred to the extent necessary to have caused the injuries to Plaintiffs' properties for which they seek compensation. Those alleged changes or deviations from the Old RMP include two categories: (1) the Corps'

[2]"Combined" refers to the effects caused by a *combination* of the System and River Changes; whereas, "cumulative" refers to the effects of those combined changes *over time.*

changes in its operation of the Missouri River Mainstem Reservoir System ("System Changes"); and (2) the Corps' changes in its operation and maintenance of the Bank Stabilization and Navigation Project ("BSNP Changes" or "River Changes"). The System Changes deal with changes in System storage and releases that regulate: (1) the storage available in the System reservoirs; and (2) the releases of water into the River at any given time. The River Changes deal with modifications to the BSNP River control structures to change how the River water is managed to change the River's geomorphology to reconnect it to its historical flood plain.

B. Plaintiffs' Theory of Causation as to System Changes

Because the Court dismissed Plaintiffs' 2011 claims for the foremost reason that Plaintiffs had purportedly failed to establish causation as to the System Changes alleged, a separate discussion of causation as to System Changes is necessary to the determination of Plaintiffs' Motion. Specifically, in dismissing their 2011 claims, the Court concluded that the "single purpose" relied upon by Plaintiffs for establishing causation under the single purpose analysis of ***Arkansas Game & Fish III*** was to comply with the ESA. **Trial Op at 34-35, 38, 80-82.** According to the Court's findings, since the System Changes Dr. Christensen established as contributing to cause the flooding in 2011 had nothing to do with ESA compliance, Plaintiffs had failed in proving causation of the System Changes in isolation, but necessarily as to the combined causation of the System and River Changes given their interdependence in causing the flooding in question under Plaintiffs' macro theory of causation.

The Corps' operation of the System is governed by the Master Manual. ***Id.* at 8.** To achieve the MRRP and its objectives, the 1979 Master Manual was revised in 2004 and again in 2006 to deprioritize flood control, adopting an adaptive management approach in operating the System that would "balance" all eight purposes of the FCA, rather than giving first priority to flood control **at all times**. ***Id.* at 9-10, 23-24.** Thus, under the Master Manual MRRP revisions,

the Corps had greater and more flexible discretion in operating the System to benefit fish and wildlife, as well as the other FCA purposes, than it had under the 1979 Master Manual, but less discretion in its authority to prioritize flood control. Plaintiffs allege that the System Changes affected how much water was stored in and released from the System reservoirs in the flood years in question, including 2011. And, of course, the effect of those changes on flooding would not only result from the releases that were made, but the releases that were not made due to the revisions to the Master Manual.

Plaintiffs' theory does **not** allege that the Corps' record releases in 2011 deviated from the guidelines of the 2006 Master Manual. Rather, it recognizes that *at the time* the 2011 storage and releases decisions were made, including the *record summer releases,* the Corps was acting in accordance with the 2006 Master Manual and had no choice but to make them. Hence, Plaintiffs' theory of causation as to System Changes causing 2011 flooding and its proof is not based upon Corps deviations from the Master Manual that existed at the time of the 2011 flooding, the new Master Manual. Rather, it is based upon the Corps deviating from the 1979 Master Manual that gave flood control first priority at all times. As such, any evidence that the Corps deviated from the new Master Manual or made a "wrong call" in operating the System is irrelevant in determining whether Plaintiffs had established the causation of the System Changes and should be ignored as being superfluous. Specifically, the trial testimony of Ms. Jody Farhart and other witnesses **justifying** the Corps' storage and release decisions for the flood years in question as being consistent with the new Master Manual, is irrelevant in determining causation as to System Changes. In fact, as the Court will well remember and the record reflects, Plaintiffs' briefed during and after trial that such a "justification defense" was irrelevant in making the requisite but for comparison to determine the causation of Plaintiffs' claims.

Unlike tort actions, takings actions are not predicated upon any negligence, wrongdoing or fault as to the actions that allegedly took the property in question. *See* ***Poorbaugh v. United States*, 27 Fed. Cl. 628, 634 (1993)**. As emphasized by Plaintiffs during and after trial, their theory of causation, consistent with Fifth Amendment takings jurisprudence, does not allege any negligence, wrongdoing or fault by the Corps in operating the System or in operating and maintaining the BSNP. Hence, as alleged, causation as to Plaintiffs' claims, including the 2011 claims, is not based upon what the Corps *should or could have done* in managing the River, but based upon what it *would have done* in operating the System and operating and maintaining the BSNP but for the Corps' RMP changes to implement the MRRP. Under Plaintiffs' theory of causation as to System Changes, the requisite but for comparison is a comparison of the releases the Corps *actually made* under the new Master Manual and the releases it *would have made* under the 1979 Master Manual to determine whether the modeled 1979 Master Manual releases would have helped avoid the property injuries for which Plaintiffs are seeking compensation.

Because Plaintiffs' theory of causation as to System Changes is not based upon any deviation by the Corps from the 2006 Master Manual or any wrongdoing, negligence or fault of the Corps in operating the System, Plaintiffs' theory *does not* attack the Corps' *exercise of its discretion* to operate the System under the new Master Manual. In other words, Plaintiffs' theory does not allege how the Corps *should* or *could* have exercised its discretion in making decisions as to System storage and releases or that the Corps made a wrong or bad call in operating the System.[3] Hence, any evidence challenging the Corps' exercise of its discretion under the Master Manual to operate the System is irrelevant and superfluous to this issue at hand.

[3]An allegation questioning the Government's exercise of discretion cannot be the basis for a taking. *See* ***Nicholson v. United States*, 77 Fed. Cl. 605, 622, 624 (2007)** (holding that attacks on an agency's discretion in how it provided flood protection, such as releases, do not support

As Plaintiffs' theory of causation as to System Changes alleges, the critical change in the Corps' operation of the System as it relates to storage and releases and the resulting flooding in question was the change in System priorities. As found by this Court, under the 1979 Master Manual, the number one priority was flood control, while under the new MRRP Master Manual, flood control was deprioritized to be balanced with the other FCA purposes that inevitably had conflicting interests. *See* **Trial Op. at 9-10, 23-24; Tr. 13757:20-13758:6, 13764:23-13765:20.** It is not the case, and Plaintiffs' theory does not allege that flood control was never to be given priority by the Corps under the new Master Manual. Rather, the change in priorities dictated a change *in the nature of the flood control priority* – a change from the Corps' 1979 Master Manual **preemptive priority** of flood control to its MRRP **reactive priority** of flood control.

Under the preemptive priority of flood control, the Corps, in exercising its discretion in operating the System, was to give priority to flood control when making any operational decisions where a potential conflict existed between flood control and another FCA purpose, including fish and wildlife. Under that priority, the Corps was to err on the side of flood control even if it meant potentially harming another purpose. However, under the Corps' MRRP reactive priority of flood control, flood control was not to be given priority in its operation of the System *unless and until* extraordinary flooding was imminent. In 2011, this meant storing more water in March and April and waiting to make larger flood control releases to evacuate the reservoirs until later in the year when the record releases were made.

The Master Manual change in priorities of flood control required the Corps, post ROD, to operate the System in a manner that would accomplish the MRRP purpose of deprioritizing flood

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takings claims), *see also* ***Laughlin v. United States,*** **22 Cl. Ct. 85, 102-03 (1990)** (allegations "[t]hat a government agency could have forecast more accurately the heavy snowmelt" also does not support a takings.) However, Plaintiffs' theory of causation does not question the Corps' exercise of its discretion in operating the System.

control to return the River to a more natural state to benefit all the FCA purposes. This resulted in a significant change in the Corps' operation of the System with respect to the volume of water being stored and the size and timing of the releases that were made by the Corps in all the flood years, including in 2011. At the time of this change, it was predictable that it would lead to increased flooding. Logic dictates that the preemptive priority gave the Corps the best chance of avoiding flooding before it was imminent and too late to act, as was the case in 2011. Specifically, as to 2011 flooding, Plaintiffs' theory of causation alleges that the Corps made storage and releases decisions early in 2011 pursuant to the new Master Manual that it would not have made under the 1979 Master Manual and that by the time flooding was imminent, it was too late to avoid having to make the historic releases of 160,000 cfs, rather than 100,000 cfs maximum releases that *would have been made* under the 1979 Master Manual. Plaintiffs allege that this substantial increase in the peak releases would have been avoided under the preemptive priority of flooding and that this increase contributed to cause the 2011 flooding in question.

Misinterpreting Plaintiffs' allegations regarding the change in the Corps' priorities in operating the System, Ms. Farhat pushed backed against a straw-man as to the Corps' priorities in operating the System – that after the adoption of the new Master Manual flood control no longer had any priority in the Corps' operation of the System. In fact, all parties recognized that when extraordinary flooding was imminent or underway flood control would be given priority as provided in the 2006 Master Manual. Hence, under Plaintiffs' theory of causation, the relevant issue is not what the Corps did in operating the System when already faced with significant flooding and little to no remaining System storage, the relevant issue is *how and why things got to that point in the first place* and whether it was due to the a change in System priorities.

The Court's own findings implicitly recognize the important distinction between the System preemptive and reactive priorities of flood control and the significant effect of changing from one to the other in causing increased flooding. Specifically, the Court's findings recognize that:

> the Corps acknowledges that during years of high early runoff from rain and snowpack melt above the System dams, if the System does not have enough storage to impound all of the runoff, the Corps may have to choose between making higher early releases, even if that would likely wash away nesting birds and contribute to early flooding downstream, or holding more water in the reservoirs and hope that spring rains are below normal.

Trial Op. at 24. This finding of the Court implicitly recognizes that in operating the System under the new 2006 Master Manual, which abandoned the 1979 Master Manual preemptive priority of flood control, the Corps, in order to balance all the FCA purposes has been forced to make numerous Hobson's choices in deciding the timing and size of its releases.

With respect to changes in the Corps' operation of the System to implement the MRRP, the Court found that two significant revisions were made to the 1979 Master Manual guidelines. First, the Court found that the "new Master Manual authorized the Corps to keep [store] a larger amount of water in the reservoirs for the benefit of **other purposes, including fish and wildlife."** ***Id.*** (emphasis added)**.** Regardless of what FCA purpose is benefitted by an increase of storage at any given time, the fact that more water could be and was stored under the new Master Manual than under the 1979 Master Manual is significant under Plaintiffs' theory of causation. This, however, is just one facet of Plaintiffs' theory of causation as to System Changes contributing to cause the flooding in question. There is a second facet or mechanism that springs from a second change in the 1979 Master Manual guidelines found by the Court, that the "new Master Manual addresses the need to return the River to having more varied river stages for the benefit of T&E Species." ***Id.*** Unlike the first mechanism, the storing-more-water

mechanism, which applies to the Corps' actions to store more water in the reservoirs for any FCA purpose, this second causation mechanism, the ESA T&E mechanism, was intended to benefit ESA-listed species. In any event, as this Court has found, the System Changes as to storage and releases alleged by Plaintiffs clearly encompass more than just T&E releases.

