2010-5084

United States Court of Appeals for the Federal Circuit

JOHN R. MILDENBERGER, MICHELE C. RUTH, ROBERT O. BARATTA, CAROL A. BARATTA, JOSEPH K. HENDERSON, PATRICIA T. HENDERSON, CHARLES C. CRISPIN, JULIE D. CRISPIN, WILLIAM E. GUY, JR., STELLA S. GUY, JAMES J. HARTER, PATRICIA C. HARTER, FLOYD D. JORDAN, MARJORIE N. JORDAN, CHARLES V. LOCKE, VERA A. LOCKE, ANN S. MACMILLAN, PAUL PARE, ROBERT H. PARE, JR., ERYN T. PARE, JOHN F. PATTESON, ROBERT PEARSON, FREDERICK RUTZE, KIMBERLY RUTZKE, BRIAN SCHMIDT, DEBORAH SCHMIDT, MARK S. BEATTY, ATHOL DOYLE CLOUD, JR., PATRICIA P. CLOUD, MARK R. CONNELL, PHILIP TAFOYA, and GERALDINE TAFOYA,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in Case No. 06-CV-760, Judge Lynn J. Bush.

BRIEF OF PLAINTIFFS-APPELLANTS

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Mildenberger, et al. v. United States

No. 2010-5084

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Appellants certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

John R. Mildenberger, Michele C. Ruth, Robert O. Baratta, Carol A. Baratta, Mark S. Beatty, Athol Doyle Cloud, Jr., Patricia P. Cloud, Mark R. Connell, Charles C. Crispin, Julie D. Crispin, William E. Guy, Jr., Stella S. Guy, James J. Harter, Patricia C. Harter, Joseph K. Henderson, Patricia T. Henderson, Floyd D. Jordan, Marjorie N. Jordan, Charles V. Locke, Vera A. Locke, Ann S. MacMillan, Paul Pare, Robert H. Pare, Jr., Eryn T. Pare, John F. Patteson, Robert Pearson, Frederick Rutzke, Kimberly Rutkze, Brian Schmidt, Deborah Schmidt, Philip Tafoya, and Geraldine Tafoya

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

See answer to no. 1.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

No corporations or publicly held companies are included as Appellants in this case.

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Nancie G. Marzulla, Roger J. Marzulla
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3-4-10
Date

Nancie Marzulla
Signature of counsel

NANCIE MARZULLA
Printed name of counsel

Please Note: All questions must be answered

cc: Steven D. Bryant, William B. Lazarus

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STATEMENT OF RELATED CASES

In accordance with Rule 47.5 of this Court, counsel for Plaintiffs-Appellants states that there have been no prior appeals to this Court or any other court from the final judgment in this case, No. 06-760. In addition, there are no pending cases known to counsel that will directly affect or that will be directly affected by this Court's decision in this appeal.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants, John R. Mildenberger et al. (the "Riparian Owners") filed suit against the United States in *Mildenberger v. United States*, No. 06-760, in the United States Court of Federal Claims ("CFC"). The Riparian Owners alleged causes of action for a compensable Fifth Amendment taking. The CFC possessed jurisdiction over the suit under 28 U.S.C. § 1491(a).

The CFC dismissed all of the claims at issue in this appeal.[1] Judgment in accordance with RCFC 54(b) was entered on January 29, 2010.[2]

The Riparian Owners appealed from the January 29, 2010 entry of judgment final order and timely filed their notice of appeal on February 12, 2010.[3] This Court has exclusive jurisdiction to consider this appeal under 28 U.S.C. § 1295(a)(3).

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[1] *Mildenberger v. United States*, 91 Fed. Cl. 217 (2010).
[2] Joint Appendix ("JA") 76.
[3] JA 501–02.

STATEMENT OF THE ISSUES

1. In Florida, riparian property rights include a right to be free from water pollution discharged by an upstream user. Several other states likewise protect riparian rights against upstream pollution. But the trial court ignored Florida law, holding that the issue was "novel" and concluded that the riparian rights here are not constitutionally protected. Did the trial court err in so holding?

2. When the damages from a government action only gradually emerge, the owner may postpone a suit for a taking until the effects become stabilized. Here, the permanent, irreversible results occurred in 2003–2006 when the Corps rendered a "knock-out blow" to the St. Lucie by releasing unprecedented toxic discharges into the river. And before that, the Corps' promises to take steps to reduce flooding of the St. Lucie inhibited legal action. Are these claims time-barred?

3. This Court has held that "in order to assert a defense under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation."[4] Here, the Government discharges polluted water from Lake Okeechobee into the St. Lucie through S-80, a structure that the Corps uses only for flood control and through which no boats can pass. Did the trial court err in holding that the navigational servitude shields the Government from takings liability for these discharges?

STATEMENT OF THE CASE

The trial court got many aspects of this case right. The court correctly noted that the "St. Lucie River is, by all accounts a national treasure."[5] The court further noted that the "long-term environmental consequences of defendant's massive

[4] *Palm Beach Isles Assocs. v. United States*, 58 Fed. Cl. 657, 664 (2003), *aff'd*, 122 Fed. Appx. 517 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 818 (2005).
[5] *Mildenberger*, 91 Fed. Cl. at 263.

discharges into the river are tragic . . . ."[6] But the court had a flawed understanding of the law and facts before, leading to the wrong result.

This case involves a physical taking the Corps' repeated releases of polluted water from Lake Okeechobee into the St. Lucie River and Estuary—which have in recent years contained ruinously high levels of pollutants. These releases have now permanently destroyed the water quality of the St. Lucie River. And in turn, the Corps' releases have destroyed the riparian rights of the homeowners along the St. Lucie.

The trial court concluded that the takings issue before it was "novel" or of first-impression. Nothing could be farther from the truth. Florida courts have long stood behind the principle—as have many other states—that riparian rights are constitutionally protected, and include the right to be free from pollution. Here, the trial court seemed to almost reach out to find an obscure thread from another case that has no conceivable application here—a case in which the court stated the holding applied only to beach restoration efforts. The trial court applied that holding here concluding that the Riparian Owners possessed no constitutionally protected property rights.

In addition, the trial court concluded that these takings claims are time-barred, ignoring the facts showing that the water quality was not irrevocably

[6] *Id.*

destroyed until the early 2000s, when the toxic levels in the water and the discharges were unprecedented. Prior to this time, a takings lawsuit would have been premature. In addition, the trial court ignored the many years in which the Corps repeatedly told the Riparian Owners that it intended to send the discharges from Lake Okeechobee elsewhere, making the Riparian Owners' reliance on the Corps' promises to alleviate the problem reasonable.

Finally, the trial court held that the navigational servitude provides an absolute defense to takings liability in this case, ignoring that the navigational servitude does not apply here because the Corps' discharges were for flood control purposes, and had nothing to do with navigation.

STATEMENT OF FACTS

The Riparian Owners initiated this case by filing a complaint in the United States Court of Federal Claims on November 13, 2006.[7] The Government filed its Answer on February 12, 2007.[8] The Government then filed a motion to dismiss the complaint in part and for summary judgment in part on January 16, 2009.[9] The Riparian Owners filed their response to the Government's motion and a cross-motion for summary judgment on March 16, 2009.[10] On January 29, 2010, the

[7] JA 93.
[8] JA 81 (Docket No. 9).
[9] JA 107.
[10] JA 85 (Docket No. 35).

court filed its published opinion[11] and entered judgment in accordance with RCFC 54(b).[12]

"The St. Lucie River is, by all accounts, a national treasure."[13] The St. Lucie River and Estuary in southeast Florida were once one of the most biologically diverse areas in the nation, which "[a]s recently as 1998, . . . provided habitat for more than 4000 plant and animal species, including manatees, dolphins, sea turtles and a wide variety of fish and invertebrates."[14] The extraordinary biological diversity of the St. Lucie River and Estuary resulted from its unique history.

The St. Lucie River is 35 miles long and has two major forks, the North Fork and the South Fork, which converge near the city of Stuart and flow eastward in a wide, middle portion of the Estuary and then south to form the outer Estuary.[15] The water in the outer Estuary feeds into the Indian River Lagoon and the St. Lucie Inlet before traveling out to the Atlantic Ocean.[16] Until the nineteenth century, the St. Lucie was a freshwater stream with no permanent physical connection to the Atlantic Ocean.[17] In 1892, a consortium of private interests constructed the St. Lucie Inlet to provide a navigable connection between the Atlantic Ocean and

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[11] *Mildenberger v. United States*, 91 Fed. Cl. 217 (2010).
[12] JA 76.
[13] *Mildenberger*, 91 Fed. Cl. at 263.
[14] *Id.* at 224.
[15] JA 281 ¶ 6.
[16] *Id.*
[17] JA 624 ¶ 7.

the Indian River Lagoon adjacent to the mouth of the St. Lucie River.[18] The construction of the inlet and the resulting tidal flow of salt water into the St. Lucie River created a unique mixing zone that was home to thousands of species that cannot live in purely fresh water or sea water and thrive only in brackish water (water that is a combination of fresh and saline water).[19]

To provide just a few examples, this unique area boasted one of the most diverse fish populations in North America, and was home to nearly one-third of the nation's West Indian manatee populations.[20] The barrier islands and Estuary beaches provided important sea turtle nesting grounds.[21] And with more than 145-square miles of mangrove, coastal salt marshes, and seagrass habitat, the Indian River Lagoon was enormously productive, supporting a commercial fishery that contributed hundreds of millions of dollars to Florida's economy each year.[22] The 1998 report referred to by the trial court summarized the extraordinary diversity of the Estuary, indicating that it was home to more than 4,000 plant and animal species, including manatees, dolphins, sea turtles, and seahorses, including the highest number of aquatic organisms of any Estuary in the United States.[23] As a result, the St. Lucie Estuary and Indian River Lagoon were designated as

[18] JA 624 ¶ 7; JA 619 ¶ 9.
[19] JA 280 ¶ 4.
[20] JA 223 ¶ 6; JA 271¶ 7.
[21] JA 223 ¶ 6; JA 271¶ 7.
[22] JA 271 ¶ 7.
[23] JA 223 ¶ 6.

Outstanding Florida Waters, Aquatic Preserve, and an Estuary of National Significance.[24]

Each of the Riparian Owners owns in fee simple one or more parcels of riparian land and related improvements, in most cases a home and a boat dock, located along the St. Lucie River and Estuary, the Indian River Lagoon, or the St. Lucie Canal (also known as the C-44 Canal).[25] The Riparian Owners specifically chose to live along the River and Estuary to enjoy its unrivaled attributes by fishing, boating, swimming, and viewing wildlife from their homes and yards adjacent to the water. According to John Patteson, for instance, "the St. Lucie River used to look beautiful, the fishing was great, and there were all kinds of wildlife to be seen."[26] John Mildenberger explained that he and his wife "purchased [their] property in 2002 with the expectation that [they] could use the St. Lucie River . . . for boating, swimming, fishing, water sports, and wildlife viewing."[27] Likewise, Mark Beatty "purchased and built [his] house on the St. Lucie River in order to fish, boat, and engage in water activities from [his] home . . . ."[28] Paul Paré stated that "the River was once a great location for

[24] JA 271¶ 7.
[25] JA 338–78.
[26] JA 354 ¶ 2.
[27] JA 356 ¶ 2.
[28] JA 362–63 ¶ 2.

fishing . . . [and] [i]n the past, I would waterski and swim in the river."[29] And Ann MacMillan indicated that she often "would enjoy fishing in the River" since "the river was teeming with fish, especially bait fish, tarpon, and snook."[30] Robert Voisinet and his family would often "recreate at our dock" as well as go "wading, swimming, snorkeling, and waterskiing in the River."[31] Finally, Robert and Carol Baratta often enjoyed going into the River to "swim[], ski[], repair the dock, and work on our boat."[32]

But that all changed between 2003 and 2006, when the levels of toxicity in the St. Lucie became so high, due to the U.S. Army Corps of Engineers' ("Corps") unusually high-volume discharges of polluted fresh water into the South Fork of the St. Lucie during those year.[33] The toxicity levels were so high that the Riparian Owners could not even come into contact with the River water without risking serious, even life-threatening disease and infection.[34] So for the first time ever, in 2005, the Martin County Department of Health judged the water unsafe for human contact and banned swimming, fishing, and other contact with the water in the River.[35]

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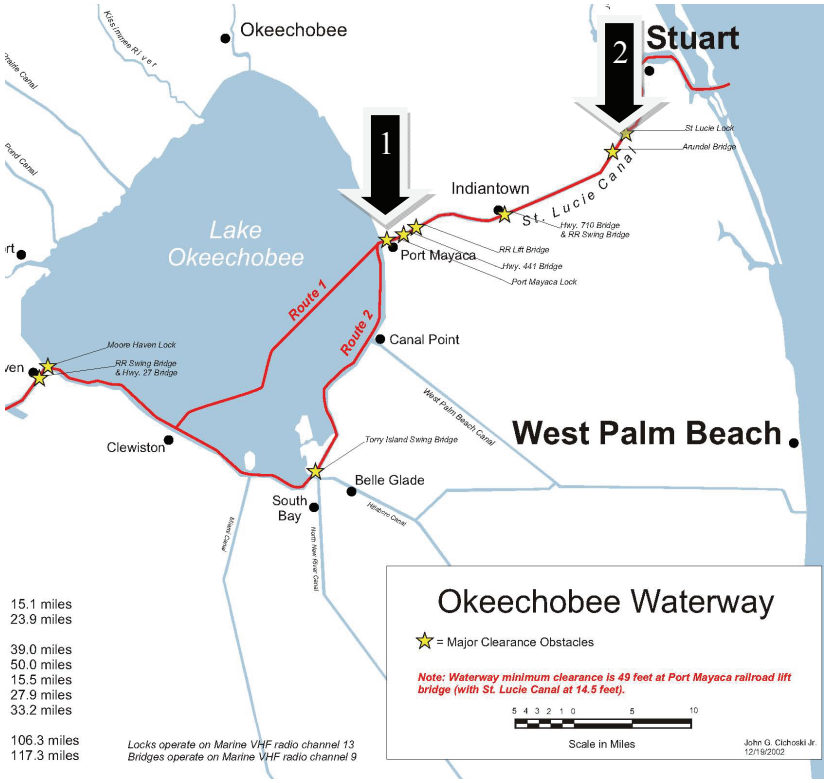
[29] JA 364 ¶ 2.
[30] JA 338 ¶ 2.
[31] JA 370–71 ¶ 2.
[32] JA 372 ¶ 2.
[33] JA 332–33 ¶ 68; JA 282 ¶ 11.
[34] JA 332–33 ¶ 68; JA 282 ¶ 11.
[35] JA 332–33 ¶ 68; JA 282 ¶ 11.