Plaintiffs' theory of causation for how the System Changes would contribute to cause the flooding in question, including 2011 flooding, is predicated on *both* the storing-more-water and T&E mechanisms. Hence, under Plaintiffs' theory of causation, the flooding effects of the System Changes in some years could be from increased storage of water and smaller early releases, resulting in larger releases that cause flooding later in the season as in 2011, while in other years they would be directly from T& E releases. Hence, depending on the specific circumstances of any given year of flooding, one or both of the mechanisms might be implicated. Regardless, as a matter of law, Plaintiffs would only be required to prove one of the two mechanisms to establish the causal connection between the Corps' System Changes and the flooding in question. As such, the manner in which System Changes caused flooding in each of the flood years in question does not have to be identical, as the Court has mistakenly found in dismissing Plaintiffs' 2011 claims. Thus, the fact that the 2011 record peak releases were not T&E releases cannot be used as a basis for dismissing the 2011 claims. As long as the evidence establishes that the System Changes contributed to cause the flooding in question, regardless of which specific System Changes causation mechanism is implicated, Plaintiffs necessarily will have satisfied their burden of proof as to causation with respect to those System Changes.

By definition, both the storing-more-water and T&E mechanisms of causation as to System Changes serve the "single purpose" on which Plaintiffs **actually** relied for establishing the causal connection between the Corps' System Changes as to storage and releases and the

flooding in question – the single purpose of the MRRP to deprioritize flood control in order to return the River to a more natural state to balance the interests of all FCA purposes.

C. First Primary Reason Found by the Court for Dismissing Plaintiffs' 2011 Claims – the System Changes Alleged as Contributing to Cause the 2011 Flooding "Had Nothing to Do with ESA Compliance"

The first and "foremost" reason found by the Court for dismissing Plaintiffs' 2011 claims was because Plaintiffs had failed to establish that the Corps' 2011 System Changes were done in furtherance of what the Court found was the "'single purpose' [Plaintiffs had] relied upon to establish causation for the other flood years" – to comply with the Endangered Species Act ("ESA"). **Trial Op. at 80.** In so finding, the Court relied upon what it accepted as Plaintiffs' theory of causation as to the 2011 claims and the single purpose relied upon, "that the cumulative and combined effects of the Corps' System and River Changes can give rise to a taking, to the extent the System and River Changes '**serve a single purpose**.'" ***Id.*** **at 81-82** (emphasis added)**.**

The Court's finding that the single purpose relied upon by Plaintiffs in establishing causation as to System Changes was to comply with the ESA misinterprets Plaintiffs' theory of causation as to System Changes; misinterprets the single purpose analysis of ***Arkansas Game & Fish III***; and is in direct conflict with some of its own findings. As discussed below, Plaintiffs alleged and established: (1) that the combined System and River Changes acted to cause the 2011 flooding in question; and (2) that those changes acted in concert to accomplish the "single purpose" Plaintiffs actually relied upon – the single purpose of the MRRP to deprioritize flood control in order to return the River to a more natural state to benefit equally all FCA purposes – to establish not only the causation of the System Changes, but the causation of the River Changes as well. Hence, the actual single purpose relied upon by Plaintiffs to establish causation, as well as foreseeability, was not the narrow single purpose found by the Court as the "primary and foremost" reason to dismiss all of Plaintiffs' 2011 claims – ESA compliance.

The Court, in dismissing Plaintiffs' 2011 claims, based upon its single-purpose conclusion, assumed, without discussion, that the single purpose on which Plaintiffs were relying to establish the causation of the 2011 System Changes under the single-purpose analysis of ***Arkansas Game & Fish III*** was compliance with the ESA. As such, the Court only reviewed Plaintiffs' causation evidence as to the causal connection between the System Changes and the 2011 flooding, which it limited to Dr. Christensen's testimony, to determine whether Plaintiffs had established that the Corps' actions in 2011 in operating the System as to storage and releases was done to comply with the ESA. Finding that it had not, the Court rejected not only Dr. Christensen's testimony, but necessarily rejected all of Plaintiff's other causation evidence as to this issue as well. The fact is that Plaintiffs' evidence of the causal connection between the System Changes and the 2011 flooding demonstrates that the Corps' changes in storage and releases in 2011 based upon a change in System priorities were caused by the Corps' implementation of the MRRP and were done to further its purpose.

In assuming incorrectly that the sole purpose relied upon by Plaintiffs was ESA compliance and rejecting Plaintiffs' causation evidence based upon that assumption, the Court never considered that the single purpose being relied upon by Plaintiffs was broader than ESA compliance and that Plaintiffs' causation evidence was sufficient to establish that the Corps' System changes were consistent with that broader single purpose. As discussed in this section, the record and the Court's own findings establish that the single purpose relied on, the MRRP purpose, was broader than ESA compliance, a purpose that encompasses both the more-water-stored and the T&E mechanisms of Plaintiffs' causation theory as to System Changes found by this Court and discussed above.

1. Plaintiffs' Single Purpose under *Arkansas Game & Fish III*

Plaintiffs' theory of causation is not predicated upon a series of interim deviations from the Corps' Old RMP adopted by it on a year-by-year basis. Rather, it is predicated on deviations that are a part of a single multi-year plan that implemented a New RMP for both the operation of the System and the operation and maintenance of the BSNP. Those deviations are the System and BSNP Changes and the plan is the MRRP, as this Court has found. It is the combined or "collective" effects of those changes over time that Plaintiffs rely upon to establish causation. Accordingly, Plaintiffs' theory of causation places the analysis of their claims for all flooding years, including 2011, within the purview of the single-purpose analysis approved in ***Arkansas Game & Fish III. Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1370 (Fed. Cir. 2013).** There, the Federal Circuit held, in pertinent part, that in determining whether there has been taking, the court must assess the "**collective" effects of the multi-year plan of the alleged deviations**, even if the flooding occurs over a period of years. ***Id.*** (emphasis added)**.** "The government cannot obtain an exemption from takings liability on the ground that the series of interim deviations were adopted on a year-by-year basis, rather than as part of a single multi-year plan, when the deviations were designed to serve a *single purpose and collectively* [or cumulatively] *caused* [injury to the landowner's] property." ***Id.* at 1370** (emphasis added)**.** Thus, in ***Arkansas Game & Fish III***, the Federal Circuit rejected the government's argument that in assessing whether there had been a taking of plaintiff's property, the trial court should have treated the seven years of flooding from the single purpose of the government's actions as seven separate one-year floods, rather than as one flood of seven years. ***Id.*** Hence, under the single purpose analysis, on which Plaintiffs' 2011 claims are based, it is the single purpose of the multi-year plan in question, in this case, the MRRP, that controls. *See* **Pls.' Opening Post-Trial Br. at 96, Sept. 21, 2017, ECF No. 374** ("Hence, consistent with the single-purpose analysis approved

by the Federal Circuit in ***Arkansas Game & Fish* [*III*]**, this Court, in assessing the compensability of the Plaintiffs' takings claims, must view all of the flooding that has been caused by the Corps' actions in authorizing and implementing the MRRP . . . as one ongoing, single-purpose flood – the MRRP flood.").

While the MRRP and the Corps' ESA obligations are intertwined, the single purpose of the MRRP relied upon by Plaintiffs is broader than just ESA compliance; the MRRP, after all, includes the Corps' comprehensive revisions to its Master Manual. This is confirmed by the Corps' 2004 Final EIS, the NRC's 2011 report, and Ms. Farhat's **Rule 30(b)(6)** testimony. *See* **PX17 at PLTF-00007950** ("The environmental impact statement and the updated Master Manual committed . . . the Corps to a new program in 2004, known as the Missouri River Recovery Program (MRRP)"); **PX110 at USACE0005085-86** ("The Basic Measures in MRRIP Include . . . Implementation of the revised Water Control Plan"); **Tr. 893:11-13** ("the Recovery Program as a whole . . . is much broader than just the Master Manual"). While the MRRP resulted in significant modifications to BSNP structures, it also produced important changes to the Corps' priorities in operating the System that directly affected the size and timing of releases from the System reservoirs that contributed to cause the 2011 flooding.

For the foregoing reasons, to the extent that the Court in dismissing Plaintiffs' 2011 claims relied upon the single purpose of Plaintiffs' theory of causation being limited solely to ESA compliance, it misunderstood and misinterpreted Plaintiffs' theory of causation as to System Changes, and misapplied ***Arkansas Game & Fish III*** as to the single-purpose analysis.

2. Single Purpose of MRRP Was to Deprioritize Flood Control to Return the River to a More Natural State to Benefit Equally All FCA Purposes

The MRRP was authorized by the ROD, which was in response to multi-district litigation against the Corps regarding its management of the River, and as found by the Court, in response

to pressure from the Fish and Wildlife Service "to address the harm to the Missouri River Basin ecosystem the Corps had caused in operating the Missouri River Mainstem Reservoir and Dam System **and** in constructing the BSNP." **Trial Op. at 17** (emphasis added). In fact, the ROD, in authorizing the MRRP, expressly provided that the Corps' MRRP actions have two general objectives: "[1] to restore the Missouri River ecosystem, **and** [2] to protect and recover ESA-listed species." **PX114 at PLTF-PX00000541** (emphasis added). Hence, the MRRP purpose is not just to recover ESA-listed species by complying with the ESA.

The MRRP was not authorized simply to make changes to the Corps' operation and maintenance of the BSNP. Rather, the language of the ROD makes it clear that the MRRP was authorized to also address the Corps' operation of the System with respect to storage and releases. The Corps' Old RMP for storage and releases, under the 1979 Master Manual, favored flood control and had worked in tandem with the BSNP structures to not only harm the River's ecosystem but the other FCA purposes, including fish and wildlife. As a consequence, the implementation of the MRRP forced revisions in the 1979 Master Manual as to storage and releases that would balance the interests of all the FCA purposes by deprioritizing flood control, *e.g.*, the change from the preemptive priority of flood control to the reactive priority. Hence, a critical part of the purpose of the MRRP was to balance the interests of all the FCA purposes by changes in the operation of the System. Accordingly, any System Changes as to storage and releases made in furtherance of that change in priorities would be in furtherance of the single purpose of the MRRP – to deprioritize flood control to return the River to a more natural state to balance equally the interests of all FCA purposes, including fish and wildlife. In other words, the System Changes in question do not have to be tied to strict ESA compliance to be part of the single purpose of the MRRP on which Plaintiffs relied to establish causation.

3. The MRRP System Changes Caused Larger Peak System Releases that Contributed to Cause the 2011 Flooding in Question

Plaintiffs' theory of causation as to System Changes alleges that but for the Corps' change in priorities as to flood control under the MRRP new Master Manual, the change from a preemptive priority under the 1979 Master Manual to a reactive priority, the peak System releases in the summer of 2011 would have been much smaller. From that, Plaintiffs allege that the MRRP-induced increase in those summer releases contributed to cause the 2011 flooding. In keeping with its theory, Plaintiffs introduced evidence at trial, including from Dr. Christensen, that the Corps' Master Manual revisions, as part of the MRRP – in particular, the express deprioritization of flood control, the transition from Plate 44 (and its mandatory minimum releases) to Plate VI-1 (and its advisory guidance), and the additional storage of water – were critical System Changes **and** important contributory causes of the historic releases and catastrophic flooding in 2011. *See,, e.g.,* **Tr. 4517:23-4524:11, 4525:4-4529:7, 4529:20-24, 4530:5-4535:7, 4610:22-4613:19.** In fact, the record releases were directly tied to recovering ESA-listed species, by complying with the ESA. Specifically, the Corps' smaller releases of water in early 2011 before the significant flooding began, was the direct result of the Corps' multi-purpose operations under the new 2006 Master Manual that benefited, *inter alia*, T&E species. This was confirmed by Dr. Christensen and Dr. Grigg and thus reflects expert testimony from both sides.

In its Trial Opinion, the Court opined, without citation, that "[t]he plaintiffs, through their expert, Dr. Christensen, conceded that the System releases in 2011 were not related to the Corps' ESA obligations under the 2003 BiOp." **Trial Op. at 48 n.27.** However, Dr. Christensen (and Plaintiffs more generally) never conceded this point. In fact, Dr. Christensen affirmatively testified that ESA obligations and operations to benefit T&E species were among the specific

causes that prevented earlier and larger releases in 2011 that would have helped to control the catastrophic summer flooding. *See* **Tr. 4625:12-20** ("New policy, T&E species and other balanced priority purposes prevented the early flood control first releases required to control an 1881 magnitude flood such as in 2011."); **Tr. 4598:25-4599:8** (In 2011, "[t]he Corps planned to defer the Plate VI-1 minimum flood control releases until after the T&E species nesting season (late August through the fall) for T&E nest protection."); **Tr. 4613:13-20** ("T&E. They were making lower releases in April so they could do them later in May and June.").

As the Court acknowledged in its Trial Opinion, Dr. Christensen testified that "the lack of system storage" and "the Corps' failure to release water from the reservoirs early enough in the year and in sufficient quantities" contributed to cause the catastrophic flooding in 2011. **Trial Op. at 62-63** (*quoting and citing* **Tr. 4591:24-4594:8**). The Corps' additional storage of water under the new Master Manual to benefit, *inter alia*, T&E species in the early months of 2011 constrained the Corps' authority and ability to make preventative flood control releases that it would have made under its old RMP. Dr. Christensen ultimately concluded from his modeling that had the Corps followed the 1979 Master Manual and Plate 44 in 2011, "the Corps would have limited releases from Gavins Point downstream to 100,000 cfs and thus limited the severity of flooding." **Trial Op. at 78** (*citing* **Tr. 4592:8-4594:8; PX2060-A at 5; PX2094-A at 4-16**); *see also* **Tr. 4601:1-6, 4625:12-16, 4794:11-15**.

Dr. Grigg largely agreed with Dr. Christensen and testified that, prior to April 1, 2011, the Corps was operating for and balancing all authorized purposes (by definition, "all authorized purposes" includes T&E species) without higher priority for flood control. *See* **Tr. 13764:23-13765:20** (Dr. Grigg agreeing that before extraordinary flooding began, "the Corps was operating by trying to balance all authorized purposes" and agreeing that this multi-purpose

operation before April 1 "*affected flood control* because that's the essence of balancing") (emphasis added)). Dr. Grigg's testimony is consistent with Plaintiffs' theory of causation that the Corps reactively prioritized flood control under the new Master Manual only after significant flooding was already underway. Dr. Grigg and the independent review panel ultimately concluded that had the Corps implemented larger early season releases in 2011, "flood damage would have been greatly reduced[.]" **PX848 at 77-78;** *see also* **Tr. 13751:5-19.**

Under Plaintiffs' theory of causation, the record releases were, indeed, the direct result of and in furtherance of the single purpose of the MRRP. In fact, the record releases were directly tied to recovering ESA-listed species, by complying with the ESA. Accordingly, this Court's finding that the Corps' 2011 System releases that are alleged to have contributed to cause the 2011 flooding in question "had nothing to do" with the single purpose on which Plaintiffs actually relied to establish causation is contrary to the law, Plaintiffs' theory of causation, the factual record, and the Court's own findings. Under Plaintiffs' theory of causation and the single purpose of the MRRP, the Corps' record releases in 2011 had everything to do with the single purpose of the MRRP – it was the direct result of the same.[4]

The disconnect between the Court's single-purpose finding dismissing Plaintiffs' 2011 claims appears to be more than just misidentifying the single purpose on which Plaintiffs relied to establish causation. That disconnect appears to also be fueled by the fact that the Court necessarily found the late record releases, on which Plaintiffs rely to establish causation, were

[4] Plaintiffs acknowledge the Court's finding that the devastating 160,000 cfs releases were necessary to "save the mainstem System" **(Trial Op. at 85)** after the structural integrity and safety of the dams were at risk. Again, however, the relevant causation issue was how and why the System got to that state of emergency in the first place – and was it the result of the MRRP. While the historic peak releases were not, by themselves, a "T&E release," these releases were certainly caused by and were the direct, probable, and natural consequence of the MRRP and the Corps' ESA obligations, which compelled the Corps to store additional water and not make preventative flood control releases in March and April of 2011 in accordance with the new 2006 Master Manual and its equal balancing of FCA priorities.

simply made for flood control and "had nothing to do with" any other purpose. However, in so finding, the Court misinterprets Plaintiffs' theory of causation and the resulting chain of causation that ties the 2011 record releases directly to the single purpose of the MRRP.

Logically, to establish that the 2011 record releases of 160,000 cfs were in furtherance of the single purpose of the MRRP requires an analysis of the chain of causation between the implementation of the MRRP and those releases. Under Plaintiffs' theory of causation as to System Changes, that chain of causation would include: (1) that the implementation of the MRRP in 2004 **caused** the Corps to deprioritize flood control in its operation of the System as to storage and releases; (2) that the MRRP deprioritization of flood control **caused** the Corps to change from the preemptive priority of flood control under the 1979 Master Manual to the reactive priority under the MRRP new Master Manual; (3) that the Corps' change in System priorities **caused** the Corps' to make storage and releases decisions in early 2011 *prior* to the record summer releases that it would not have made under the 1979 Master Manual preemptive priority of flood control; (4) that the changes in storage and releases under the new Master Manual due to the change in System priorities, **caused** the maximum releases to be 160,000 cfs instead of 100,000 cfs, as would have occurred under the 1979 Master Manual preemptive priority according to Dr. Christensen's modeling; and (5) that this substantial increase in peak releases, in combination with the River Changes, contributed to **cause** the 2011 flooding in question. This chain of causation is in keeping with Plaintiffs' theory that the 2011 flooding was "originally set in motion" by the Corps' implementation of the MRRP deviating from its Old RMP both as to its operation of the System and its operation and maintenance of the BSNP. *See* ***Cary v. United States*, 552 F.3d 1373, 1378 (Fed. Cir. 2009).** This chain of causation clearly establishes that the significant increase in peak releases of 2011 that contributed to cause the

2011 flooding was the direct result of the System change in flood control priorities **due to the implementation of the MRRP**. But for that change, Plaintiffs' evidence and Dr. Christensen's modeling establish that the maximum releases would have been limited within the System design of 100,000 cfs, rather than the 160,000 cfs releases that contributed to cause the 2011 flooding.

Given the foregoing, the Court has no basis at law or in the record to conclude that the "releases in 2011 were not part of the 'single purpose'" on which Plaintiffs **actually** relied to establish causation – the MRRP single purpose. Thus, this Court cannot dismiss Plaintiffs' 2011 claims based upon that "foremost" reason, as it did. To prevent manifest injustice, the Court should reconsider its 2011 dismissals on that basis and reconsider whether Plaintiffs have demonstrated that but for the System and River Changes the flooding would not have been of such severity and duration to have caused the injuries for which Plaintiffs seek compensation.

4. The Court's Reliance on Two Reports to Confirm Its Single-Purpose Conclusion Dismissing the 2011 Claims Is Misplaced

In dismissing Plaintiffs' 2011 claims based upon its single-purpose conclusion, the Court opines that its "conclusion is confirmed" by the *Review of the Regulation of the Missouri River Mainstem Reservoir System During the Flood of 2011* ("Panel Report") and the *2011 Missouri River Flood Report: Opinions, Bases, Reasons, Facts and Data* ("Grigg Expert Report"). **Trial Op. at 80-82.** The Court's takeaway from those reports was that the record 2011 releases had nothing to do with complying with the ESA. However, that takeaway is predicated on the Court's misinterpretation of Plaintiffs' theory of causation and the single purpose relied upon by Plaintiffs to establish causation was simply to comply with the ESA, rather than the single purpose of the MRRP, and that the late releases had nothing to do with the MRRP. Accordingly, the Court's reliance on these two reports is misplaced and does not provide any support for dismissing Plaintiffs' 2011 claims on the Court's single-purpose basis, or any other basis.

In support of its "single-purpose" dismissal of Plaintiffs' 2011 claims, the Court, quoting from the Panel Report, states in its Trial Opinion that the Panel's "experts concluded that the Corps' 'decisions related to storage and evacuation of spring runoff were not influenced or affected by consideration of threatened or endangered species.'" **Trial. Op. at 81** (citation omitted)**.** This quotation comes from the Panel's discussion of the effects of the "bimodal spring pulse releases" to recover and protect the pallid sturgeon required by the 2003 Amended Biological Opinion, on the Corps' 2011 System storage and releases. **DX192 at DX0192-0074.** In context, the quotation relied upon by the Court only speaks to the Corps' concerns for threatened or endangered species as it relates to spring pulse releases. Of course, Plaintiffs' theory of causation does not hypothesize 2011 flooding caused by such releases. Moreover, the quote does not speak to all of the Corps' 2011 storage and release decisions and whether they were influenced by the MRRP change in System priorities under the new Master Manual **as to balancing all FCA purposes**.

The Panel Report was primarily commissioned to determine whether the Corps' operation of the System in 2011 deviated from the new 2006 Master Manual that led to flooding, which does **not** analyze Plaintiffs' theory of causation as to System Changes. As discussed above, Plaintiffs' theory of causation is predicated on a deviation from the 1979 Master Manual as part of the implementation of the MRRP, not a deviation from the new Master Manual. The Panel made no attempt to determine if the Corps' 2011 operation of the System as to storage and releases constituted a change in RMP that deviated from the 1979 Master Manual guidelines that lead to the flooding, **Tr. 13721:16-13723:18**, which is the relevant inquiry given Plaintiffs' theory of causation. Moreover, as to the bimodal spring pulse releases that the Panel's experts were addressing, Plaintiffs' theory does not claim that they caused the 2011 flooding. Critically,

the Panel made no but for comparison between the Corps' storage and releases under the new Master Manual and what they would have been under the 1979 Master Manual.