The Corps discharges polluted fresh water into the St. Lucie primarily to control flooding from Lake Okeechobee.[36] In its natural state, the St. Lucie River did not connect with Lake Okeechobee.[37] But in 1924 Lake Okeechobee was connected to the St. Lucie River by a 23.9-mile canal, the St. Lucie Canal, which is controlled by the Corps.[38] The Okeechobee Waterway, which includes the St. Lucie Canal (C-44), became a federal project in 1937.[39]

The St. Lucie Canal (C-44) has floodgates at each end, which the Corps opens when it discharges water from Lake Okeechobee to the St. Lucie River and Estuary.[40] The S-308 structure (at arrow 1), is managed and operated by the Corps and controls the release of water from

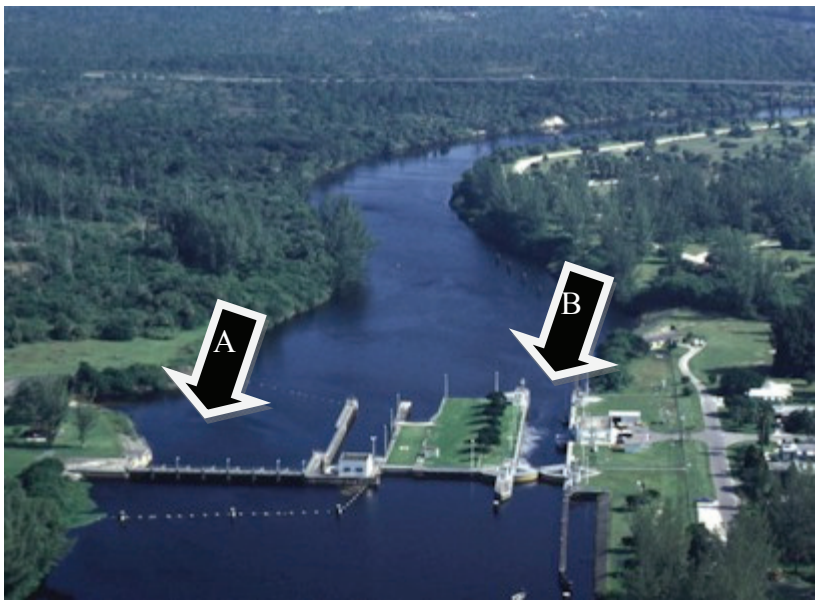


Map taken from JA 642 (arrows added). An interactive version of this map is available at http://www.saj.usace.army.mil/Divisions/Operations/Branches/SFOO/DOCS/owwmap.pdf.

[36] JA 613–14; JA 617–19; JA 623.
[37] JA 270 ¶ 4.
[38] JA 294–95 ¶ 9; JA 616–17 ¶ 3.
[39] JA 616–17 ¶ 3.
[40] JA 294–95 ¶ 9.

Lake Okeechobee into the St. Lucie Canal (C-44).[41] At the other end of the canal, where it joins the St. Lucie River, the Corps uses the S-80 structure (arrow 2) to discharge water from the C-44 canal into the south fork of the St. Lucie River for flood control purposes.[42]

Through its management and operation of S-308 (arrow 1) and S-80 (arrow 2), the Corps regularly discharges large amounts of water from the St. Lucie Canal (C-44) into the South Fork of the St. Lucie River.[43] No boats ever use the S-308 floodgates or S-80 floodgates (arrow A). And the Corps releases a "very very small amount" of water for navigational use for operation of the locks (arrow B).[44]



Photograph taken from U.S. Army Corps of Engineers, Jacksonville District, St. Lucie Lock & Dam Fact Sheet, http://www.saj.usace.army.mil/Divisions/Operations/Branches/SFOO/DOCS/FactSheet_StLucie.pdf (last visited Apr. 19, 2010) (arrows added).

One of the chief problems with the water that

[41] JA 295–96 ¶ 12; JA 281–82 ¶ 8; JA 617 ¶ 4.
[42] JA 249–52 ¶¶ 22–27; JA 294–95 ¶ 9; JA 613, lines 14–18; JA 617–19 ¶¶ 5, 8; JA 628–29 ¶ 14.
[43] JA 295 ¶ 10; JA 270 ¶ 4.
[44] JA 294–95 ¶ 9; JA 613.

the Corps releases from Lake Okeechobee into the St. Lucie is that it is highly polluted, particularly with sediments and excess nutrients such as phosphorus and nitrogen.[45] The Corps flushes excess nutrients, such as phosphorus, from Lake Okeechobee into the St. Lucie every time it releases water through S-308 into the St. Lucie Canal (C-44).[46] Because the St. Lucie Estuary is low in nutrients in its natural state, the Corps' discharges of water that are exceedingly high in nutrients greatly interferes with the natural balance of the St. Lucie ecosystem, causing immense environmental damage.[47]

The damage caused by the Corps' releases of polluted water from Lake Okeechobee into the St. Lucie did not go unnoticed over the years.[48] And yet, as late as at least 1998, a report on the health of the St. Lucie indicated that the Estuary continued to maintain its extraordinary biological diversity, providing habitat for more than 4,000 plant and animal species.[49]

So Lake Okeechobee waters have become gradually more polluted over time and consequently the Corps' discharges to the St. Lucie River from

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[45] JA 270 ¶ 4.
[46] JA 252–53 ¶ 28. Note that the Corps' discharge of polluted water into the St. Lucie is intentional, as the Corps could filter the water to remove the pollution or discharge it elsewhere. JA 274–75 ¶¶ 15, 16.
[47] JA 223–24 ¶ 8; JA 270 ¶ 4.
[48] *See Mildenberger*, 91 Fed. Cl. at 237–38 (citing various newspaper articles and government reports).
[49] *Id.* at 224 (citing Gilmore Decl. ¶ 6 (JA 223)).

Lake Okeechobee have similarly become more polluted.[50] Phosphorus, for instance, is exceedingly high in Lake Okeechobee and seven of the eleven highest loads of phosphorus inflow to the lake have occurred since 1995 and exceeded Okeechobee's annual phosphorus loading goal by more than 300 percent.[51] The result of increased pollution and the record-high levels of discharges in 2004 and 2005 was a "knock-out blow" to the ecology of the St. Lucie from which it has never recovered and that many believe is now irreversible.[52]

For example, in 2004 alone the Corps discharged 190 billion gallons of highly polluted non-saline water from Lake Okeechobee into the St. Lucie River and Estuary, so that in September of 2004 the salinity levels dropped to nearly zero in the Estuary at the Roosevelt Bridge.[53] That same month, for the first time, state environmental officials warned residents not to swim or fish in the St. Lucie River because of the high fecal coliform bacteria levels.[54] This warning lasted nearly ten weeks.[55]

A number of Riparian Owners remember this period in 2004 as the beginning of the end for their use of the River. Kevin Henderson, for instance, recalled that he continued fishing the River up until 2004, but he "eventually over

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[50] JA 272 ¶ 10.
[51] JA 253 ¶ 30.
[52] JA 272 ¶ 10; JA 246 ¶ 13; JA 286–88 ¶¶ 19–21; JA 472.
[53] JA 298–99 ¶ 17.
[54] JA 546–49.
[55] *Id.*

2004 and five and six just gave it up completely and ha[s]n't fished at all" since then.[56] Similarly, James Harter indicated that he caught fish every day off his dock up until September 4, 2004, but was unable to catch even a single fish in the St. Lucie after that day.[57] And William Guy stated that in 2004 he spotted algal blooms behind his home for the first time.[58]

Algal blooms can be triggered by phosphorus concentrations above 50–60 ppb.[59] Lake Okeechobee's phosphorus-rich conditions select for buoyant blue-green algae species, such as *Anabena, Microcystis*, and *Cylindro spermopsis*.[60] At high concentrations, these toxic algae species can kill even large animals, such as livestock and humans.[61] The toxic cyanobacteria, such as *Microcystis aeruginosa*, that grow in Lake Okeechobee survive best in low salinity waters but release their toxins when they encounter salt water.[62] In 2005, the Corps discharged 300 billion gallons of highly polluted water from Lake Okeechobee into the St. Lucie River and Estuary, creating an ideal environment for the harmful algal blooms of *Microsystis* that followed.[63] As a result, health officials judged the water unsafe for human contact in 2005, and banned swimming, fishing, and other contact with

[56] JA 552, line 25 to JA 553, line 4.
[57] JA 556, lines 7–11.
[58] JA 559, lines 9–18.
[59] JA 253–54 ¶ 31.
[60] *Id.*
[61] JA 254 ¶ 32.
[62] JA 226–27 ¶¶ 21–22.
[63] JA 301 ¶ 21; JA 282–83 ¶ 11; JA 226–27 ¶ 22.

the water in the River.[64] On April 15, 2005, high fecal coliform bacteria levels forced another warning to avoid contact with the waterway.[65] In June, the warning area expanded from Palm City to the Evans Crary Bridge and in July, "no swimming" signs were installed along the North Fork.[66]

The Corps' 2005 discharges affected species other than humans as well. Oysters form oyster reefs within the St. Lucie Estuary that provide food and important habitat for 300 estuarine species including gastropods, crabs, sponges, fish, and birds, with up to 40 species living in a single, healthy oyster bed.[67] As a result, oysters are considered an important indicator species, since their health and survival parallel the health and survival of the Estuary.[68] Simply stated, without oysters, there are no oyster reefs to provide habitat for the hundreds of organisms that live within the reefs, a single one of which takes years to rebuild and colonize.[69] A reduction in the salinity of the Estuary decreases the oysters' ability to grow, reproduce, and make spat.[70] The Corps' 2005 discharges of polluted, non-

[64] JA 332–33 ¶ 68; JA 282–83 ¶ 11.
[65] JA 546–49.
[66] *Id.*
[67] JA 284 ¶ 14.
[68] JA 284 ¶ 15.
[69] JA 288 ¶ 21.
[70] JA 284–85 ¶ 17.

saline water into the River and Estuary caused an estimate 116 acres of live oyster beds to die because the salinity of the water was reduced to near zero.[71]

Low salinity levels due to the Corps' 2005 discharges had a similar effect on sea grass habitat, which suffered a substantial decline adjacent to the mouth of the St. Lucie River in 2006.[72] Without sea grass habitat, which takes years to grow back once destroyed, the communities of juvenile fish, various shrimps, crabs, and other crustaceans that rely on the sea grass habitat to survive are compromised, and the entire estuarine ecosystem is harmed.[73] Historical and 2006 fish density estimates indicated that millions of fish were impacted by the loss of sea grass habitat within two to three miles of the mouth of the St. Lucie River, which had a catastrophic impact on regional fisheries.[74]

Beginning in the 1950s the Corps: (1) identified the nascent environmental damage its activities were beginning to have on the St. Lucie River; (2) admitted that the Corps' actions were the source of the damage; and (3) promised to mitigate both existing and future environmental degradation. Since the early 1950s the Corps made numerous efforts and made many promises to mitigate the damage to the St. Lucie. These Corps mitigation efforts, combined with the healing power of nature itself, often ameliorated much of the environmental damage. But in 2003–

[71] JA 282–83, 285–86 ¶¶ 11, 18.
[72] JA 225 ¶ 13; JA 283 ¶ 13; JA 274 ¶ 14.
[73] JA 283 ¶ 13; JA 224 ¶ 10.
[74] JA 274 ¶ 14.