As to Dr. Grigg, the Court relied on his explanation in his Expert Report that, in 2011, "operation for purposes other than flood control (*including environmental purposes*) were suspended or assigned secondary priority once significant flooding started . . . ." **Trial Op. at 81** (*quoting* **PX847 at 5**) (emphasis added). Importantly, this excerpt actually *confirms* Plaintiffs' theory of causation that, in 2011, rather than operating under the preemptive priority of the 1979 Master Manual, the Corps reactively prioritized flood control under the new Master Manual *only after* significant flooding was already underway. Additionally, the fact that the multi-purpose operation (including for "environmental purposes") needed to be "suspended" implies that the Corps was, in fact, making storage and release decisions between January and April based on MRRP considerations, including T&E species and ESA considerations. *See also* **Tr. 13687:8-11, 13764:23-13765:20** (Dr. Grigg agreeing that this multi-purpose operation before April 1 "***affected flood control*** because that's the essence of balancing"). Moreover, this excerpt does not even address the early storage and releases on which Plaintiffs' theory of causation is predicated – that they were done as part of the single purpose of the MRRP and they caused the record releases, which contributed to cause the 2011 flooding.

5. Plaintiffs' Evidence Was Sufficient to Establish that the 2011 Releases, Including the Record Peak Releases, Were the Direct Result of the Implementation of the MRRP and in Furtherance of Its Purpose

The Court dismissed Plaintiffs' 2011 claims based upon its single-purpose conclusion that "[b]ecause the releases in 2011 were not part of the 'single purpose' to comply with the ESA, the flooding caused by the System Releases in 2011 cannot be considered with the other flood years to establish the plaintiffs' takings claims." **Trial Op. at 82.** It did not address

whether Plaintiffs' evidence established that the 2011 releases, including the record releases, were set in motion or were caused by the implementation of the MRRP and the change in System priorities as to flood control. The fact that the foremost reason given for the Court's dismissal is predicated on its clear misinterpretation of Plaintiffs' theory of causation and application of the ***Arkansas Game & Fish III*** single-purpose analysis, this Court should reconsider its dismissal of Plaintiffs' 2011 claims so that it can consider the 2011 System Changes' evidence along with all of Plaintiffs' other evidence to determine whether they proved their theory of causation.

As discussed *supra* in Section I.C.3, any fair reading of Dr. Christensen's testimony as a whole on this issue reveals that Plaintiffs did, in fact, establish that the 2011 System Changes as to storage and releases were in keeping with the purpose of the MRRP. He testified that "but for" the MRRP and the Master Manual revision, the Corps would have preemptively (not reactively) prioritized flood control in 2011 by storing less and releasing more water during the early months of 2011, which would have allowed it to limit the peak System releases to under 100,000 cfs. **Trial Op. 4625:12-25.** From that, he concluded that the 2011 flooding would have been less severe and of shorter duration such that the injuries to Plaintiffs' properties, *for which they seek compensation*, would not have occurred. **Tr. 4600:16-4601:12.** Plaintiffs' evidence supports the fact that **in furtherance of the single purpose of the MRRP**, the Corps made decisions in 2011 as to System storage and releases that it would not have made before the implementation of the MRRP, decisions that ultimately contributed to cause the 2011 flooding that, in turn, caused the injuries to Plaintiffs' properties and for which they seek compensation.

D. Second Primary Reason Found by the Court for Dismissing Plaintiffs' 2011 Claims – Plaintiffs Purportedly Did Not Establish that the 2011 Flood by Itself Meets the Causation and Foreseeability Tests to Serve as an Independent Basis for a Takings Claim

Although not the foremost reason for dismissing Plaintiffs' 2011 claims, the Court also found that Plaintiffs "ha[d] not established that the 2011 flood by itself meets the causation and foreseeability tests to serve as an independent basis for a takings claim." **Trial Op. at 82**. On close review, however, the Court did not find Plaintiffs' fact or expert witnesses unreliable or lacking credibility, and did not reject or dismiss their documentary evidence. Instead, the Court's conclusion flowed from its interpretation of Plaintiffs' theory of causation as to System Changes. Specifically, the Court did not find that the MRRP change in System flood control priorities – the change from a preemptive priority to a reactive priority of flood control – impacted the Corps' System storage and releases in 2011 sufficient to cause the injuries at issue. *See **Id.*** ("Plaintiffs' 2011 takings claims turn on their contention that when the Corps began balancing priorities under the new Master Manual, the Corps abandoned control as its first priority . . . ."). Hence, this "second primary reason" for dismissing Plaintiffs' 2011 claims is similar to the first primary reason found by the Court in that they both are based upon the Court's interpretation of Plaintiffs' theory of causation as to the change in System priorities as to 2011 storage and releases due to the implementation of the MRRP and its effects on the 2011 flooding in.

1. Plaintiffs' Theory of <u>Causation</u> as to 2011 System Changes to Storage and Releases Due to MRRP System Priority Change – Comparison of Conditions in the Upper Basin in 1997 with Those in 2011

Apparently focusing on one small portion of Plaintiffs' evidence establishing the causation of the 2011 System Changes, the Court found that to prove causation Plaintiffs "rel[ied] on a comparison of conditions in the upper Basin in 1997 with those in 2011." ***Id.*** And, because the Court found that there were "significant differences" between the two years impacting what storage and releases were made, found that "the premise of plaintiffs' takings claims for flooding in 2011 [was] not supported." ***Id.*** However, the record reflects that

Plaintiffs' theory of causation as to System Changes, the "premise," does not live and die with the 1997 comparison as the Court's finds. And, in fact, the 1997 comparison is not part and parcel of the requisite but for test to establish causation as to 2011 flooding. As such, even though the Court found that the 1997 comparison fails, logically, that would not be a basis for ignoring all of Plaintiffs' other evidence that was offered to establish causation as to the System Changes. As discussed above and in Plaintiffs post-trial briefing, regardless of the Court's finding as to the persuasiveness of the 1997 comparison, there is other substantial evidence in the record, including Dr. Christensen's quantitative modeling, that does not legally or factually rely on the 1997 comparison and satisfies Plaintiffs' theory of causation. To prevent manifest injustice, the Court should reconsider its dismissal of Plaintiffs' 2011 claims due to its finding that the weather and runoff conditions in 1997 were distinguishable from those in 2011.

While the Court's conclusion suggests that the 1997 comparison was the bedrock on which Plaintiffs proof of causation relies under its theory of causation that is simply not the case. Legally and factually, Plaintiffs can establish causation under their theory of causation as to the System Changes even though the Court rejects the 1997 comparison. Stated another way, by its very nature, the but for comparison as to the 2011 flooding that is required to establish causation is not reliant on the 1997 comparison as this Court has necessarily and incorrectly found in denying Plaintiffs' 2011 claims. Rather, the 1997 comparison was offered by Plaintiffs to demonstrate the effects of the Corps' change in flood control priority and to refute the government's argument that given the late snowpack melt and the late rains resulting in a record runoff, the 2011 flooding was going to happen regardless of the System Changes. Plaintiffs, to counter, wanted to demonstrate, *using 1997 as an illustration*, that flooding is not inevitable simply because there was a record runoff. Hence, Plaintiffs offered the 1997 comparison to

show that prior to the changes in the Corps' operation of the System and in its operation and maintenance of the BSNP there was a record runoff without flooding occurring, which is what happened in 1997 with a runoff second only to the 2011 runoff.

Plaintiffs would submit that the 1997 comparison does stand for the general proposition that flooding is not inevitable during years of record runoff. However, even if this Court's finding distinguishing the conditions that existed in 1997 with those in 2011 is sufficient to refute this general proposition, that is not legally or factually an automatic refutation of Plaintiffs' theory of causation as to System Changes that is dependent on the requisite but for analysis. And, of course, that requisite comparison is not legally or factually dependent on the 1997 comparison. Hence, this Court's conclusion ignoring all of Plaintiffs' other evidence that is legally and factually relevant on the issue of causation simply because it finds the 1997 comparison unpersuasive, is not supported by Plaintiffs' theory of causation or the law.

As discussed in briefing and in this Motion, to establish Plaintiffs' theory of causation as to the 2011 System Changes, the law requires a but-for comparison between **what flooding actually occurred in 2011 with** the Corps changing from a preemptive priority under the 1979 Master Manual to a reactive priority for flood control under the new 2006 Master Manual and **what flooding would have occurred in 2011 without** that change in priority. Thus, by definition, the requisite but-for comparison to establish the causation of 2011 flooding only addresses the with and without of the targeted flood year, not a comparison to a non-flood year. Hence, the requisite test to establish the but-for causation of the 2011 flooding due to the System Changes **does not** rely on the 1997 comparison, as this Court has necessarily found in dismissing Plaintiffs' claims based on that comparison. Simply put, while the Court's finding clearly posits that the 1997 comparison is part of the requisite but-for test to establish the causation of the 2011

flooding from the System Changes, it is **not**, such that the legal importance attached to it by the Court as being a but-for test of causation has skewed the Court's findings and conclusions in dismissing Plaintiffs' 2011 claims.

The Court, as to this issue, misinterprets the role of the 1997 comparison with respect to establishing Plaintiffs' theory of causation as to System Changes. In its Trial Opinion, the Court found that "because Dr. Christensen's modeling of the 'but for' world *depended upon* finding that upper Basin runoff in 2011 was virtually the same as 1997" it could not conclude "that 'but for' the new Master Manual, the Corps would have begun to make releases from the dams earlier and could have avoided the 160,000 cfs releases that resulted in devastating flooding in 2011." **Trial Op. at 83** (emphasis added). While Dr. Christensen did offer a *qualitative* comparison between the conditions and the Corps' operations in 1997 and 2011 to *illustrate* Plaintiffs' theory of causation and foreseeability regarding the 2011 flooding, Dr. Christensen's *quantitative* "but for" model for 2011 (and all other flooding years in question) **was not determined by the Corps' historic operations in 1997**, but instead was **dictated by Plate 44 in the 1979 Master Manual**. *See* **Tr. 4601:21-4602:14** ("My but-for model assumes . . . the Corps would have released minimum volumes from Gavins Point . . . ***as directed by Plate 44***. Pre-2004, the 1979 Manual required that the Corps consider the Plate 44 schedule as setting forth a minimum for releases, especially in . . . flood evacuation mode . . . . And pre-2004, the Corps, as a matter of policy and practice, adhered to the minimum release schedule in Plate 44.") (emphasis added)). During his direct examination, Dr. Christensen presented the 1997 example merely as a qualitative comparison to illustrate how the Corps' changed priorities resulted in concrete differences in release and storage decisions in 1997 and 2011, despite similar conditions.[5] *See*,

[5] Although it remains a purely illustrative comparison, Plaintiffs note that, besides Dr. Christensen, multiple *government* witnesses (including Corps employees, the government's

e.g., **Tr. 4598:1-10, 4610:9-15** ("In 2011, there was substantial under-releases relative to the Manual minimum releases levels. In 1997 – different releases reflect changed priorities. In 1997, the Corps released as much or more than the plate's minimum amounts."). Ultimately, Dr. Christensen testified that his "but for" reservoir release model relied on "the *same forecasts and the same storage levels* that the Corps people have" and "follow[ed] the release schedules and policies designed to prioritize flood control in the 1979 Manual" because "[e]ach release [he] made in [his] simulation ***was read and taken directly from Plate 44*** as that plate was utilized pre-2004 . . . ." **Tr. 4643:7-4644:15** (emphasis added). It was this change in priorities as reflected in the concrete change from Plate 44's *mandatory* minimum releases to Plate VI-1's mere *advisory* releases that actually contributed to cause the 2011 flooding, not the closeness of the comparison with 1997 conditions.

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causation expert, and the government's weather experts) all drew significant parallels between January–April 1997 and January–April 2011 regarding the weather, runoff, and the Corps' operations. *See* **Tr. 13022:22-13023:3, 13037:25-13038:13** (Webb), **13589:1-20** (Hoerling), **11904:17-11905:20** (Woodbury); **PX1814** (Grode); **PX2206** (Farhat). While the Court observed differences in the timing and volume of the runoff in 1997 and 2011, **Trial Op. at 82-83**, Plaintiffs respectfully submit that these differences are not particularly relevant to the comparative analysis. First, although the Court found that 2011 was colder and therefore experienced later inflows from snowmelt than in 1997, the relevant fact pertaining to Plaintiffs' theory of causation is not the timing of the snowmelt, but that the Corps *knew* in early 2011 that extensive snowmelt *already existed* in the mountains and plains and would *melt eventually*. *See*, *e.g.*, **PX691** (warning of substantial snow accumulation and forecasting future runoff and flooding); **PX2330** (same). Armed with these alarming forecasts, the Corps, operating under the 1979 Master Manual, would have evacuated space in the System for the substantial future inflows that they knew would inevitably melt in the coming weeks or months. Second, while the Court found that *annual* runoff was higher in 2011 than in 1997, it is crucial to note that the vast majority of the difference in *annual* runoff volume between the two years was the precipitation that fell in May and June of 2011, when it was already too late for preventative early season flood control evacuation. The most relevant point of comparison is the runoff before the significant flooding commenced, which is what affected the Corps' decision to make (or not to make) preventative *early season* releases. Accordingly, Dr. Christensen's 1997–2011 comparison analyzed these early months in question. *See* **PX2203** (focusing on releases and water supply forecasts from February to mid-May). Finally, the observed difference in March–April runoff between 1997 and 2011 was only 1.8 MAF. **DX3001-202**. Given the storage space allocated in the entire System, this difference is not particularly striking.

Bottom line, 1997 was not a targeted flood year of Plaintiffs' theory of causation requiring a but for test for that year. It was just being offered to show that there should not be an automatic bar to Plaintiffs' 2011 claims simply because there was a record runoff in 2011, which would be the equivalent of automatically barring a claim simply because there had not been a certain number of floods to establish severity. Of course, such automatic bars have been expressly rejected by the U.S. Supreme Court in ***Arkansas Game & Fish II***. ***Ark. Game & Fish Comm'n v. United States,* 568 U.S. 23, 37 (2012).** Hence, under the controlling law, in determining the elements of a taking, *e.g.*, causation, foreseeability, or severity, each case must turn on its own facts and has to be analyzed to determine whether the recognized standard has been met for a takings claim. ***Id.***

Because the 1997 comparison was not the sole evidence offered by Plaintiffs to establish the causation as to the 2011 System Changes, specifically, as to the change in priorities as to storage and releases, it should not summarily deny Plaintiffs' 2011 claims based upon a rejection of that comparison. Moreover, Dr. Christensen's quantitative "but for" reservoir release modeling, which guided his expert causation opinions, depended on Plate 44 and the 1979 Master Manual and not on the Corps' historic operations in 1997. Accordingly, this Court should reconsider its finding that Plaintiffs' theory of causation and Dr. Christensen's modeling hinges decisively on a comparison of weather and runoff conditions between 1997 and 2011. It should consider all of Plaintiffs' evidence that was submitted on this issue and make findings and conclusions as to why *that* evidence is not sufficient to establish causation, which it did not appear to do, requiring reconsideration.

2. Plaintiffs' Theory of <u>Foreseeability</u> as to 2011 System Changes – Distinguishing 1997 from 2011 as to Flood Control as a System Priority

In concluding that Plaintiffs did not establish the foreseeability of their 2011 claims as a basis for dismissal, the Court stated Plaintiffs' theory of foreseeability as their argument that the "2011 flood was the foreseeable result of the Corps' policy change, which no longer placed flood control as the Corps' first priority except when there were threats to human health and safety." **Trial Op. at 83.** With that as a given, the Court then found that the "new Master Manual requirement to balance priorities did not mean that flood control was ignored by the Corps during March and April 2011, thus making flooding inevitable." ***Id.*** The Court appears to be saying that given the fact that the change in System priorities under the MRRP and the new Master Manual did not mean that the Corps would no longer protect human health and safety from flooding, the Corps would not have known that such a change would lead to increased flooding such that the "increased flooding in 2011 was not the direct, natural, and probable consequence of the new Master Manual." ***Id.*** The Court's findings and conclusions dismissing Plaintiffs' 2011 claims for the purported failure to establish foreseeability misstate and misinterpret Plaintiffs' theory of foreseeability and overlook or misstate material matters of law and fact, requiring reconsideration of its dismissal on that basis.

a. Court's Foreseeability Findings and Conclusions Are Contrary to Tenets of the Legally Recognized Foreseeability Standard

The Court's 2011 foreseeability findings and conclusions dismissing Plaintiffs' 2011 claims are not consistent with the tenets of the recognized standard of foreseeability for a taking by flooding claim in several respects. Contrary to the Court's foreseeability findings and conclusions, Plaintiffs, under the recognized legal standard of foreseeability, were not required to show **that at the time the 2011 storage and release decisions were made**, the Corps knew that they would likely lead to the flooding in question. That standard also did not require Plaintiffs to show that the Corps actually knew and predicted that there would be the actual 2011 flooding in

question. It also did not require that Plaintiffs show that the Corps in making 2011 its decisions as to System storage and releases, chose to benefit fish and wildlife and other FCA purposes over protecting Plaintiffs.

Under the foreseeable standard of intent, a taking is "foreseeable" if it is the direct, natural or probable result of the alleged U.S. authorized actions for a public purpose and not a mere eventual or consequential injury inflicted by those actions. ***Cary*, 552 F.3d at 1377; *Moden v. United States*, 404 F.3d 1335 (Fed. Cir. 2005)**. To evaluate whether flooding is foreseeable, the proper inquiry is "whether the alleged injury was the predictable result of [that action]," *not that it was actually predicted*. ***Moden*, 404 F.3d at 1343** (citation omitted). In other words, in determining whether the foreseeability standard is satisfied, the question is whether the plaintiff's injury was "the likely result of the United States' act." ***Cary*, 552 F.3d at 1377** (citation omitted).

In this case, the Court's focus in making its findings and conclusions as to the foreseeability of the 20011 claims as to System Changes is on what the Corps was thinking at the time it made its decisions to store and release water in March and April of 2011. In that regard, the Court found that the Corps was concerned with downstream flooding in March and April 2011 such that the Corps' 2011 releases did consider flood control. **Trial Op. at 83-84.** In other words, the Court, in determining the foreseeability of the change in System priorities causing flooding, was focusing on the Corps' concerns **at the time** it was making its decisions as to System storage and releases. The timing of the Court's focus is contrary to the recognized legal standard of foreseeability.

Where, as here, the single purpose analysis of ***Arkansas Game & Fish III*** is invoked, the plaintiff, to establish foreseeability, must show that the flooding in question was foreseeable at

the "outset of the [Corps'] deviation period" or, in other words, in this case, at the time the Corps authorized the multi-year plan in question, which was the authorization of the MRRP in 2004. *See* ***Ark. Game & Fish,*** **736 F.3d at 1372-73**. Thus, the foreseeability of increased flooding caused by the change in System priorities in combination with the River Changes, under Plaintiffs' theory of foreseeability, must be determined by what the Corps knew or should have known at the time the change in priorities was mandated by the authorization of the MRRP and the adoption of the new Master Manual, **not** in March and April of 2011 when it was making its System storage and releases decisions on which this this Court's foreseeability findings and conclusions are based.

The apparent confusion as to when and how foreseeability is to be determined under the legally recognized standard for determining the same, not only led it to incorrectly focus on what the Corps was considering at the time of the actual System releases in March and April of 2011, rather than what it knew or should have known at the time of the System priority change or deviation in 2004, but to invoking several other aspects of a false standard. In that regard, the Court found that under Plaintiffs' theory of foreseeability and the controlling law, they had to demonstrate, *inter alia*, that the Corps "knew" at the time of the 2011 releases that the flooding in question would occur "because inflows exceeded the amount of storage available in the six reservoirs that make up the mainstem System, not because the Corps knew that would happen and then chose to protect one group of landowners over another." **Trial Op. at 84-85.** The legally recognized standard for determining foreseeability does not require Plaintiffs to show that the Corps "knew" that the increased flooding would occur and that it knew the exact mechanism of how it would occur. In addition to *not* being required to show foreseeability with respect to and at the time of each individual action of the Corps in deviating from its Old RMP to

implement the MRRP and new System priority, Plaintiffs are not required to show that the Corps could have predicted the exact causation-mechanics of the flooding in question, *i.e.*, predicting a particular act of Mother Nature such as heavy rainfall. *See* ***Palsgraf v. Long Island R.R. Co.,* 248 N.Y. 339, 344 (1928)** ("It was not necessary that the defendant should have had notice of the *particular method* in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." (internal quotation marks omitted) (emphasis added)). ***Palsgraf*** was cited favorably by the Supreme Court in ***Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527 (1995)**, for the proposition that proximate cause or foreseeability is simply meant to "eliminate the bizarre" consequences of the Corps' actions. ***Id.* at 536.**

Contrary to the standard of foreseeability relied upon by the Court in dismissing Plaintiffs' 2011 claims, Plaintiffs did not have to show that in making all of its decisions as to 2011 storage and releases, not just those in March and April, pursuant to the reactive priority of the new Master Manual, Plaintiffs did not have to establish that the Corps made a forced choice between "protect[ing] one group of landowners over another." **Trial Op. at 83-84.** This would seem to be a nod to the fact that the bedrock of takings claims is that private citizens should not be forced to sacrifice for the good of everyone without just compensation. In so finding, the Court is focusing on the wrong "choice." The choice at issue under the correct legal standard of foreseeability and Plaintiffs' theory is the choice that was made by the government when it forced the Corps to adopt the MRRP in 2004. That choice led to the change in System priorities in the new Master Manual. Plaintiffs' theory of foreseeability hypothesizes that **at the time of the change in System priorities**, the Corps was put on notice that it was likely that it could lead to increased flooding, similar to the flooding in 2011. The logic for that is that by the time the reactive priority is triggered, when extraordinary flooding is imminent, it would likely be too late

to undo the flooding effects of the early storage and release decisions made by the Corps, which is exactly what happened in 2011 when the Corps' decisions as to early releases directly led to the record peak releases. Hence, the requisite "choice" is the choice between keeping the preemptive priority of flood control, which would have avoided the increase in flooding in 2011, or deviating from that priority and adopting the new reactive priority of flood control that would not provide the same level of flood protection, **but** would allow the Corps to give all the FCA purposes equal treatment. The Corps was forced by the government to choose a change in priorities, which it knew or "should have known" would lead to the type of increased flooding that occurred in 2011. This is the requisite "choice" Plaintiffs were required to show to establish foreseeability, which they did, not the false "choice" posited by the Court's findings and conclusions.