2005, the Corps dumped unprecedented massive quantities of pollutants into the St. Lucie, overwhelming its natural processes and dealing the estuary a "knock-out blow" from which the River has not recovered—and it may never recover.[75]

SUMMARY OF THE ARGUMENT

The trial court erred in granting the Government's motion to dismiss the Riparian Owners' claims alleging a physical taking of their riparian rights and for summary judgment as to these claims.

First, under Florida law, it has long been settled that "[r]iparian rights . . . are property, and, being so, the right to take it for public use without compensation does not exist."[76] In *Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association*, the Florida Supreme Court described at length the rights of riparian owners, which includes "*the right to have the water kept free from pollution* . . . ."[77] More than 70 years later, the Florida Supreme Court reiterated that *Ferry Pass* "set forth in detail the rights of riparian

[75] JA 274–277; JA 282–83; JA 472.
[76] *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917); *see also Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008) (the *Thiesen* court rejected the notion that riparian, or "littoral," rights "are subordinate to public rights and, as a result, could be eliminated without compensation"), *cert. granted sub nom*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l. Protection*, 129 S. Ct. 2792 (2009).
[77] *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48. So. 643 (Fla. 1909).

owners . . . ."[78] The trial court erred in failing to apply the recognized notion in Florida law that riparian owners have a cognizable right to, among other things, an unimpeded flow of water that is free from pollution. In fact, as the Riparian Owners pointed out to the trial court, this proposition is well established as one of general applicability.[79]

Second, the trial court erred in failing to apply the law to the facts in this case. Here, the ecological damage caused by the Corps' discharges of polluted water into the St. Lucie has been gradual, sporadic, and (until the massive discharges of 2003–2005) periodically mitigated by the Corps' efforts and by natural processes. The trial court thus correctly held that the statute of limitations issue in this case is governed by the stabilization rule announced by the Supreme Court in *United States v. Dickinson*[80] and refined by this Court in more recent cases such as *Applegate*,[81] *Banks*,[82] and, most recently, *Northwest Louisiana Fish*

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[78] *Game & Fresh Water Fish Comm'n v. Lake Islands*, 407 So. 2d 189, 191 (Fla. 1981).

[79] *E.g.*, *Snyder v. Callaghan*, 284 S.E.2d 241, 246, 248 (W. Va. 1981); *Sundell v. Town of New London*, 409 A.2d 1315, 1318–19 (N.H. 1979); *Fenwick v. Bluebird Coal Co.*, 140 N.E.2d 129, 131 (Ill. App. Ct. 1957); *McLaughlin v. City of Hope*, 155 S.W. 910, 911 (Ark. 1913); *Doremus v. City of Paterson*, 55 A. 304, 304–05 (N.J. Err. & App. 1903); *Platt v. City of Waterbury*, 45 A. 154, 162 (Conn. 1900). *See generally* 93 C.J.S. *Waters* §§ 93–94 (Westlaw 2009).

[80] *United States v. Dickinson*, 331 U.S. 745 (1947).

[81] *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), *cert. denied*, 540 U.S. 1149 (2004).

[82] *Banks v. United States*, 314 F.3d 1304, *reh'g denied*, 2003 U.S. App. LEXIS 10933 (Fed. Cir. May 16, 2003), *cert. denied*, 540 U.S. 985 (2003).

*and Game Commission v United State*s.[83] But the trial court failed to apply them here, erroneously holding that the statute of limitations had run against these claims.

Finally, the trial court erred in holding that the navigational servitude provides a blanket defense to takings liability in this case. This case is squarely under the rule of *United States v. Gerlach Live Stock Co.*,[84] in which the Supreme Court rejected the Government's argument that riparian owners could not recover for the taking of their water rights resulting from the operation of Friant Dam because Congress had declared the entire Central Valley Project (of which Friant is a part) to be in aid of navigation. Stating that "[t]he Government contends that the overall declaration of purpose is applicable to Friant Dam and related irrigation facilities as an integral part of 'what Congress quite properly treated as a unit,'"[85] the Supreme Court went on to rule:

> [W]e need not ponder whether, by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it . . . .[86]

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[83] *Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285 (2006), *aff'd*, 574 F.3d 1386 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1072 (2010).
[84] *Gerlach Live Stock Co. v. United States*, 339 U.S. 725 (1950).
[85] *Id.* at 735.
[86] *Id.* at 737.

The Supreme Court thus rejected the Government's argument—erroneously accepted by the trial court here—that "the relevant inquiry is not whether a particular element of a public project will further navigation, but whether the entire project is related to that purpose."[87] Here, because the Corps' releases are for flood control purposes—and have essentially nothing to do with navigation—the navigational servitude does not bar takings liability.

ARGUMENT

I. Standard of Review

This Court reviews the trial court's grant of summary judgment and conclusions of law *de novo*.[88] "Conclusions of law . . . are 'subject to full and independent review,' without deference to the trial court."[89] Summary judgment is proper if the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[90] Therefore, in reviewing a grant of summary judgment by the trial court,

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[87] *Mildenberger*, 91 Fed. Cl. at 252.
[88] *Anderson v. United States*, 344 F.3d 1343, 1349 (Fed. Cir. 2003).
[89] *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1378 (Fed. Cir. 2001).
[90] *Long Island Savings Bank FSB v. United States*, 503 F.3d 1234, 1243 (Fed. Cir. 2007) (citations omitted).

this Court draws justifiable factual inferences in favor of the party opposing the judgment.[91]

This Court reviews the jurisdictional determination to determine if it was clearly erroneous.[92]

II. The Riparian Owners' riparian rights are property rights that support a takings claim

The Court has directed that a two-part test be used to evaluate whether governmental action constitutes a taking without just compensation. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking.[93] Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was "taken."[94] The court does not reach

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[91] *Id.* at 1244 (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 64 F.3d. 1531, 1539 (Fed. Cir. 1995) (en banc)).

[92] *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006) (citations omitted), *aff'd*, 552 U.S. 130 (2008).

[93] *See Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3396 (U.S. Dec. 29, 2009) (No. 09-771); *see also Mildenberger*, 91 Fed. Cl. at 240 ("Before determining whether a particular governmental action has effected a taking of private property requiring the payment of just compensation, a court must first 'inquire into the nature of the . . . owner's estate to determine whether the use interest proscribed by the governmental action was part of the owners' title to being with, *i.e.*, whether the . . . use interest was a 'stick in the bundle of property rights' acquired by the owner." (quoting *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995))).

[94] *See Acceptance Ins. Cos.*, 583 F.3d at 854.

this second step without identifying a cognizable property interest in the first step.[95]

In this case, the trial court concluded that the Riparian Owners' riparian rights did not constitute a cognizable property interest under Florida law and consequently did not reach the issue of whether the Corps' dumping of billions of gallons of highly polluted, non-saline water into the St. Lucie effected a taking of their property.[96] Because the trial court wrongly decided the legal issue of whether the Riparian Owners have a cognizable property interest, the case must be remanded so that the trial court can make a determination as to the second step of the analysis.

It has long been settled under Florida law that "[r]iparian rights . . . are property and, being so, the right to take it for public use without compensation does not exist."[97] Eight years earlier, in *Ferry Pass Inspectors' & Shippers'*

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[95] *Id.*; *see also Mildenberger*, 91 Fed. Cl. at 240 (the first step of this analysis is a "threshold inquiry").
[96] *Mildenberger*, 91 Fed. Cl. at 240-47.
[97] *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917); *see also Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008) (the *Thiesen* court rejected the notion that riparian, or "littoral," rights "are subordinate to public rights and, as a result, could be eliminated without compensation"), *cert. granted sub nom*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l. Protection*, 129 S. Ct. 2792 (2009).

Association v. White's River Inspectors' & Shippers' Association,[98] the Florida Supreme Court had described at length the rights of riparian owners:

> Riparian rights are incident to the ownership of lands contiguous to and bordering on navigable waters. . . .
>
> Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and dereliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper of lower riparian owners or others, *the right to have the water kept free from pollution*, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his property, the right to use the water in common with the public for navigation, fishing, and other purposes in which the public has an interest. Subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like, a riparian owner may erect upon the bed and shores adjacent to his riparian holdings bath houses, wharves, or other structures to facilitate his business or pleasure; but these privileges are subject to the rights of the public to be enforced by proper public authority or by individuals who are specially and unlawfully injured. Riparian owners have no exclusive right to navigation in or commerce upon a navigable stream opposite the riparian holdings, and have no right to so use the water or land under it as to obstruct or unreasonably impede lawful navigation and commerce by others, or so as to unlawfully burden or monopolize navigation or commerce. *The exclusive rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully*

[98] *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48. So. 643 (Fla. 1909).

> *conducted thereon*; and these rights may not be so exercised as to injure others in their lawful rights.[99]

Florida courts have never receded from this statement of riparian owners' rights, including the right to be free from water pollution. Indeed, more than 70 years later, the Florida Supreme Court reiterated that *Ferry Pass* "set forth in detail the rights of riparian owners . . . ."[100]

Consistent with *Ferry Pass*, Florida courts have recognized that a riparian owner has a cause of action for pollution of waters adjacent to his or her property. For example, in *Harrell v. Hess Oil & Chem. Corp.*,[101] a case involving a class-action suit by riparian landowners seeking damages for alleged discharges of sand and silt into a navigable creek, the plaintiffs were owners of riparian rights in the creek.[102] The plaintiffs there claimed that their riparian rights had been adversely affected by the defendant's discharges of sand and silt into the creek.[103] The court held that the plaintiffs' assertion that the defendant's acts had injured their riparian rights was sufficient to support a claim for relief.[104]

The Florida legislature has also codified many of the riparian rights detailed in *Ferry Pass* and later cases, such as the common-law rule that a riparian owner

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[99] *Id.* at 644–45 (emphasis added); *accord Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 191 (Fla. 1981).
[100] *Lake Islands*, 407 So. 2d at 191.
[101] *Harrell v. Hess Oil & Chem. Corp.*, 287 So. 2d 291 (Fla. 1973).
[102] *Id.* at 293.
[103] *Id.* at 295.
[104] *Id.*

owns to the line of the ordinary high watermark on navigable waters.[105] The Florida statute defines riparian rights as "those incident to land bordering upon navigable waters," and specifically including the "rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law."[106] The statute further provides that these riparian rights "inur[e] to the owner of the riparian land but are not owned by him or her."[107] Rather, "[t]hey are appurtenant to and inseparable from the riparian land."[108] This is consistent with the common-law rule that riparian rights are "easements incident to the riparian holdings and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law."[109]

There is nothing particularly groundbreaking about the recognized notion in Florida law that riparian owners have a cognizable right to, among other things, an unimpeded flow of water that is free from pollution. In fact, the proposition is well established as one of general applicability:

> Because a landowner's riparian rights may involve not only the quantity of a stream's flow, but also its quality, it is the right of every riparian owner to have the stream continue to flow through or by his or her premises in its natural condition of purity, and free from any contamination or pollution, such as would render it unfit for domestic purposes, manufacturing purposes, agricultural purposes such as

[105] Fla. Stat. § 253.141(1).
[106] Fla. Stat. § 253.141(1).
[107] Fla. Stat. § 253.141(1).
[108] Fla. Stat. § 253.141(1).
[109] *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919).

> irrigation or the watering of stock, or swimming and bathing purposes, or which would be destructive to the fish therein, or cause it to give off noxious and unhealthful odors. Thus, an upper riparian proprietor ordinarily has no right to pollute a stream.[110]

Consistent with Florida law treating riparian rights as easements, the general rule is that the

> right of a riparian owner to have the water flow pure and undefiled is what is termed a "natural easement" it inheres in the estate independent of the grant or prescription. Such right is not conditioned on the actual beneficial use of it, nor may its owner be deprived of it by legislation. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of a private right.[111]

As such, many States other than Florida have also recognized a riparian owner's right to be free of pollution caused by an upstream owner,[112] and at least five states have done so specifically in the context of a taking claim.[113]

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[110] 93 C.J.S. *Waters* § 93 (Westlaw 2009) (footnotes omitted).
[111] *Id.* § 94 (footnotes omitted).
[112] *See, e.g.*, *Fenwick v. Bluebird Coal Co.*, 140 N.E.2d 129, 131 (Ill. App. Ct. 1957) ("Every owner of land through which water flows either as surface water or in a stream, has the right to have the same flow in its natural state, which extends to the quality as well as the quantity of the water. One who pollutes or contaminates the water is liable to those injured thereby.").
[113] *See McLaughlin v. City of Hope*, 155 S.W. 910, 911 (Ark. 1913) (city's violation, by construction of sewer system, of riparian owner's right to flow of water in its natural state constituted a taking of private property for which compensation had to be made); *Platt v. City of Waterbury*, 45 A. 154, 162 (Conn. 1900) (the pollution of a river by city sewers so as to destroy the value of property located on the river is a taking of private property for a public use requiring the payment of just compensation, no matter what the necessity); *Sundell v. Town of New London*, 409 A.2d 1315, 1318–19 (N.H. 1979) (riparian owners who sued town that operated sewage treatment plant that discharged nutrient-laden effluent

The trial court here nevertheless refused to apply this unexceptional statement of controlling Florida law in *Ferry Pass* because these "ten words embedded within an extended passage in a 100-year old decision of the Florida Supreme Court" are supposedly obiter dictum.[114] But the trial court failed to explain why this passage, extended or not, "set[ting] forth in detail the rights of riparian owners" in Florida should be accorded any less precedential value than the Florida Supreme Court's discussion of such rights in the *Walton County* case, which the trial court incorrectly concluded was inconsistent with the rights asserted by the Riparian Owners in this case.[115]

In fact, the trial court's reliance on *Walton County* is especially puzzling, given that the Florida Supreme Court expressly limited its holding therein to the facts of that case. Indeed, after answering in the negative the certified question rephrased by the court as whether "the Beach and Shore Preservation Act unconstitutionally deprive[d] upland owners of littoral rights without just

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into a brook could recover under takings law for damages caused by reduced enjoyment of lake waters); *Doremus v. City of Paterson*, 55 A. 304, 304–05 (N.J. Err. & App. 1903) (riparian owners of land abutting a river could recover just compensation for the diminution of their property caused by pollution of the river by a city in draining sewage into it above their lands); *Snyder v. Callaghan*, 284 S.E.2d 241, 246, 248 (W. Va. 1981) (the state's approval of upstream construction work involving the introduction of foreign material into a watercourse constituted an infringement of riparian owner's property interest for purposes of the state constitution).