To establish foreseeability under the foregoing applicable test and their theory of foreseeability, Plaintiffs only had to show that the 2011 flooding in question was the direct, natural or probable result of the change in priorities, which is different from establishing but for causation. In other words, under the controlling law as to the test of foreseeability, the question is whether the Corps, based upon its expertise and experience in operating the System for decades *would have* or *should have been* aware at the time the MRRP was authorized that as a direct, natural or probable result of that change in priorities it was likely that there would be increased flooding. Plaintiffs' evidence as to foreseeability when viewed as a whole clearly satisfies the recognized legal standard for establishing foreseeability.

This change in System priorities, as part of the implementation of the MRRP, was a significant change that would have reasonably put the Corps on notice of the potential for increased flooding; and, in fact, Plaintiffs presented evidence that established that the Corps was

on notice of this potential for increased flooding due to the change in System priorities. *See, e.g.*, **PX216 at FWS_00008418** (letter from Governor Holden to the Corps complaining that increased storage and deprioritizing flood control would lead to additional years of massive flooding as "ability to prevent and moderate flooding" is reduced); **PX363 at FWS_00037616-17** (top FWS and Corps officials noting that deprioritization may lead to overtopping of levees); As part of the public's input the Corps received regarding the 1979 Master Manual revisions and the implementation of the MRRP were numerous concerns of increased flooding; **Tr. 5741:13-18; 13140:1-8; 13141:11-13; 13151:24-13152:2; 13169:25-13170:4; 13170:8-11** (reflected broad general concerns about increased flooding independent of T&E cycling releases).

Additionally, the Court found that the 2011 flood was not "the foreseeable result of the Corps' policy change" because "[t]he new Master Manual requirement to balance priorities did not mean that flood control was ignored by the Corps during March and April 2011, thus making flooding inevitable." **Trial Op. at 83.** Specifically, the Court found that "the Corps claims that it did not make releases in March and April 2011 because it was in fact concerned with downstream flooding." ***Id.*** Respectfully, the Court should reconsider this finding because it relies almost exclusively upon unsubstantiated testimony from Ms. Farhat that is contradicted by: (1) quantitative flood stage data in Ms. Farhat's own trial presentation, (2) an academic article written by Dr. Jacobson (of the USGS) and Mr. Bitner (of the Corps), (3) eyewitness testimony of numerous plaintiffs with properties downstream of Gavins Point, and (4) the Corps' own contemporaneous presentation about their knowledge of current and future downstream flooding conditions as of March 4, 2011.

First, although Ms. Farhat testified that she didn't increase releases between the start of the runoff season and April 9 "[b]ecause of the flooding that was occurring downstream[,] **Tr.**

7525:16-19, demonstrative exhibits from Ms. Farhat's own trial presentation clearly verify that *neither* Sioux City nor Nebraska City nor St. Joseph were above flood stage until at least one week after April 9. *See* **DX3001-162; DX3001-163; DX3001-164; Tr. 7775:16-7776:11.** In fact, Sioux City never exceeded flood stage between March through May, Nebraska City did not exceed flood stage until mid to late April, and St. Joseph did not exceed flood stage until late April. ***Id.*** Second, a 2015 article written by Jacobson, Lindner, and Bitner recounts that in 2011, "tributaries downstream of the mainstem reservoir system *were contributing little discharge*." **DX220 at US0007003** (emphasis added). Third, eyewitness testimony from several plaintiffs also refute Ms. Farhat's claim that there were major downstream flooding concerns prior to the significant Basinwide flooding in 2011. *See* **Tr. 1292:13-25** (Jackson) ("In January, February and March of 2011, the river in front of our farm was so low that we could almost walk across it"), **2239:22-2240:5** (Connealy) ("prior to the time the flooding started, we were dry, crops were planted, and the river level was extremely low."), **2316:13-18** (Schneider), **2884:12-24, 2885:20-2886:4** (Griffin), **3531:7-14** (Binder), **3325:6-11** (Drewes), **4141:23-4142:3** (Ideker) ("The region was dry leading up to the flood. The river was running low. We had a good stand of crops."). Fourth, while the Court cited to **PX691 at USACE1012607** to support its finding that the Corps "did not make releases in March and April 2011" because of downstream flooding concerns, Plaintiffs respectfully note that this particular map predicts *future* flooding hotspots between March 7 and June 5. Meanwhile, another slide in this same Corps presentation shows *recent and current flooding* as of March 4 and almost every single River and tributary gage indicated "no flooding" at that time; in fact, only three gages in the entire Basin indicated "minor flooding" and not a single gage indicated "moderate flooding" or "major flooding" as of March 4. **PX691 at USACE1012610.** This confirms Plaintiffs' theory of foreseeability that as of early

March, the Corps foresaw significant future flooding from inflows from mountain and plains snow that had yet to melt but there was still time to evacuate water from the System because downstream conditions were still relatively dry at that time. *See generally* **PX691; PX2330.**

As discussed *supra*, Ms. Farhat's proffered explanation for impounding water in March and April 2011 is not consistent with the record and was not a discretionary decision to control downstream flooding. Rather, the Corps' decision to not make preventative flood control releases was a result of its multi-purpose operation that balanced all authorized purposes equally without higher priority for flood control – for either the upper River or the lower River – until extraordinary flooding was imminent or already underway.

In support of its foreseeability finding, the Court points to the 1997 comparison. However, given the reason for why Plaintiffs offered evidence as to 1997, the standard for establishing foreseeability, and Plaintiffs' theory of foreseeability as to System Changes, any analysis as to the Corps' storage and releases decisions in 1997 under the 1979 Master Manual would have little or no bearing on the foreseeability of the 2011 flooding in question. At best, it might shed some light on how the Corps viewed the dynamics of the preemptive priority on storage and releases, but the Court's finding did not piggyback on that theme. Hence, for that reason alone, the Court's reliance on the 1997 comparison as a basis for dismissing Plaintiffs' 2011 claims for failure to establish foreseeability is misplaced.

There is no factual dispute that the Corps made distinctly different operating decisions in 1997 and 2011. In its Trial Opinion, the Court found that in both years, "Corps personnel made System release decisions based on their best judgment in light of the information they had at the time." **Trial Op. at 84.** However, the record provides abundant evidence that the Corps' different operational approaches in 1997 and 2011 were not merely the consequence of

contrasting discretionary decisions made by Corps to address flood control concerns. Alternatively, this concrete divergence in operational approach reflects the changed priorities and operating rules incorporated into the new Master Manual as part of the MRRP. *See* **Tr. 4610:12-4611:8** ("In 1997, the Corps released as much or more than the plate's minimum amounts. . . . In 2011, the Corps released less than the plate's guidance directed. It was treated as guidance. *The different approaches reflect the changed policy in the manuals themselves.* Higher early releases benefit flood control at the potential expense of all other authorized purposes. The higher early releases are required under the 1979 Manual but are rarely acceptable under the 2006 Master Manual because of its mandate to balance project priorities.") (emphasis added).

Importantly, Dr. Grigg also testified that the new 2006 Master Manual essentially bound the Corps' hands in managing the Missouri River for flood control: The Corps' discretion in prioritizing flood control operations post-2004 was (a) limited until extraordinary flooding was imminent or underway and (b) constrained by the new operations regime post-2004 of balancing the FCA purposes with equal weight. *See* **Tr. 13769:1-15** (Dr. Grigg agreeing that under the 2006 Master Manual, the Corps could not prioritize flood control until extraordinary flooding was underway or imminent and could not preemptively evacuate space in the reservoirs even after obtaining flood risk forecasts like **PX691**), **13757:20-13758:6** (Dr. Grigg agreeing that "when reservoir operators are exercising their judgment and making specific release decisions, . . . it is important for them to understand the priorities among different authorized purposes"), **13785:15-13786:19** (Dr. Grigg agreeing that one way to avoid repeating the devastation of the 2011 flood is to "provide for a higher priority for flood control").

b. Plaintiffs' 2011 Claims Are Not Tort Claims that Attack the 2011 Decision-Making of the Corps in Operating the System

In dismissing Plaintiffs' 2011 claims based upon its foreseeability findings and conclusions, the Court appears to be opining that Plaintiffs' theory of foreseeability is really an attack on the Corps' exercise of its discretion under the 2006 Master Manual to operate the System – that Plaintiffs are simply second guessing the Corps' 2011 System decisions in storing and releasing water. In that regard, the Court opined: "The court also recognizes that the Corps could have exercised its judgment differently in 2011 and perhaps minimized some of the terrible flooding that took place in 2011, but the plaintiffs cannot base their takings claims on their challenge to the Corps' management of the mainstem." **Trial Op. at 85**. Of course, the Court's characterization of the Corps' alleged deviations from the 1979 Master Manual preemptive priority of System operations would, by legal definition, not be a foreseeability issue, but a causation issue. Regardless, based upon that characterization, the Court then opines that it has no jurisdiction to address such a challenge because it sounds in tort. ***Id.*** Hence, it would appear that the Court has concluded, incorrectly, that Plaintiffs' 2011 claims should be dismissed based on a lack of jurisdiction due to the Court's now belief that Plaintiffs' 2011 claims are actually tort claims that attack or second guess the decision-making of the Corps in operating the System in 2011. While Plaintiffs agree with the Court that a taking cannot be predicated on an abuse of discretion by the Corps in its management of the River, Plaintiffs did not plead and their theories of causation and foreseeability do not rest on seconding guessing the Corps' exercise of the discretion. Plaintiffs' pleadings, which govern this issue, make that fact crystal clear. Hence the Court's apparent dismissal of the 2011 claims on this jurisdictional basis is wholly unsupported by the record and in contravention of the law governing pleadings.

As Plaintiffs' pleadings and argument throughout have made clear, their theories of causation and foreseeability as to both System and River Changes do **not** allege or rest upon any negligence, wrongdoing, or fault by the Corps in operating the System or operating and maintaining the BSNP. Plaintiffs' theories as to System Changes in no way second guess or attack the decisions made by the Corps in operating the System in 2011 as to storage and releases. They do not allege how the Corps *should* or *could* have exercised its discretion in making decisions as to System storage and releases or that those decisions were "wrong" under the 2006 Master Manual. Rather, they are solely predicated on the Corps' deviation from its Old RMP to implement the MRRP, which necessitated the revision of the 1979 Master Manual, including the change in System priorities as to storage and releases. Under Plaintiffs' theory of causation as to System Changes, the issue is **not** what the Corps *should or could have done* in exercising its judgment as to storage and releases to have lessened flooding. Rather, the issue is what the Corps *would have done* if it had followed the preemptive priority for flood control under the old 1979 Master Manual instead of the reactive priority under the MRRP and 2006 Master Manual.

The Court's finding that Plaintiffs' 2011 claims challenge the correctness of the Corps' 2011 management decisions in operating the System comes from purported "testimony from several plaintiffs to the effect that the Corps made the wrong call in failing to recognize the magnitude of the upper Basin runoff leading up to the 2011 flood." **Trial Op. at 84.** Without citation to the record, it is impossible to determine if this purported testimony was even referring to the legal standards for establishing the causation and foreseeability elements of their 2011 claims or whether the witnesses in question were simply and generally referring to the fact that

they viewed the Corps' decisions in accord with the MRRP System priorities was the wrong call.[6]

Regardless of whether several Plaintiffs did testify in such a way so as to question the Corps' judgment in managing the System that would **not** automatically change Plaintiffs' theories of causation of foreseeability as pleaded. Moreover, since this is a mass action, those Plaintiffs could not speak for and legally bind all the Plaintiffs so as to unilaterally cause a sudden and drastic change in the theory of recovery for their claims. And, while the Court may be able to point to some isolated instances of non-attorney witnesses testifying as to the deviations of the Corps on which their 2011 claims are not based, the overwhelming evidence in this case is in keeping with Plaintiffs' pleadings and the theory alleged therein, which does **not** question the Corps' judgment or the exercise of its discretion in managing the System, but is predicated on a change or deviation in System operational policies, as was the case in ***Arkansas Game & Fish***. Obviously, it would be manifestly unjust to Plaintiffs to dismiss all of their 2011 claims for a lack of jurisdiction on a theory of causation and foreseeability that they did not even plead or pursue simply because "several plaintiffs" testified "to the effect that the Corps made the wrong call in failing to recognize the magnitude of the upper Basin runoff leading up to the 2011 flood." **Trial Op. at 84.**

E. Conclusion as to Dismissal of Plaintiffs' 2011 Claims

The Court has dismissed all of Plaintiffs' 2011 claims based primarily and "foremost" on its conclusion that the 2011 "releases" alleged as contributing to cause the 2011 flooding in questioning had nothing to do with complying with the ESA, which it found was the "single

[6] Plaintiffs consistently objected to questions by the government that were designed to test Plaintiffs' individual legal understanding of the causation and foreseeability allegations of their claims. Plaintiffs are not legal experts and could not be expected to differentiate between and draw fine legal distinctions invoked by their claims and their allegations.

purpose" on which Plaintiffs were relying to prove causation under the single purpose analysis of ***Arkansas Game & Fish III***. The Court also based its dismissal on a second primary reason – that the change in System priorities did not cause the 2011 flooding in question and the change in priorities did not put the Corps on notice that the likely result of such a change in priorities would contribute cause flooding in 2011. However, as discussed above, the Court in doing so not only misinterpreted and misstated Plaintiffs' actual theory of causation and foreseeability as to the 2011 System Changes, but overlooked and misinterpreted related material matters of law and fact and ignored its own findings. Plaintiffs submit these circumstances constitute errors of law and fact and that reconsideration of Plaintiffs' 2011 claims is necessary to prevent manifest injustice to Plaintiffs. Hence, Plaintiffs would respectfully request that this Court reconsider the dismissal of Plaintiffs' 2011 claims in accordance with Plaintiffs' actual theory of causation and foreseeability as to the 2011 System Changes, the applicable law and facts, and its own findings.

Besides preventing manifest injustice, it is important to note that reconsideration and reinstatement of Plaintiffs' 2011 claims would serve the purposes of judicial economy. If the Court does not reinstate the 2011 claims, then they will not be adjudicated, along with the remaining Bellwether claims, as to the remaining liability and damage issues. As such, if the 2011 claims are reinstated on appeal, the Court will be required to conduct a second trial on all such issues as to those claims when they could have already been adjudicated along with the other Bellwether claims. This is much like the situation where a trial court denies a motion for directed verdict at the close of all the evidence, even if though it has reservations about the claim, because it knows that in doing so, it can have the benefit of the verdict while still having the ability to deny the claim, if it so chooses, by granting judgment notwithstanding the verdict – the best of both worlds.

It is also worthy of pointing out that unlike takings-by-flooding claims tied to natural disasters such as Hurricane Harvey, Plaintiffs' 2011 claims are different. Plaintiffs' 2011 claims are directly tied to a Corps multi-year plan, the MRRP, with a very focused and laser-like purpose – to transform a river back to a natural state, the hallmark of which was bi-annual flooding that benefited a robust ecosystem that favored fish and wildlife, but was not favorable to people living and working near the River. There will be very few cases, if any, that present like this case. This case involves a very unique set of facts and circumstances arising out of a government plan to transform nearly an entire major river and its basin.

II. Dismissal of Claims Due to Failure of Federal L-575 Levee

In its liability findings, the Court accepted Plaintiffs' theory of direct causation that the atypical flooding that injured or damaged Plaintiffs' properties would not have occurred without, or "but for," the cumulative and combined effects of the Corps' System and River Changes. *See e.g.*, **Trial Op. at 128.** This was true with respect to accepting the opinions of Dr. Hromodka, Dr. Christensen (except for the 2011 flooding) and Mr. Tofani (except for the 2011 L-575 levee breaches). The test for this "but for" analysis involves determining all of the variables that *actually* existed at the time (*e.g.*, rainfall, levee alignment, condition of relief wells, floodplain constrictions), and then opining whether, after removing the effects of the System and River Changes, the flooding would or would not have occurred. Conversely, the Court rejected the opinions of government experts Dr. Mussetter and Mr. Woodbury, finding them unreliable given that they did not examine the cumulative and combined impacts of the Corps' System and River Changes. *See, e.g.*, **Trial Op. at 119-120, 127-26.** Importantly, both Dr. Mussetter and Mr. Woodbury opined that the System and River Changes had *no effect* on elevating WSEs, which the Court found to "defy both common sense and principles of hydrology and hydraulics" and did not otherwise undermine the opinions of Plaintiffs' experts. **Trial Op. at 55-56, 93-94, 116.**

In analyzing the numerous levee breaches at issue in this case, including the two breaches of the L-575 federal levee in 2011, Mr. Tofani conducted a "but for" analysis. **Trial Op. at 129; Tr. 6044:24-6045:7.** Importantly, in rendering his opinions, Mr. Tofani applied the Plaintiffs' theory of actual causation and considered ***all*** of the Corps' System and River Changes in both the actual and "but for" worlds (which he referred to as the "New" and "Old" River Management Policies). **Tr. 6281:21-6282:6.** This "but for" analysis of the Corps' System and River Changes properly included taking into consideration all factors, or "status quo" variables, which actually existed at the time (*e.g.* the geometry of the levee and the narrow floodplain), and then opining whether, after removing the effects of the System and River Changes, the flooding would or would not have occurred. **Tr. 5924:25-5925:5; 6326:23-6327:10**. He concluded that the Middle and Upper L-575 levee failures occurred under the New RMP, but would not have occurred under the Old RMP, primarily because of the higher WSEs associated with the New Policy. **Tr. 5906:1-16, 5914:5915:7, 5923:13-5924:1-24.**

In denying liability relating to flooding from the Middle L-575 federal levee breach, the Court relied upon the opinions of government expert Dr. Schaefer, who opined that the Lower Hamburg Chute was not a contributing cause of the Middle L-575 levee breach, and that Plaintiffs had not established causation for that breach. **Trial Op. at 139.** The Court relied upon Dr. Schaefer's opinions even though it otherwise found his opinions regarding causation as to seepage and blocked drainage to be unreliable, given that he relied upon Mr. Woodbury's otherwise unreliable modeling. **Trial Op. at 151.**

Dr. Schaefer's opinions respecting the Middle L-575 breach were infirm, and therefore should be rejected. First, Dr. Schaefer relied upon the opinions of Dr. Mussetter and Mr. Woodbury for his L-575 levee breach opinions. In fact, Dr. Schaefer began his direct trial

testimony regarding the Middle L-575 levee breach by adopting and discussing the hydraulic modeling and data provided by Dr. Mussetter, as well as the hydrologic modeling from Mr. Woodbury, which included Mr. Woodbury's "baseline/actual" (corresponding to the "New" policy) and "No-MMR" (corresponding to the "Old" policy) scenarios. **Tr. 12340:7-12342:4, 12442:23-12443:3, DX3018-269-270.** He relied upon Dr. Mussetter's 2-D modeling for his opinions on the flow patterns both before and after the breach, and importantly, the flow patterns prior to the breach with and without the Lower Hamburg Chute in place, to conclude there was no difference with the chute in place. **Tr. 12383:12-12385:7; DX 3018-320-322.** This modeling and data was critical to Dr. Schaefer in establishing the timing of the seepage distress on the levee in relation to river stages and discharges.

On cross-examination, Dr. Schaefer again confirmed his reliance upon the modeling from Mr. Woodbury for hydrographs (*e.g.*, WSEs) and on Dr. Mussetter for additional hydrographs (WSEs) and 2-D modeling of Lower Hamburg Bend. **Tr. 12441:3-19, 12447:16-23.** Dr. Schaefer also performed a seepage analysis at this location, similar to Mr. Tofani. Again, however, Dr. Schaefer's seepage modeling for the Middle L-575 breach relied upon the WSE modeling provided by Dr. Mussetter and Mr. Woodbury. **Tr. 12359:15-20, 12525:2-12526:4; DX3018-293.** Importantly, Dr. Schaefer testified that his opinions were based upon the assumptions that Mr. Woodbury's hydrographs were accurate. **Tr. 12446:20-23.** In fact, Dr. Schaefer even vouched for Mr. Woodbury's modeling, testifying that Mr. Woodbury's methodology was "consistent with practice" and that he "accepted it as accurate." **Tr. 12445:21-12446:3.** Given that the Court has already found Mr. Woodbury's and Dr. Mussetter's opinions and modeling to be unreliable, their unreliability also infects Dr. Schaefer's opinions regarding the Middle L-575 levee breach.