[114] *Mildenberger*, 91 Fed. Cl. at 245–46.

[115] *See id.* at 242–43.

compensation," the court specifically "emphasize[d] that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act."[116]

Even more indefensible than the trial court's decision to ignore controlling statements of the Riparian Owners' rights under Florida law is its characterization of their claim as "[i]n essence, . . . seek[ing] individual compensation for burdens that are shared by the public as a whole."[117] Incredibly, the trial court opined that "[t]he pollution of the St. Lucie River . . . does not inflict any special injury on plaintiffs; it is an injury that is sustained by the general public."[118] Thus, the trial court concluded, "[b]ecause any legal interest in pollution-free water is shared equally by all Florida residents, any infringement of that interest is not compensable as a taking under the Fifth Amendment."[119]

The trial court's holding in this regard is out of step with a common-sense understanding of the enhanced value of riparian property to its owners, as reflected both in venerable Florida law on the issue of riparian rights and in the specific facts of this case. While it may be true, as the trial court opined, that the "general public" has some interest in "the abatement of water pollution" in navigable waters

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[116] *Walton County*, 998 So. 2d at 1105 (footnotes omitted).
[117] *Mildenberger*, 91 Fed. Cl. at 247.
[118] *Id.* at 246.
[119] *Id.*

in which public fishing, bathing, and boating is permitted.[120] But this does not mean that the general public has the *same* interest in the abatement of water pollution as landowners who live along a navigable waterway.

To the contrary, the Florida Supreme Court long ago explained that riparian rights are property that may not be taken without just compensation precisely because of the special value of riparian property to its owners:

> Riparian rights we think are property, and, being so, the right to take it for public use without compensation does not exist. The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller.[121]

The court's observations in *Thiesen* and reiterated by the court nearly 70 years later,[122] are certainly borne out in this case, where the Riparian Owners indicated that they chose to live along the St. Lucie specifically to enjoy the benefits of

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[120] *Id.*
[121] *Thiesen*, 78 So. at 507.
[122] *Belvedere Dev. Corp. v. Dep't of Transp., Div. of Admin.*, 476 So. 2d 649, 652, (Fla. 1985).

fishing, boating, swimming, and viewing wildlife from their homes and yards adjacent to the River.[123]

Thus, it is absurd to suggest that the "public as a whole" shares the burden of the Corps' pollution of the St. Lucie to the same extent as the Riparian Owners[124] because, while members of the public may enjoy boating or swimming in the River or Estuary for a day or afternoon, they ultimately return to their homes away from the water. But for the Riparian Owners whose homes are adjacent to the water, access to the water and to their docks for fishing, boating, and swimming affects their daily lives. The water is essentially part of their land. And where the water is polluted with excess nutrients or with toxic algae blooms, like the St. Lucie, adjacent landowners cannot "reasonably use the water" as they are entitled to do under any statement of Florida law, whether set forth in *Ferry Pass*[125] or in *Walton County*.[126]

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[123] *See, e.g.*, JA 356 ¶ 2 (John Mildenberger and his wife purchased their property in 2002 with the expectation that they could the River for boating, swimming, fishing, water sports, and wildlife viewing); JA 362–63 ¶ 2 (Beatty purchased and built his house on the River in order to fish, boat, and engage in water activities from his home).

[124] *Mildenberger*, 91 Fed. Cl. at 247.

[125] *See Ferry Pass*, 48 So. at 645 (riparian owners have "the right to a reasonable use of the water for domestic purposes," as well as "the right to have the water kept free from pollution").

[126] *See Walton County*, 998 So. 2d at 1111 (upland owners have the rights "to reasonably use the water" and to a view of the water, among other common-law littoral rights).

In fact, the record in this case is replete with evidence that the injury suffered by the Riparian Owners is categorically different than any injury that may have been suffered by the public as a whole as a result of the Corps' discharges of polluted water into the St. Lucie. For example, the Riparian Owners have the right to keep their boats in the river, moored to docks attached to their land, whereas the general public must remove their boats and go home at the end of the day. And, because the Corps' discharges have degraded the water, many of the Riparian Owners here, such as the Harters, the Hendersons, the Guys, the Pearsons, the Schmidts, and Robert Paré, can no longer keep their boats in the water or must constantly clean the muck off their boats.[127]

Similarly, while the public can simply go away from unpleasant odors and dead, or dying, marine animals, the Riparian Owners cannot, and must endure the ugly sights and smells day-in and day-out. Not long ago, thousands of dead foot-long stingrays drifted and collected in the canal in front of the Beattys' home.[128] Likewise, the Jordans have noticed many diseased fish in the St. Lucie.[129] The Mildenbergers witnessed a dead sea turtle and a dead porpoise wash up near their home.[130] Mr. Cloud testified that when the Corps releases water from Lake

[127] JA 352 ¶ 2; JA 358–59 ¶ 2; JA 378–79 ¶ 2; JA 374 ¶ 2.
[128] JA 362–63 ¶ 2.
[129] JA 348 ¶ 2.
[130] JA 356–57 ¶ 3.

Okeechobee, the St. Lucie "looks like foamy and dirty Coca-Cola."[131] The Schmidts, Paul Paré, and the Voisinets also notice unsightly colors and green slime in the St. Lucie corresponding to the Corps' discharges.[132] Mr. Connell testified that the Corps' discharges "kill" the oysters and fish in his section of the St. Lucie.[133] And, the Crispin family notices a rotting smell and algae blooms when the Corps discharges Lake Okeechobee water into the St. Lucie.[134] Mr. Wakeman also complains of the "stagnant" odor in the water,[135] while Mr. Mildenberger says that the "water gives off a strong sewer-like odor . . . ."[136] Other Riparian Owners also testified of seeing the toxic blue-green algal blooms covering the River.[137] While it is easy enough for the "public as a whole" to avoid the noxious odors and ruined view of the St. Lucie simply by staying away from the River, not so for the Riparian Owners, who certainly had something completely different in mind when they purchased their properties adjacent to the water.[138]

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[131] JA 340 ¶ 2.
[132] JA 364 ¶ 2; JA 342 ¶ 2; JA 370–71 ¶ 2.
[133] JA 360 ¶ 2.
[134] JA 344–45 ¶ 2.
[135] JA 376–77 ¶ 2.
[136] JA 356–57 ¶ 3.
[137] JA 368–69 ¶ 2; JA 350–51 ¶ 2; JA 376–77 ¶ 2; JA 370–71 ¶ 2.
[138] There is no reason to believe that a riparian landowner's "right to the unobstructed view of the water," *Walton County*, 998 So. 2d at 1111, is diminished any less by the sight of rotting fish and animal carcasses and toxic algal blooms than by the construction of a bridge, *see Lee County v. Kiesel*, 705 So. 2d 1013 (Fla. 2d DCA 1998). Indeed, at this point, the Riparian Owners might welcome

Finally, the trial court's error in concluding that riparian owners do not have a cognizable property interest in those rights that are shared, to some extent, with the general public, such as boating, fishing, and swimming, is also demonstrated by Florida cases indicating that government regulation that may be permissible as to the public generally may nevertheless constitute a taking as to a riparian owner. In *Board of Trustees of Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*,[139] for instance, the court stated that a police power regulation prohibiting swimming, fishing, or boating "may be unchallengeable by the public but constitute a taking with respect to a riparian."[140] Based on the weighty considerations given to riparian owners, the court held that the accreted land along the owners' property belonged to the owner even though the accretion was the result of a lawful exercise of police power.[141]

And in *Lake Islands*, a case involving a challenge to a Florida administrative rule by riparian owners, the Florida Supreme Court struck down as unconstitutional the rule that prohibited riparian owners from using their motorboats and airboats on the lake during duck hunting season.[142] The court held

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the construction of a structure to shield their view from the carnage caused by the Corps' discharges.

[139] *Bd. of Trs. of Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209 (Fla. 2d DCA 1973).

[140] *Medeira Beach Nominee*, 272 So. 2d at 214.

[141] *Id.* at 211–15.

[142] *Lake Islands*, 407 So. 2d at 193.

that, as applied to the public generally, the rule was constitutional, but it was unreasonable and arbitrary as applied to riparian owners because it deprived them of their rights to reasonable ingress and egress.[143]

In sum, there is no support in the law or in the factual record for the trial court's conclusion that the Riparian Owners' right to be free from pollution caused by the Corps' discharges is not well-grounded in Florida law because that pollution supposedly does not inflict an injury on the Riparian Owners that is not shared equally by all Florida residents. Accordingly, the trial court erred in holding that the Riparian Owners had not demonstrated a cognizable property interest sufficient to support their taking claim.

III. The statute of limitations has not run

The ecological damage caused by the Corps' discharges of polluted water into the St. Lucie has been gradual, sporadic, and (until the massive discharges of 2003-2005) periodically mitigated by the Corps' efforts and by natural processes. The trial court thus correctly held that the statute of limitations issue in this case is governed by the stabilization rule announced by the Supreme Court in *United States v. Dickinson*[144] and refined by this Court in more recent cases such as

[143] *Id.*
[144] *United States v. Dickinson*, 331 U.S. 745 (1947).

Applegate,[145] *Banks*,[146] and, most recently, *Northwest Louisiana Fish and Game Commission v. United State*s.[147] But the trial court misapplied that rule of law by completely ignoring the undisputed evidence that, although environmental damage had been reported as early as the 1950s, much of that damage had been mitigated by the Corps—and the Corps had promised even more mitigation—until the massive, unprecedented and unforeseen discharges of polluted water in 2003–2005 dealt a "knock-out blow" to the St. Lucie from which it still has not recovered.[148]

As the trial court itself noted, "[a]s recently as 1998, the estuary provided habitat for more than 4000 plant and animal species, including manatees, dolphins, sea turtles and a wide variety of fish and invertebrates."[149] The Corps' 2003–2005 pollution discharges devastated those species—giving rise to this claim well within the six-year statute of limitations.

Because the facts did not support a statute of limitations argument, the Government itself did not even raise this jurisdictional issue in its Answer to Complaint, nor throughout 15 months of discovery during which 42 depositions were taken, nor even when, following the close of discovery, the Government

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[145] *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), *cert. denied*, 540 U.S. 1149 (2004)
[146] *Banks v. United States*, 314 F.3d 1304, *reh'g denied*, 2003 U.S. App. LEXIS 10933 (Fed. Cir. May 16, 2003), *cert. denied*, 540 U.S. 985 (2003).
[147] *Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285 (2006), *aff'd*, 574 F.3d 1386 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1072 (2010).
[148] JA 274–277; JA 282–83; JA 472.
[149] *Mildenberger*, 91 Fed. Cl. at 244.

moved for summary judgment and dismissal.[150] That the Government jumped on the statute of limitations bandwagon only after the trial court itself raised the issue[151] is an excellent indication that the argument lacks merit.

A. The trial court correctly held that the stabilization doctrine applies

The trial court correctly determined that the stabilization doctrine, first announced by the Supreme Court in *United States v. Dickinson*,[152] is the proper rule of law to apply to the gradual and uncertain environmental processes that in 2003–2005 suddenly morphed into a full-blown environmental catastrophe for the St. Lucie estuary. The trial court "conclude[d] that the stabilization doctrine is likewise applicable to plaintiffs' takings claims in this case,"[153] relying on this Court's decision in *Northwest Louisiana Fish & Game*, in which this Court summarized the doctrine applicable to takings resulting from gradual physical processes:

> When the damages from a taking only gradually emerge, e.g., as in recurrent flooding, a litigant may postpone a suit for a taking until "the situation becomes stabilized" and "the consequences of inundation have so manifested themselves that a final account may be struck." *Dickinson* established the principle that, "when the government allows a taking of land to occur by a continuing process of physical events, plaintiffs may postpone filing suit until the nature and extent of the taking is clear." *Dickinson* discouraged a strict

[150] JA 107.
[151] JA 432–33.
[152] *United States v. Dickinson*, 331 U.S. 745 (1947).
[153] *Mildenberger*, 91 Fed. Cl. at 236.