Second, Dr. Schaefer's opinions should be disregarded as he admittedly did not perform a "but for" analysis taking into account the combined and cumulative effects of the System and River Changes, as Mr. Tofani did. In fact, when presented with Plaintiffs' theory of actual causation on cross-examination, he acknowledged that he understood it, but conceded that he did not analyze it. **Tr. 12485:22-12487:4.** Rather, for his opinion regarding the Middle L-575 levee breach, he simply considered a "with" and "without" chute scenario. Accordingly, Dr. Schaefer's micro analysis was not unlike that of the "local scale" 2-D modeling performed by Dr. Mussetter, which only analyzed the effects of limited features and which the Court has rejected. Dr. Schaefer acknowledged this fact on cross-examination when he conceded he did not consider the cumulative effects of the Corps' changes, but only site-specific features. **Tr. 12462:13.** His explanation for not conducting such an analysis was that they were already "reflected in Mr. Woodbury's analysis" – which the Court has of course already rejected. **Tr. 12462:9-13.**

Third, for his "with" and "without" chute scenarios, Dr. Schaefer incorrectly assumed that there had been ***no*** changes whatsoever resulting from the Corps' System and River Changes – including no changes in WSEs. In fact, he opined that there were no changes in the operations of the River by the Corps between 2007 and 2015. **Tr. 12461:9-14.** Again, his opinion was based upon the hydraulic analyses performed by Mr. Woodbury, purportedly showing no changes in those WSEs. **Tr. 12461:15-19.** Predictably, then, Dr. Schaefer's "primary" factors which he opined as contributing to the Middle L-575 levee breach were nothing more than the actual, or status quo, variables that existed at the time (*e.g.*, levee alignment, floodplain configuration, soil stratigraphy). And as Dr. Schaefer acknowledged on cross-examination, as did many Corps witnesses, those status quo variables had existed for decades before the Corps' System and River Changes were even implemented. **Tr. 12522:6-15.**

The Court also denied liability as to the 2011 "Upper" L-575 levee breach near Percival, Iowa, finding Dr. Schaefer's opinions persuasive over those of Mr. Tofani. The Court found that "the 2011 releases were so overwhelming that the levee failure was inevitable." **Trial Op. at 141.** Plaintiffs' arguments respecting the 2011 flooding are addressed elsewhere in this Motion.

As to Dr. Schaefer's opinions respecting the Upper L-575 levee breach, however, they too are infirm for the reasons stated above for the Middle L-575 breach. First, he performed no "but-for" analysis. Again, he simply opined that, given there were no changes in WSEs from the System and River Changes according to Mr. Woodbury, the breach was caused by existing status quo variables (levee alignment kink point, geomorphological features and soil conditions). **Tr. 12397:25-12398:24; DX3018-344.** Second, he conducted a seepage analysis of the Ettleman property, which is near the breach site. However, he again relied upon Mr. Woodbury's unreliable WSE modeling as a foundation for his own seepage modeling. **Tr. 12397:5-16, 12441:5-12442:12, DX3018-346-347.** As the Court already disregarded Dr. Schaefer's seepage modeling in other instances because it relied upon Mr. Woodbury's unreliable modeling, it should also disregard his results as to the Upper L-575 levee breach.

III. Dismissal of Claims Due to Union Township Levee Breach - Property 34: Drewes Farms, Inc.; Eddie Drewes; David Drewes; Rita K. Drewes Revocable Trust; Robert W. Drewes Revocable Trust/Property 35: Steven K. Cunningham Trust; Doris I. Cunningham Trust/Property 36: Darwin and Jennifer Binder; Dustin and Jenny Binder; Richard and Karen Binder; Midwest Grain Company/Property 37: Dennis and Beth Saunders Dismissal

Property numbers 34, 35, 36 and 37 were each affected by flooding from overtopping of the Union Township levee. For the 2007 and 2010 claims, the Court found that Plaintiffs did not meet their burden to support a takings claim. However, the Court made conflicting findings as to these levee failures, and did not rely upon actual trial testimony respecting same.

The Court first noted in **footnote 72** that that the Union Township levee "would have possibly failed" in 2007, and "would have failed" in 2010, citing to Mr. Tofani's summary table of levee failures for 2007/2008/2010 **(PX2554)**. Later in its individual Bellwether findings, the Court found, based upon Mr. Tofani's testimony, that the Union Township levee "could have breached" in 2007 and 2010 in both the actual and "but for" worlds, and that flooding "could have possibly occurred." **Trial Op. at 225-26.** However, this conclusion is not supported by Mr. Tofani's actual trial testimony.

PX2554 is Mr. Tofani's summary table of levee failures for 2007/2008/2010. As the Court noted in its Trial Opinion for the 2010 flooding, **PX2554** does reflect that the Union Township levee "possibly" could have failed under the "but for" (or "simulated" using Mr. Tofani's nomenclature) world. In fact, a closer look at **PX2554** actually reveals that the "but for" (simulated) WSE was 871.25 feet (*see* "adjusted peak" column). The estimated levee crest for Union Township was 871.5 feet. Accordingly, the "but for" (simulated) WSE is truly ***below***, or ***under***, the levee crest elevation of Union Township. This is clearly visible in **PX 2886**, Mr. Tofani's chart comparing the actual (estimated) and "but for" (simulated) WSEs for Union Township. Importantly, Mr. Tofani testified at trial that the "but for" (simulated) "gets very close, certainly within six inches or so, ***but remains just below the estimated levee crest elevation***." **Tr. 5982:22-5983:4** (emphasis added)**.** He never testified that it "would have failed" in 2010 as found by the Court.

To account for the "but for" (simulated) WSE approaching, *but not exceeding*, the Union Township levee crest, Mr. Tofani noted in **PX 2554** that it "may have required sandbagging." Placing sandbags atop levees was a common and successful practice during flood-fighting efforts to prevent overtopping. *See, e.g.*, **Tr. 1602:16-21, 2515:20-2516:6, 2991:6-8, 2991:19-2992:9,**

3387:11-3388:12, 3873:4-17. Sandbagging would have been easier in the "but for" versus actual world. As the Court will recall, several Plaintiffs testified, as did Dr. Hromodka, that following the Corps' System and River changes, the Missouri River rose higher and faster than it had before the changes. **Tr. 3599:22-3600:3, 3884:4-9, 4168:1-10.** The corollary to that is that in the "but for" world, the River did not rise as high or as fast, thus allowing more time for sandbagging, if necessary.

The Court reached a similar conclusion for these properties during the 2007 flooding. Again, **PX 2554** reflects that the Union Township levee "possibly" could have failed under the "but for" (simulated) world. However, a closer look at **PX 2554** actually reveals that the "but for" (simulated) WSE was 870.84 feet. The estimated levee crest for Union Township was 871.5 feet. Accordingly, the "but for" (simulated) WSE is truly ***below***, or ***under***, the levee crest elevation of Union Township. This is clearly reflected in **PX 2902**, Mr. Tofani's chart comparing the actual (estimated) and "but for" (simulated) WSEs for the Union Township levee. At trial, Mr. Tofani testified that the "estimated (actual) ends up at this location right at the estimated levee crest elevation. The simulated ("but for") is six inches at its peak, ***or perhaps a little more than six inches below***." **Tr. 5991:11-19.** As with 2010, and to account for the "but for" (simulated) WSE approaching, *but not exceeding*, the Union Township levee crest, Mr. Tofani again noted in **PX 2554** that it "may have required sandbagging," which is addressed above for the 2010 flooding.

Accordingly, the uncontroverted testimony from trial shows that the WSEs in the "but for" world in 2007 and 2010 at the Union Township levee would have been below the levee crest. However, given that those WSEs approach, but do not exceed, the levee crest in both years, Mr. Tofani noted that it "may" have required sandbagging, a common practice to prevent

overtopping. Accordingly, these Plaintiffs have satisfied their burden for a takings claim in 2007 and 2010.

IV. Dismissal of Sargent Claim - Property 21: Merrill Sargent (Deceased); Ron and Dale Sargent

In its Trial Opinion, the Court found that for the Sargents' 2010 claim, a private levee on their property would have failed even without the Corps' River and System Changes, citing to Mr. Tofani's summary table of the 2007/2008/2010 levee failures (**PX2554**). The Court also found that it could not determine if the flooding on the Sargents' property was due to overbank flooding or levee overtopping, and therefore, they did not meet their burden of causation. Plaintiffs respectfully suggest the Court misconstrued the evidence respecting the flooding affecting these Plaintiffs in 2010, and that they have, in fact, satisfied their burden.

The uncontroverted evidence at trial demonstrated that no levee failure, overtopping or otherwise, affected the Sargents in 2010 or any other year. Rather, Dale Sargent testified that the property sits on the "unprotected" side, or "outside" of a nearby federal levee, and that it was affected by "overbank" flooding in 2010. **Tr. 1486:17-18; 1488:19-1489:9; 1498:15-22.** He never claimed nor testified that the property was affected by any levee overtopping. Similarly, Dr. Hromodka testified that the Sargents' property was located at river mile 385 on the "unprotected" side of the federal levee. **Tr. 5294:3-12;** *see also* **PX1319.** The flooding affecting this property in 2010 was "similar to 2008," which was "overbank flooding." **Tr. 5294:23-5295:2.** His causation opinion was "[B]ut for the higher WSE and/or higher groundwater table as a result of the system and/or BSNP changes to the river, the overbank flooding and interior blocked drainage/seepage would not have occurred and would have been less severe and of shorter duration." **Tr. 5295:9-14.** He testified that his water surface elevation profiles for this

property (**PX2025A**) reflected four flooding incidents in blue, corresponding to "overbank flooding." **Tr. 5295:17-23.**[7]

Mr. Tofani offered no testimony or liability opinions at trial regarding the Sargents. The *only* reference in the entire trial record to a levee in relation to the Sargents' property is found in Mr. Tofani's summary table of levee failures for 2007/2008/2010 (**PX2554**), which the Court cites to in its Trial Opinion. However, and as explained during closing arguments, not all levee failures represented in **PX2553** and **PX2554** actually affected the Bellwether properties. **Tr. 14908:4-7, 14919:7-17, Tr. 14954:23-14955:2.** For example, in 2010, only seven of the fourteen levee failures listed in PX2554 actually affected Bellwethers. The levee listed for the Sargents in **PX2554** is denoted as a "private" levee. But that levee/berm does not even protect the Sargents and is located at river mile 584.6 – approximately one-half mile downstream of the Sargents' property.

The evidence adduced at trial, which is undisputed, clearly reflects that the Sargents' property was affected by overbank flooding in 2010, and not by the overtopping of a nearby downstream private levee that does not even protect their property. Accordingly, the Court's reliance upon Mr. Tofani's entry in **PX2554** is misplaced. Plaintiffs respectfully request the Court rely upon the actual testimony at trial respecting the Sargents' cause of flooding in 2010, and find that the Sargents have in fact satisfied their burden for a takings claim in 2010.

V. Conclusion

For the reasons stated, Plaintiffs request that the rulings of the Court discussed herein be reconsidered to prevent manifest injustice to Plaintiffs.

[7] Although the Court found Mr. Woodbury's opinions unreliable, he too testified that the Sargent's flooding in 2010 was caused by overbank flooding. **Tr. 11188:5-7.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did on this 30th day of March, 2018, cause the above and foregoing to be sent via electronic transmission to:

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