> application of accrual principles in unique cases involving Fifth Amendment takings by continuous physical processes. This court followed the Supreme Court's *Dickinson* mandate in *Applegate,* and held that the gradual character of the natural erosion process to the beach-front properties south of the Cape Canaveral harbor made accrual of the landowner's claim uncertain. Likewise, in *Banks v. United States*, . . . this court also applied the stabilization doctrine to another shoreline erosion case.[154]

This Court therefore ruled that a taking based on uncontrolled hydrilla growth resulting from Government action was only a speculative threat until the damage had actually occurred and could be quantified, at which time suit could be brought:

> A possible future taking of property cannot give rise to a present action for damages. Thus, in this case, until the hydrilla had grown, *and* had grown to harmful levels, *and* the Corps refused to drain the lake to alleviate the harm caused by the *overgrowth* of hydrilla, damages were not "present," i.e. they were still unquantifiable and speculative. Until damages were quantifiable and present, the potential harm that could be caused by the hydrilla was only a threat. It did not become clear that the gradual process set in motion by the Corps had effected a permanent taking until the situation, i.e. the overgrowth of hydrilla, "stabilized" in 1997.[155]

Applegate v. United States,[156] cited by the Northwest Louisiana Fish and Game Commission court, was a suit filed in 1992 (some 40 years after erosion from the Government's actions had begun) in which this Court identified the difficulties that such gradual takings create, quoting from *Dickinson*:

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[154] *Nw. La. Fish & Game*, 446 F.3d at 1290–91 (citations omitted).
[155] *Id.* at 1291 (citations omitted).
[156] *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), *cert. denied*, 540 U.S. 1149 (2004)

> If suit must be brought, lest [the property owner] jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river-is not a single event; it is continuous.[157]

The *Applegate* court went on to explain its understanding of the Supreme Court's *Dickinson* doctrine as allowing the property owner to postpone filing the taking case until the effects of the Government's actions had become stabilized:

> [T]he Supreme Court clarified: "The Government . . . left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in [an ongoing] process of acquisition by the United States when the fact of taking could no longer be in controversy." Under these circumstances, the Supreme Court explained that the claimant can postpone filing a suit "until the [continuing taking] situation becomes stabilized." In other words, the Supreme Court reiterated that the owner may wait until "the consequences of inundation have so manifested themselves that a final account may be struck." Moreover, *Dickinson* discouraged a strict application of accrual principles in unique cases involving Fifth Amendment takings by continuous physical processes.[158]

In a subsequent decision, *Bolling v. United States*,[159] this Court further refined the stabilization doctrine, stating: "[T]he touchstone for any stabilization analysis is determining when the environmental damage has made such substantial

[157] *Id.* at 1582–83 (quoting *Dickinson*, 331 U.S. at 749).
[158] *Id.* at 1582 (citations omitted).
[159] *Boling v. United States,* 220 F.3d 1365 (Fed. Cir. 2000).

inroads into the property that the permanent nature of the taking is evident and the extent of the damage is foreseeable."[160]

Finally, in *Applegate* this Court identified a second aspect of uncertainty that may postpone the stabilization of cases like this one, holding that the Corps' announcements of possible plans for amelioration of the taking (in that case, creation of a sand transfer plant to restore the eroded sand) also postponed accrual of the statute of limitations:

> The slow physical process, however, is not the only event inhibiting stabilization. The Corps itself has held forth the promise of a sand transfer plant for years. Authorized in 1962 and proposed again in 1988, the sand transfer plant would reverse the continuous erosion process. With a sand transfer plant in place, the landowners would encounter little, if any, permanent destruction of their shoreline property.
>
> * * *
>
> With plans for a sand transfer plant pending, the landowners had no way to determine the extent, if any, of the permanent physical occupation.
>
> * * *
>
> Thus, due to both the very gradual nature of this particular continuous physical process and the Corps' promises to restore the littoral flow of sand, this taking situation had not stabilized by 1986—six years before the landowners filed suit. The statute of limitations does not bar this action.[161]

Similarly, relying on *Applegate*, in *Banks v. United States*,[162] this Court found that Corps efforts and promises to mitigate erosion resulting from a jetty

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[160] *Id.* at 1372.
[161] *Applegate*, 25 F.3d at 1582–83.
[162] *Banks v. United States*, 314 F.3d 1304, 1309–10, *reh'g and reh'g en banc denied*, 2003 U.S. App. LEXIS 10933 (Fed. Cir.), *cert. denied*, 540 U.S. 985 (2003).

constructed by the Government in 1903 and improved in 1950 postponed the onset of the statute of limitations until the Corps determined that the damage was permanent in a 1996 report:

> In *Applegate,* the mere promises of a sand transfer plant, held out by the Corps and repeatedly renewed but never implemented, indicated that "the landowners did not know when or if their land would be permanently destroyed." Here, even greater uncertainty was created by the Corps' mitigation plan. While the Corps in *Applegate* made promises of a mitigating sand transfer plant, the Corps in this case actually performed its mitigation activities for several years before the filing of this action. The record shows that the Corps dumped fine sand onto plaintiffs' properties several times over a twenty-three year period beginning in 1970. When the Corps determined that dumping fine sand was not working, it deposited coarse material on the shoreline five different times between 1986 and 1993. The Corps tried a different technique in 1995. The Corps' mitigation operations at St. Joseph appeared to successfully stave off the damaging effects of the jetties. With the mitigation efforts underway, the accrual of plaintiffs' claims remained uncertain until the Corps' 1996 Report, 1997 Report, and 1999 Report collectively indicated that erosion was permanent and irreversible. We are satisfied that the plaintiffs met their jurisdictional burden before the Court of Federal Claims on the basis of the justifiable uncertainty of the permanence of the taking caused by the actual mitigation efforts of the Corps.[163]

B. The trial court committed clear error in holding that these claims had stabilized in the 1950s

Having correctly determined that the stabilization doctrine applies, the trial court erred in concluding that this claim is nevertheless barred by the statute of limitations. Because the voluminous record demonstrates that, although Corps discharges periodically damaged the St. Lucie's ecology, since the early 1950s the

[163] *Id.* at 1309–10 (citation omitted).

Corps also made numerous efforts and even more promises to mitigate the damage to the St. Lucie. These Corps mitigation efforts combined with the healing power of nature itself to ameliorate much of the environmental damage. But in 2003–2005 the Corps dumped unprecedented massive quantities of pollutants into the St. Lucie, overwhelming its natural processes and dealing the estuary a "knock-out blow" from which the River has still not recovered—and may never recover.[164]

The trial court thus erred in holding that this unforeseeable environmental damage was outside the statute of limitations, and "that the current environmental damage to the river is qualitatively different from the damage that occurred in earlier years and did not "peak" until 2004 or 2005 is irrelevant to the applicable legal standard for determining whether plaintiffs' claims are timely."[165]

The complete record before the Court demonstrates that beginning in the 1950s the Corps: (1) identified the nascent environmental damage its activities were beginning to have on the St. Lucie River; (2) admitted that their actions were the source of the damage; and (3) promised to mitigate both existing and future environmental degradation. The trial court ignored the facts that because of the Corps' repeated and long-standing promises and attempts to mitigate, the Riparian

[164] JA 274–277; JA 282–83; JA 472.
[165] *Mildenberger*, 91 Fed. Cl. at 238.

Owners were justifiably uncertain about the predictability and permanence of the damage caused by the Corps dumping of non-saline water into the estuary.[166]

- Although the trial court found that "[a]s early as 1952, however, one local newspaper observed that "irreparable damage has been done to the St. Lucie River basin by siltation,"[167] the court failed to note that the March 8, 1952 newspaper editorial she quoted began by reporting:

  > Army Engineers, who have pledged Martin County that they will not release Lake Okeechobee's muddy deluge into the world-famous fishing grounds of the St. Lucie River, "except in cases of extreme emergency," went on record that they will carry out that policy in lowering Lake Okeechobee this coming summer.[168]

  The report goes on to state that the Corps plans to discharge water to another river: "They [the Corps] plan to use the Caloosahatchee River as the 'regulatory discharge' . . . ."[169]

- Although the trial court stated: "Additionally, in a federal report on the St. Lucie Canal issued in 1957, defendant discussed longstanding local opposition to precisely the same environmental impacts now alleged by

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[166] *See Banks*, 314 F.3d at 1309–10 ("We are satisfied that the plaintiffs met their jurisdictional burden before the Court of Federal Claims on the basis of the justifiable uncertainty of the permanence of the taking caused by the actual mitigation efforts of the Corps."); *see also Applegate*, 35 F.3d at 1583 ("[P]recisely because of the Government's promises [to mitigate], the landowners remain justifiably uncertain about the permanency of the . . . taking.").
[167] *Mildenberger*, 91 Fed. Cl. at 236.
[168] JA 588.
[169] *Id.*

plaintiffs,"[170] the court also failed to note that the report dealt primarily with sedimentation as an obstacle to boating (and not the other environmental concerns raised in this claim) and that the Corps had decided to implement Plan B to mitigate this sedimentation problem, describing Plan B as involving "[f]our small-craft navigation channels [that] would be excavated around the shoal, with connecting lateral channels between the drawspan of Palm City Bridge and the east and west channels on both sides of the bridge."[171] The report went on to state: "The improvement would appear to be economically justified on the basis of benefits to recreational boating and from land enhancement, and this margin of justification would be greatly increased if fish and wildlife benefits were added."[172]

- The trial court also completely ignored the testimony of Kevin Henderson, a long-term resident of Martin County, who testified that "[a]s long ago as 1958, the Corps proposed to construct a 'third outlet south' for Lake Okeechobee waters as an alternative to dumping polluted Lake Okeechobee water into the St. Lucie"[173]
- Although the trial court quoted "[a] Wall Street Journal editorial published in 1970, for example, [that] noted that 'the once-clear St. Lucie is black with

[170] *Mildenberger*, 91 Fed. Cl. at 236.
[171] JA 575.
[172] JA 585.
[173] JA 274.

mud,'"[174] the court failed to note that in the same paragraph the editorial reported that "[n]ow Corps officials talk of a costly new project—a 10-year effort to clean up the river,"[175] and on the next page goes on to state that the then Chief of Engineers had said, "we of the Corps believe . . . we can plan to meet the needs in ways that will result in a balanced and harmonious treatment of resources and environment."[176]

- Although the trial court states that "[i]n that same year [1970], an internal memorandum prepared by defendant noted that its discharges through the St. Lucie Canal 'erode the canal banks, fill the estuary with shoals, discolor the water, deny boating in the estuary, and drive out the fish each time regulatory discharges are required from Lake Okeechobee,'"[177] the court failed to note that the memorandum goes on to state that:

> [t]he Corps should not continue to effect discharges that erode the canal banks, fill the estuary with shoals, discolor the water, deny boating in the estuary, and drive out the fish each time regulatory discharges are required from Lake Okeechobee. The continuation of such a system contributes greatly to the Corps' bad image in the area."[178]

And in that memorandum, Col. Fullerton, of the Corps, further identified efforts that should be undertaken to mitigate the negative impacts of water

[174] *Mildenberger*, 91 Fed. Cl. at 237.
[175] JA 593.
[176] JA 594.
[177] *Mildenberger*, 91 Fed. Cl. at 237.
[178] JA 590 ¶ 5.

discharges, including adding bank protection to the St. Lucie River and dredging spur channels.[179] He finally concluded that such efforts "would appear to be about the minimum gestures to mitigate for the many years of ecological transgressions committed."[180]

- Although the trial court stated: "As evidenced by the newsletters, news articles and other documents submitted by defendant, the Initiative has been tirelessly working for almost twenty years to stop defendant's discharges and to restore the environmental health of the St. Lucie River,"[181] the court failed to note that those same newsletters stated that "[i]n the longer future, we must rely on our vigorous cooperation with the District and [t]he Corps . . . . They are now in the planning and design phase of a system that will eventually return the river to health . . . ."[182] The newsletters also noted that the environmental problems were attributable in part to "the [Corps'] failure to construct the storage reservoir at the junction of C-23/23/25 which was originally planned in the 1950's[;]"[183]that "[t]he [1998] schedule for

[179] JA 590–591.
[180] JA 591 ¶ 7.
[181] *Mildenberger*, 91 Fed. Cl. at 238.
[182] JA 597.
[183] JA 601.

improvements in our basin is too lengthy[;]" and that "[w]e request more rapid completion."[184]

The trial court is, then, simply wrong in asserting that "[t]he mitigation efforts cited by plaintiffs . . . did not commence until the mid-1990s,"[185] and the court's conclusion that the statute of limitations had begun to run in the 1950s is clear error.

Finally, the trial court simply ignored the fact that Lake Okeechobee became more and more polluted over the years and that the Corps' massive discharges of this highly concentrated pollution in 2003–2005 caused a different kind of unmitigated damage that was, until that time, merely a speculative threat: "Discharges to the St. Lucie River from S-308 have similarly become more polluted, peaking in 2004 and 2005 at levels never before reported."[186]

The trial court thus erred in concluding that "Plaintiffs' assertion that the current environmental damage to the river is qualitatively different from the damage that occurred in earlier years and did not 'peak' until 2004 or 2005 is irrelevant to the applicable legal standard for determining whether plaintiffs' claims are timely."[187] For if this type or quality of damage had not previously occurred, the statute of limitations could not have run on the claim:

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[184] *Id.*
[185] *Mildenberger*, 91 Fed. Cl. at 237.
[186] JA 272.
[187] *Mildenberger*, 91 Fed. Cl. at 238.

> A possible future taking of property cannot give rise to a present action for damages. Thus, in this case, until the hydrilla had grown, *and* had grown to harmful levels, *and* the Corps refused to drain the lake to alleviate the harm caused by the *overgrowth* of hydrilla, damages were not "present," i.e. they were still unquantifiable and speculative.[188]

IV. The trial court erred in sustaining the Government's navigational servitude defense because the Corps' discharges of polluted water into the St. Lucie were for purposes of flood control, not navigation

Because both the Corps' discharges of pollution into the St. Lucie River and the S-80 floodgates through which those discharges are made lack any navigational purpose, the trial court erred in upholding the Government's navigational servitude defense. In authorizing enlargement of the 23-mile canal that carries the polluted water from Lake Okeechobee to the St. Lucie, in 1948 Congress declared that the project's navigational benefits are relatively small and that the project should be considered henceforward as a flood control project instead:

> [N]avigation benefits are relatively small and incidental when compared with the primary features of flood protection and water control . . . . [T]he comprehensive plan of improvement will serve the purposes of flood protection, drainage, and water control to a far greater degree than navigation. Consequently, it is believed that this project should be considered henceforth as one for flood control and other purposes, and that its further consideration should be under the provisions of flood-control law.[189]

The same congressional report identified the Corps' objectives as:

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[188] *Nw. La. Fish & Game*, 446 F.3d at 1291.
[189] H.R. Doc. No. 643, 80th Cong. 2d Sess. at 2 (1948).

> [I]mprovement for flood protection, water control, and allied purposes. It provides the protection and control works urgently needed to prevent a repetition of recent destructive flooding, as well as the related major drainage outlets, control structures, and water conservation facilities which are needed to stabilize the present agricultural economy of the region and are essential to ultimate development.[190]

And the releases of water associated with locking boats from the Lake to the St. Lucie are, according to the Government's navigational servitude expert, "miniscule:" What I'm saying is, it's just . . . such a very very small amount [of water]; I mean, it's a minuscule amount in regards to the size of the lake."[191] And when asked the purpose of the expansion of the St. Lucie Canal in 1949, he testified: "It was for flood damage reduction."[192]

The trial court thus erred in holding that "the fact that those navigational benefits are small or incidental is irrelevant for purposes of determining the applicability of the federal navigational servitude,"[193] for the Supreme Court has held that the commerce clause is not a blanket exception to the just compensation clause:

> Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, this Court has never held that the navigational servitude creates a blanket

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[190] *Id.*
[191] JA 613, lines 14–18.
[192] JA 614, line 5.
[193] *Mildenberger*, 91 Fed. Cl. at 250.

> exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation.[194]

This case is thus squarely within the rule of *United States v. Gerlach Live Stock Co.*,[195] in which the Supreme Court rejected the Government's argument that riparian owners could not recover for the taking of their water rights resulting from the operation of Friant Dam because Congress had declared the entire Central Valley Project (of which Friant is a part) to be in aid of navigation. Stating that "[t]he Government contends that the overall declaration of purpose is applicable to Friant Dam and related irrigation facilities as an integral part of 'what Congress quite properly treated as a unit,'"[196] the Supreme Court went on to rule:

> [W]e need not ponder whether, by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it . . . .[197]

The Supreme Court thus rejected the Government's argument—accepted by the trial court here—that "the relevant inquiry is not whether a particular element of a public project will further navigation, but whether the entire project is related to that purpose":[198]

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[194] *Kaiser-Aetna v. United States*, 444 U.S. 164, 172 (1979) (citation omitted).
[195] *Gerlach Live Stock Co. v. United States*, 339 U.S. 725 (1950).
[196] *Id.* at 735.
[197] *Id.* at 737.
[198] *Mildenberger*, 91 Fed. Cl. at 252.

> Even if we assume, with the Government, that Friant Dam in fact bears some relation to control of navigation, we think nevertheless that Congress realistically elected to treat it as a reclamation project. It was so conceived and authorized by the President and it was so represented to Congress.[199]

As this Court held in *Palm Beach Isles v. United States*, "[t]he effect of the Government's invocation of the navigational servitude as a defense to a regulatory taking, in a case in which it properly applies, is to give the Government a defense to the alleged taking,"[200] only if the government action that caused the taking was for a navigational purpose:

> Thus it is clear that in order to assert a defense under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to "identify background principles . . . that prohibit the uses [the landowner] now intends."[201]

The *Palm Beach Isles* Court relied on Supreme Court precedent holding that the Government's purpose must be related to navigation if it is to avoid liability for the taking of riparian property:

> The precedents clearly establish that the Government's purpose must be related to navigation if it wishes to avoid paying compensation for the regulation or control of private property. In a straightforward declaration on this point, the Supreme Court said: The right of the United States in the navigable waters within the several States is, however, "limited to the control thereof for purposes of navigation." And while Congress, in the exercise of this power, may adopt, in its

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[199] *Gerlach*, 339 U.S. at 739.
[200] *Palm Beach Isles Assoc's. v. United States*, 208 F.3d 1374, 1384 (2000), *aff'd*, 122 Fed. Appx. 517 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 818 (2005).
[201] *Id.* at 1385 (citation omitted).

> judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.[202]

The *Palm Beach Isles* Court also cited with approval a Third Circuit condemnation decision rejecting the Government's navigational servitude defense where the landowner claimed that the Government's installation of an underwater pipeline took riparian rights:

> Within the realm of reason the mere running of a pipeline over the bed of a navigable body of water cannot be considered as an aid to navigation or bearing some positive relation to the control of navigation. The petition in condemnation did not aver nor was any proof offered from which the trial court could find that one of the purposes of the pipelines was to facilitate navigation. Hence, the United States failed to meet its burden on this issue, and should, therefore, be required to pay Bergen Point just compensation for the use of the submerged land and the interference with its access to navigable water . . . .[203]

The trial court's error in this case also rests in part on its misreading of the *Coastal Petroleum*[204] decision, a case in which the Claims Court held that the "entire C&SF Project, and the levees surrounding Lake Okeechobee in particular, serve a navigational purpose."[205] The trial court reasoned that since the Lake

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[202] *Id.* at 1384.
[203] *Palm Beach Isle Assoc*, 208 F.3d at 1385 (quoting *United States v. 50 Foot Right-of-Way in Bayonne, New Jersey*, 337 F.3d 956, 960 (3d Cir. 1964)).
[204] *Coastal Petroleum Co. v. United States*, 524 F.2d 1206 (Ct. Cl. 1975).
[205] *Mildenberger*, 91 Fed. Cl. at 251 (quoting *Coastal Petroleum Co. v. United States*, 524 F.2d 1206 (Ct. Cl. 1975)).

Okeechobee and the St. Lucie Canal are part of the C&SF Project, then the discharges at issue in this case must also be for a navigational purpose.[206] Indeed, the trial court went so far as to say that *Coastal Petroleum* was "dispositive" of the claims of the Riparian Owners in this case.[207] But the *Coastal Petroleum* decision did not so hold, nor did that case even involve discharge of pollution from Lake Okeechobee. And the facts of this case establish that the Corps' discharges have nothing to do with navigation. Instead, the releases are purely flood control measures.

Coastal Petroleum involved limestone deposits that the company had ownership rights in pursuant to mining leases issued to it by the State of Florida. That limestone lay in a navigable stream. The Corps excavated the limestone during the construction of levees, which are part of the navigational waterway.[208]

The levees at issue in *Coastal Petroleum* are at least 23 miles away from the St. Lucie and the S-80 floodgates that the Corps opens in order to discharge water from Lake Okeechobee into the St. Lucie Canal (C-44). The S-80 floodgates have nothing to do with navigation and everything to do with flood control. In fact, it is

[206] *Id.* at 250–51.
[207] *Id.* at 251.
[208] *Coastal Petroleum*, 524 F.2d at 1209–10.

through the locks adjacent to the S-80 floodgates by which boats navigate from Lake Okeechobee to the St. Lucie.[209]

Finally, even if these releases played a small role in navigation—which they do not—and if the mere fact that the Government built a structure in aid of navigation serves as an absolute defense to a riparian claim, the plaintiffs in *Applegate* (construction of a waterway), *Banks* (construction of a jetty) and *Gerlach* (construction of a massive project of dams, canals and reservoirs) could not have prevailed.[210] The nexus between navigation and the taking must be something more—a nexus that is lacking in this case.

Because the Corps' S-80 discharges of polluted water into the St. Lucie—flooding the river and estuary and destroying private riparian rights—serve no navigation purpose, the navigational servitude does not shield the Corps from takings liability.[211] Put simply, the navigational servitude protects the Government from takings liability for actions in support of navigation; it is not a blanket authorization to pollute and flood private water rights (such as those in the St. Lucie River) with impunity. Thus, the navigation servitude defense (an affirmative

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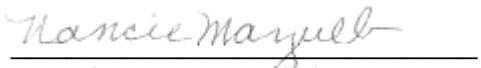
[209] JA 448–50 ¶¶ 26, 29.
[210] *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), *cert. denied*, 540 U.S. 1149 (2004); *Banks v. United States*, 314 F.3d 1304, *reh'g denied*, 2003 U.S. App. LEXIS 10933 (Fed. Cir. May 16, 2003), *cert. denied*, 540 U.S. 985 (2003); *Gerlach Live Stock Co. v. United States*, 339 U.S. 725 (1950).
[211] *See* JA 430–31.

defense on which the Government has the burden of proof)[212] fails in this case because the Corps' discharges to the St. Lucie are not navigation-related, but are made instead for flood control and water supply.[213] This Court should reverse the trial court's decision holding otherwise.

CONCLUSION

For all of these reasons, the Riparian Owners ask this Court to reverse the trial court's decision, to hold that the Riparian Owners possess constitutionally protected property rights, and to find that their claims are not barred by the statute of limitations or by the navigational servitude defense.

Respectfully submitted,



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Dated: April 20, 2010

[212] *Palm Beach Isles,* 208 F.3d at 1385.
[213] JA 294–95 ¶ 9.

ADDENDUM

In the United States Court of Federal Claims

No. 06-760 L

(Filed January 29, 2010)

* * * * * * * * * * * * * * * * * * * *	*	
JOHN R. MILDENBERGER, *et al.*,	*	
	*	Motion to Dismiss for Lack of
Plaintiffs,	*	Subject Matter Jurisdiction
	*	RCFC 12(b)(1); Motion for
v.	*	Summary Judgment RCFC 56;
	*	Fifth Amendment Takings
THE UNITED STATES,	*	Claim.
	*	
Defendant.	*	
	*	
* * * * * * * * * * * * * * * * * * * *	*	

Roger J. Marzulla, Washington, DC, for plaintiffs. *Nancie G. Marzulla*, Washington, DC, of counsel.

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Stephen Fry, Stuart, FL, for *amicus curiae* Martin County, Florida.

Keith W. Rizzardi, West Palm Beach, FL, with *Sheryl Wood*, General Counsel, for *amicus curiae* South Florida Water Management District.

OPINION AND ORDER

BUSH, *Judge.*

This takings case is currently before the court on defendant's motion to dismiss, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), defendant's motion for summary judgment pursuant to RCFC 56, and plaintiffs' cross motion for summary judgment, pursuant to RCFC 56. For the reasons set forth herein, plaintiffs' cross motion for summary judgment is denied, defendant's motion to dismiss is granted in part and denied in part, and defendant's motion for summary judgment is granted in part and denied in part.

BACKGROUND

In this case, the court must decide whether the transfer of water from one navigable waterway into another as part of a comprehensive system of water management effects an uncompensated physical taking of the riparian rights held by owners of land situated along the receiving body of water. This appears to be an issue of first impression in this court. The United States Court of Appeals for the Federal Circuit has noted that "[t]he issue of whether a taking has occurred is a question of law based on factual underpinnings." *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212 (Fed. Cir. 2005). Because of the highly fact-intensive nature of the required takings analysis, the court must engage in a thorough examination of the relevant facts in this case.

I. Factual Background[1]

A. Plaintiffs and the St. Lucie River and Estuary

Each of the named plaintiffs in this case is an owner in fee simple of one or more parcels of riparian land and related improvements located along the St. Lucie

[1]/ The facts presented in this section are undisputed by the parties unless otherwise noted.

River, the Indian River or the St. Lucie Canal (also known as the C-44 Canal) in southeastern Florida. Compl. ¶¶ 1-22; Pls.' Mot. Ex. 7 (Pls.' Declarations). The St. Lucie River is composed of two forks, the North Fork and the South Fork, which converge near the city of Stuart before flowing east and then south into the Indian River Lagoon. Expert Declaration of Mark D. Perry (Perry Decl.) ¶ 6. The Indian River Lagoon is connected to the Atlantic Ocean at the St. Lucie Inlet and is a part of the Atlantic Intracoastal Waterway. *Id.*; Declaration of James H. Hammond (Hammond Decl.) ¶ 9. The St. Lucie River, the St. Lucie Canal and the Indian River Lagoon are all navigable bodies of water. Hammond Decl. ¶ 3.

Until the late nineteenth century, the St. Lucie River was a freshwater stream with no permanent physical connection to the Atlantic Ocean. *Id.* ¶ 9; Declaration of Andrew E. Geller (Geller Decl.) ¶ 7. In 1892, a consortium of private interests constructed the St. Lucie Inlet to provide a navigable connection between the Atlantic Ocean and the Indian River Lagoon adjacent to the mouth of the St. Lucie River. Hammond Decl. ¶ 9; Geller Decl. ¶ 7; Def.'s Reply Ex. C at 130. The construction of the inlet and the resulting tidal flow of salt water into the St. Lucie River resulted in a brackish marine environment that now supports a large number of plant and animal species that cannot survive in either pure fresh water or pure sea water. Perry Decl. ¶ 4. As recently as 1998, the estuary provided habitat for more than 4000 plant and animal species, including manatees, dolphins, sea turtles and a wide variety of fish and invertebrates. Expert Declaration of Richard Grant Gilmore, Jr. (Gilmore Decl.) ¶ 6. According to plaintiffs, defendant's high-volume discharges of polluted fresh water into the South Fork of the St. Lucie River have dramatically reduced aquatic plant and animal populations and irreparably damaged the environmental health of the estuary. Compl. ¶¶ 28-31; Pls.' Mot. at 5-13; Perry Decl. ¶¶ 8-13. Under this scenario, plaintiffs argue that defendant's actions have effected a physical taking of their riparian rights in the use and enjoyment of the St. Lucie River.

B. Lake Okeechobee and the Central and Southern Florida Project

Lake Okeechobee is located approximately twenty-five miles southwest of the St. Lucie River and is the second largest freshwater lake in the continental United States. Geller Decl. ¶ 2; Hammond Decl. Ex. G. Although several natural streams and artificial canals flow into Lake Okeechobee from the north, the lake does not possess any well-defined natural outlet for the release of excess water.

Geller Decl. ¶ 24; Hammond Decl. Ex. G. Historically, such water generally spilled over the southern rim of Lake Okeechobee and flowed south and west in a large, slow-moving sheet that formed the northern portion of the Everglades. Perry Decl. ¶ 8; Expert Declaration of Paul N. Gray, Ph.D. (Gray Decl.) ¶ 10. Prior to the development of significant drainage infrastructure in south Florida, much of the land located south of Lake Okeechobee was inundated for months following the summer wet season. Gray Decl. ¶¶ 18-20. Such flooding was the principal impediment to development in south Florida during the late nineteenth and early twentieth centuries. Geller Decl. ¶ 5.

From the beginning, it was apparent that the reclamation of much of south Florida would require some means of lowering the level of Lake Okeechobee in order to prevent the natural flow of excess water over the lake's southern rim. In the late nineteenth and early twentieth centuries, both private interests and state agencies constructed a number of significant infrastructure projects in an attempt to achieve that objective. Geller Decl. ¶ 5; Def.'s Opp'n to Pls.' Mot. to Strike Hammond Decl. Ex. B (Okeechobee Waterway Report) at 3-1 to 3-12. Over a period of several decades, many of those early drainage projects were consolidated into a comprehensive federal project known as the Central and Southern Florida (C&SF) Project. The C&SF Project is an integrated water management system that covers an area of approximately 16,000 square miles and extends from just south of Orlando to the Florida Bay. Geller Decl. ¶ 2; Hammond Decl. ¶ 2. The system now includes more than 1000 miles of canals, 1000 miles of levees, 250 water control structures and seventeen pump stations. Geller Decl. ¶ 3. Lake Okeechobee, the C-44 Canal and the St. Lucie River are central components of the C&SF Project. *Id.* ¶ 2; Hammond Decl. ¶ 2.

As noted above, the C&SF Project incorporated a number of smaller flood control and drainage projects that were initially constructed by state and private actors. Federal involvement in what would later become the C&SF Project was initiated by the Rivers and Harbors Act of 1930, Pub. L. No. 71-520, 46 Stat. 918. Geller Decl. ¶ 6; Hammond Decl. ¶ 2. In that act, Congress authorized the construction of an improved levee system along the northern and southern shores of Lake Okeechobee. Geller Decl. ¶ 6. Those levees were subsequently named the Herbert Hoover Dike. In addition, the 1930 act further provided that the federal government would operate and maintain the Okeechobee Waterway system.

The Okeechobee Waterway is approximately 154 miles in length and provides a continuous navigable channel across the Florida peninsula between the Atlantic Ocean and the Gulf of Mexico. Geller Decl. ¶ 9; Hammond Decl. ¶ 3. Vessels traveling through the Okeechobee Waterway enter the waterway from the Atlantic Ocean through the St. Lucie Inlet and continue through the Indian River Lagoon, the St. Lucie River, the St. Lucie Canal, Lake Okeechobee, and the Caloosahatchee River, and enter the Gulf of Mexico near Fort Myers, Florida. Hammond Decl. ¶¶ 3, 8. The Okeechobee Waterway began operation as a federal project in 1937 and has become an important navigational corridor through the state. *Id.* ¶ 3. Approximately 10,000 vessels now pass through the St. Lucie Lock each year, carrying approximately 26,000 tons of manufactured goods, equipment, machinery, and raw materials.[2] *Id.* ¶ 6.

The Okeechobee Waterway and much of the existing drainage infrastructure in south Florida were subsequently absorbed into the C&SF Project with the enactment of the Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1175. Hammond Decl. ¶¶ 2-3. The principal design features of the C&SF Project were proposed in an official report prepared by the U.S. Army Corps of Engineers. *See* Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No. 80-643 (1948) (C&SF Report). The comprehensive plan identified and discussed a number of the C&SF Project's objectives, including flood control, water control, water conservation, prevention of saltwater intrusion, fish and wildlife preservation, and navigation. *Id.* at 33-38. Although navigation was identified as one of the many purposes to be furthered by the C&SF Project, the comprehensive plan noted that the project would "serve the purposes of flood protection, drainage, and water control to a far greater degree than navigation." *Id.* at 2. The navigational purposes of the C&SF Project were described in the report as "relatively small and incidental when compared with the primary features of flood protection and water control . . . ." *Id.*

The Flood Control Act of 1948 authorized the construction of the first phase of the C&SF Project as described in the comprehensive plan. The remaining features of the comprehensive plan were later authorized by the Flood Control Act of 1954, Pub. L. No. 83-780, 68 Stat. 1248. The system was subsequently

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[2]/ There are five navigation locks located along the Okeechobee Waterway. Hammond Decl. ¶ 4.

expanded and modified by the Flood Control Act of 1958, Pub. L. No. 85-500, 72 Stat. 297, the Flood Control Act of 1960, Pub. L. No. 86-645, 74 Stat. 480, the Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1173, the Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073, the Flood Control Act of 1968, Pub. L. No. 90-483, 82 Stat. 731, and other federal statutes. Geller Decl. Ex. B at FEIS-4.

Within the C&SF Project, water is constantly transferred from one location to another in order to achieve the system's various purposes. In operating the C&SF Project, defendant frequently discharges high volumes of non-saline water into the St. Lucie River. Those discharges are the subject of the instant suit.

C. Management of Lake Levels and Water Discharges into the St. Lucie River

One of the central purposes of the C&SF Project is to protect the structural integrity of the Herbert Hoover Dike by maintaining the level of Lake Okeechobee within an acceptable range.[3] In addition to direct rainfall, high volumes of water enter the lake from the Kissimmee River and Lake Istokpoga basins to the north, as well as from the lake's own watershed. Geller Decl. ¶ 24. Water also enters the lake from the St. Lucie Canal to the east and from four major agricultural drainage canals to the south. Water levels in Lake Okeechobee are significantly affected by both rainfall and drainage from the surrounding watershed, and when inflows into the lake exceed outflow capacity, the water level within the lake can rise very quickly. *Id.* ¶ 14. In order to manage the level of Lake Okeechobee and prevent damage to the Herbert Hoover Dike, water is released from the lake into the Caloosahatchee River to the west and into the St. Lucie Canal to the east. *Id.* Most of the water discharged into the St. Lucie Canal ultimately reaches the St. Lucie River, the Indian River Lagoon, and the Atlantic Ocean. Expert Declaration of Robert L.P. Voisinet (Voisinet Decl.) ¶ 10.

The maintenance of high water levels in Lake Okeechobee for any extended period of time threatens the structural integrity of the surrounding levees. When

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[3]/ The flood-control features authorized in the Rivers and Harbors Act of 1930 were approved in response to hurricanes in 1926 and 1928, which caused the water in Lake Okeechobee to breach the surrounding levees. The catastrophic flooding in the surrounding area following those hurricanes resulted in more than 3000 deaths. Geller Decl. ¶ 6.

water levels reach eighteen feet, for example, the probability that the levees will fail is approximately forty-five percent.[4] Gray Decl. ¶ 24. When the lake reaches twenty-one feet, moreover, the risk of levee failure increases to 100 percent. *Id.* Despite defendant's repeated and massive discharges of water into the St. Lucie River, the lake has reached an elevation in excess of seventeen feet on seven separate occasions since 1995. *Id.*

Defendant manages water levels in Lake Okeechobee in accordance with a regulation schedule. Geller Decl. ¶ 11; Gray Decl. ¶ 11. A regulation schedule is an official management policy that dictates the rate at which water is released from a lake or reservoir based on the current water level within that lake or reservoir. Geller Decl. ¶ 11; Gray Decl. ¶¶ 11-12. During the period of time in which the alleged taking of plaintiffs' property rights occurred, water releases from Lake Okeechobee were generally made in accordance with a regulation schedule known as Water Supply and Environment (WSE). Geller Decl. ¶ 13; Gray Decl. ¶ 11. WSE was adopted in 2000 and was designed to promote the various objectives of the C&SF Project, such as flood control, water supply, navigation, prevention of saltwater intrusion, and environmental protection.[5] Geller Decl. ¶¶ 12-13.

Under WSE, defendant released water from Lake Okeechobee at a rate determined by the lake's elevation and the time of year. *Id.* ¶ 11; Gray Decl. ¶¶ 11-12. Defendant releases lake water into the St. Lucie Canal through a structure known as S-308. Voisinet Decl. ¶¶ 9-10, 12. When the lake is at a relatively low stage, however, water flows into the lake from the St. Lucie Canal through the same structure. *Id.* ¶ 9. In addition to maintaining the level of the lake within an acceptable range, defendant's releases of water through S-308 also maintain minimum navigational depths within the St. Lucie Canal and supply water to agricultural, industrial and municipal users located within the St. Lucie Canal watershed. Geller Decl. ¶¶ 20, 22; Declaration of Trent L. Ferguson (Ferguson Decl.) ¶ 6. Defendant constructed the S-308 structure in 1977. Ferguson Decl. ¶ 4.

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[4]/ Lake elevation measurements are presented in National Geodetic Vertical Datum 1929 (NGVD).

[5]/ In 2007, WSE was replaced with a new regulation schedule referred to as the Lake Okeechobee Regulation Schedule 2007 ("LORS 2007"). Geller Decl. ¶ 12. The government's change from WSE to LORS 2007 has no impact on the present case and, for purposes of the current litigation, references will be made to WSE only.

In addition to releases required under the regulation schedule, defendant sometimes discharges water from the lake when such releases would not otherwise occur under that schedule. Declaration of John E. Zediak (Zediak Decl.) ¶¶ 3-4. Between 2003 and 2005, for example, defendant made a number of low-level releases from the lake pursuant to a "temporary planned deviation" from the regulation schedule. *Id.* Defendant approves such deviations when it expects future inflows into the lake to exceed its ability to maintain the lake at a safe elevation in accordance with the flow rates permitted under the regulation schedule. *Id.* Even at a relatively high release rate, it sometimes requires a very long period of time to achieve even modest reductions in lake levels. *Id.* ¶ 8. Because releases under a temporary planned deviation are typically made in anticipation of – rather than in response to – significant rainfall, releases into the St. Lucie River are not always correlated with named storm events. *Id.* ¶ 7; Voisinet Decl. ¶ 27.

Defendant releases water from the St. Lucie Canal into the South Fork of the St. Lucie River through the St. Lucie Lock and the adjacent St. Lucie Spillway (also referred to as structure S-80). Voisinet Decl. ¶¶ 9-10, 12. Defendant constructed the existing S-80 control structure in 1941 and is responsible for its operation and maintenance. Hammond Decl. ¶¶ 4-6. Unlike the S-308 structure, the S-80 control structure operates in only one direction (*i.e.*, water does not enter the St. Lucie Canal from the St. Lucie River through S-80). Voisinet Decl. ¶ 9. In addition to receiving discharges of lake water through S-308, the St. Lucie Canal also collects a substantial amount of drainage from its own watershed. *Id.* ¶¶ 12, 17. Consequently, the water that is discharged into the St. Lucie River through the S-80 control structure includes both lake water and drainage from the St. Lucie Canal watershed.

The St. Lucie River collects fresh water from a number of different sources. Ferguson Decl. ¶ 8, Table 2; Supplemental Declaration of Trent L. Ferguson (Ferguson Suppl. Decl.) ¶ 5; Voisinet Decl. ¶¶ 17, 24-25. In addition to direct rainfall and natural runoff within its own watershed, the estuary receives fresh water containing significant amounts of nutrients and sediment from three major canals: the St. Lucie Canal (through the S-80 structure), the C-23 Canal (through the S-48 structure), and the C-24 Canal (through the S-49 structure). Ferguson Decl. ¶ 8, Table 2; Ferguson Suppl. Decl. ¶¶ 8-11, Tables 3-5, Figures 3-10; Voisinet Decl. ¶¶ 11, 14, 17, 25, 55-56, 59-67. The C-23 Canal and the C-24

Canal collect drainage from smaller canals located throughout the regional watershed to the north and northwest of the St. Lucie River. Voisinet Decl. ¶ 11.

D. Discharges between 2003 and 2005 and the Alleged Taking of Plaintiffs' Property Rights

Plaintiffs claim that defendant's discharges of polluted fresh water from Lake Okeechobee into the St. Lucie River between 2003 and 2005 destroyed the estuary's natural environment and effected an unconstitutional taking of their riparian rights without just compensation in violation of the Takings Clause of the Fifth Amendment. Compl. ¶¶ 31-37.

Average lake levels were unusually high for long periods of time between 2003 and 2005. Geller Decl. ¶ 18; Zediak Decl. ¶ 2. As a result, annual discharges of water into the St. Lucie River through the S-80 control structure were similarly high in those years, as were discharges from Lake Okeechobee into the St. Lucie Canal through the S-308 control structure. Defendant states that the releases made during that period were necessary to protect the structural integrity of the Herbert Hoover Dike. Def.'s Mot. at 7-9.

In August and September of 2003, net inflows into the lake amounted to approximately thirty-six inches in equivalent lake depth. Zediak Decl. ¶ 5. In 2003, defendant discharged approximately 179 billion gallons of water from Lake Okeechobee into the St. Lucie Canal through the S-308 control structure. Ferguson Decl. Table 2; Voisinet Decl. ¶ 17. In that same year, total discharges from the St. Lucie Canal into the St. Lucie River through the S-80 control structure amounted to approximately 236 billion gallons of water.[6] Ferguson Decl. Table 2;

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[6]/ Defendant releases water from Lake Okeechobee into the St. Lucie Canal through the S-308 control structure. Voisinet Decl. ¶ 12. Defendant releases water from the St. Lucie Canal into the St. Lucie River through the S-80 control structure. *Id.* ¶ 9. The annual discharges through the S-308 control structure provide a rough approximation of the total quantity of water released from Lake Okeechobee into the St. Lucie River each year. *Id.* ¶¶ 17-18. The difference between the quantity of water released through S-308 and the quantity of water released through S-80 provides a rough approximation of the quantity of water that enters the St. Lucie Canal from its own watershed. *Id.* ¶17. Because water is diverted from the St. Lucie Canal to meet the needs of agricultural, municipal, and industrial users, the releases through S-308 and S-80 do not provide an exact measurement of the quantity of water entering the St. Lucie River from Lake

(continued...)

Voisinet Decl. ¶ 17. Lake Okeechobee reached a maximum elevation of 17.15 feet in 2003. Second Supplemental Declaration of Trent L. Ferguson (Ferguson 2d Suppl. Decl.) Table 2.

In late 2003, an active tropical storm season was predicted for 2004. Geller Decl. ¶ 15. Due to that forecast and high lake levels between November 2002 and December 2003, defendant approved a temporary planned deviation from the regulation schedule, which remained in effect from December 2003 through May 2005. Zediak Decl. ¶ 3. The temporary deviation allowed defendant to make low-level releases from the lake that would not have occurred under the regulation schedule. Hurricanes Frances, Ivan, and Jeanne all struck Florida between August and October of 2004, and the net inflows into Lake Okeechobee during that period exceeded seventy-two inches of equivalent lake depth. *Id.* ¶ 5. Following the hurricanes in October, Lake Okeechobee reached a maximum elevation of 18.02 feet. Geller Decl. ¶ 15; Ferguson 2d Suppl. Decl. Table 2. In 2004, defendant released approximately 190 billion gallons of lake water into the St. Lucie Canal through the S-308 control structure and approximately 225 billion gallons of water into the St. Lucie River through S-80. Ferguson Decl. Table 2; Voisinet Decl. ¶ 17.

In June and July of 2005, net inflows into Lake Okeechobee amounted to approximately forty-seven inches of equivalent lake depth. Zediak Decl. ¶ 5. In 2005, defendant released approximately 304 billion gallons of lake water into the St. Lucie Canal through the S-308 control structure and approximately 399 billion gallons of water into the St. Lucie River through S-80. Ferguson Decl. Table 2; Voisinet Decl. ¶ 17. The lake reached a maximum elevation of 17.12 feet in 2005. Ferguson 2d Suppl. Decl. Table 2.

According to plaintiffs, defendant's releases of turbid fresh water into the South Fork of the St. Lucie River have resulted in a number of adverse environmental impacts on the estuary. First, the discharges have repeatedly resulted in dramatic and prolonged reductions in the salinity of the river. Perry Decl. ¶ 17. Because many of the plant and animal species in the estuary can survive only within a relatively narrow salinity range, plaintiffs claim that

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[6]/ (...continued)
Okeechobee and the St. Lucie Canal watershed.

defendant's high-volume discharges of non-saline water into the river have gradually resulted in the disappearance of many acres of oyster and sea grass beds, as well as a significant reduction in other plant and animal populations. *Id.* ¶¶ 11-13, 17-20. Second, plaintiffs claim that the high nutrient content of the water discharged into the river has resulted in algal blooms and the proliferation of toxic cyanobacteria that present serious risks to human health and safety. *Id.* ¶¶ 9, 11; Gilmore Decl. ¶¶ 21-22. Finally, plaintiffs argue that defendant's discharges have carried massive amounts of sediment into the river, resulting in significant muck deposits on the bed of the river and a dramatic reduction in water clarity and depth. Expert Declaration of Kevin Henderson (Henderson Decl.) ¶ 9; Perry Decl. ¶¶ 9, 11.

In addition to the alleged damage to the river itself, certain plaintiffs further claim that defendant's discharges have resulted in a number of injuries to their upland parcels. First, plaintiffs Robert and Carol Baratta claim that the water in their well has become contaminated as a result of the discharges and can no longer be used to clean their house or to water plants on their property. Declaration of Robert O. Baratta (Baratta Decl.) ¶ 2. Plaintiffs William and Stella Guy allege that defendant's discharges flooded their garage and damaged all of the property located on the floor of the garage. Declaration of William E. Guy, Jr. (Guy Decl.) ¶ 2. Plaintiff Ann MacMillan asserts that defendant's discharges of polluted water into the St. Lucie River resulted in the death of mangrove trees located on her upland property. Declaration of Ann S. MacMillan (MacMillan Decl.) ¶ 2. Finally, a number of plaintiffs generally state that defendant's discharges result in unpleasant odors that waft over their upland parcels. *See* Declaration of Charles C. Crispin (Crispin Decl.) ¶ 2; Declaration of Floyd D. Jordan (Jordan Decl.) ¶ 2; Declaration of John R. Mildenberger (Mildenberger Decl.) ¶ 3; Declaration of Robert H. Paré (Paré Decl.) ¶ 2; Declaration of John Francis Patteson (Patteson Decl.) ¶ 2; Declaration of Frederick Rutzke (Rutzke Decl.) ¶ 2; Declaration of Philip Tafoya (Tafoya Decl.) ¶ 2; Declaration of Rufus Wakeman II (Wakeman Decl.) ¶ 2.

Plaintiffs request relief in the form of a monetary judgment equal to the just compensation owed to each plaintiff together with interest, in an amount estimated to be at least $50 million.

II. Procedural History

Plaintiffs commenced suit in this court on November 13, 2006, alleging that defendant's intentional and repeated discharges of polluted non-saline water into the St. Lucie River effected a physical taking of plaintiffs' riparian rights without just compensation in violation of the Takings Clause of the Fifth Amendment. Plaintiffs have requested $50 million in compensation for the property allegedly taken, plus reasonable attorneys' fees and costs. Defendant filed its answer to the complaint on February 12, 2007, and the parties conducted discovery in 2007 and 2008.

On January 16, 2009, defendant filed a motion to dismiss plaintiffs' suit and a motion for summary judgment. In support of its motion to dismiss under RCFC 12(b)(1), defendant argues that any alleged harm to plaintiffs' upland parcels sounds in tort and is therefore beyond the jurisdiction of this court. According to defendant, any claims related to the alleged invasion of plaintiffs' upland parcels above the ordinary high water line are not appropriately treated as physical takings; on the contrary, those claims must be analyzed as torts.

Defendant makes three principal arguments in support of its motion for summary judgment under RCFC 56. First, defendant denies that its discharges were the direct and proximate cause of any of the alleged environmental damage to the St. Lucie River. According to defendant, those discharges were caused by unusually high rainfall between 2003 and 2005, and a failure to make those releases would have compromised the structural integrity of the levee system surrounding Lake Okeechobee. Second, defendant argues that plaintiffs' claims are barred by the federal navigational servitude. According to defendant, any interests plaintiffs may have in the use or enjoyment of the St. Lucie River are subordinate to the superior right of the federal government to improve and protect navigation. Finally, defendant claims that plaintiffs have failed to demonstrate the possession of a cognizable property right under state law. Because the riparian interests allegedly taken by defendant's actions are held in common with the general public, any deprivation of those rights cannot form the basis of a valid takings claim. For those reasons, defendant asserts that it is entitled to judgment as a matter of law.

On March 16, 2009, plaintiffs filed a timely opposition to defendant's

motion to dismiss, as well as a cross motion for summary judgment on the issue of liability. Plaintiffs first assert that they possess a protected property right in the use of the St. Lucie River under state law that cannot be taken by the government without just compensation. In addition, plaintiffs reject defendant's contention that high precipitation was the cause of the discharges into the St. Lucie River between 2003 and 2005. In support of that argument, plaintiffs note that many of the discharges occurred between hurricanes and in non-hurricane years. Plaintiffs further argue that the federal navigational servitude does not apply in this case because defendant's discharges of polluted water into the St. Lucie River were unrelated to any navigational purpose. According to plaintiffs, the primary purposes of the releases into the river were flood protection and agricultural irrigation. Finally, plaintiffs dispute defendant's claim that the alleged injuries to plaintiffs' upland parcels sound in tort. Plaintiffs assert that the government's discharges effected a physical taking of their riparian rights without compensation, and that they are entitled to judgment as a matter of law on that basis.

On May 20, 2009, defendant filed its response, in which it expanded upon the arguments first presented in its motions to dismiss and for summary judgment. In addition to reiterating its assertion that unusually high precipitation was the root cause of the discharges into the St. Lucie River, defendant further argues that it was not the source of the nutrients and sediment present in the discharged water. Defendant also claims that there is insufficient evidence to conclude that the water discharged through the S-80 control structure resulted in the alleged damage to the St. Lucie River because the river also receives substantial additions of nutrients and sediment from a number of other sources, such as the C-23 Canal, the C-24 Canal, and local runoff along the river. Defendant also argues that plaintiffs' claims of noxious odors and aerosols resulting from the discharges might provide the basis for a tort claim, but do not constitute a physical taking of their property. Finally, defendant once again argues that plaintiffs do not possess any compensable property rights under state law and that, in any event, any such rights would be subordinate to the federal navigational servitude.

On June 19, 2009, plaintiffs filed their reply to defendant's response. Plaintiffs first argue that defendant directly and proximately caused the environmental damage to the St. Lucie River because its discharges would not have occurred in the absence of a deliberate decision by defendant to open the gates of the S-308 and S-80 control structures. Plaintiffs further claim that they possess

compensable property rights as riparian landowners in the use of the St. Lucie River for fishing, boating, swimming, and recreation, and that those rights are unaffected by the federal navigational servitude because defendant's discharges were not related to any navigational purpose. Plaintiffs also assert that riparian landowners in Florida possess a protected property right to pollution-free water in the navigable waterway adjacent to their property. Finally, plaintiffs note that the alleged injuries to their upland parcels are properly analyzed as takings rather than as torts.

On August 27, 2009, the court ordered supplemental briefing from the parties on a number of legal and factual issues. Specifically, the court requested the acquisition dates for each of plaintiffs' upland parcels and directed the parties to address whether plaintiffs' suit was time-barred under the six-year statute of limitations applicable to takings claims in this court. The court further instructed the parties to discuss whether the accrual of plaintiffs' claims was delayed pursuant to the stabilization doctrine first articulated by the United States Supreme Court in *United States v. Dickinson*, 331 U.S. 745 (1947). Finally, the court asked the parties to discuss the applicability of the Federal Circuit's recent decision in *N.W. La. Fish & Game Pres. Comm'n v. United States*, 574 F.3d 1386 (Fed. Cir. 2009) (*Louisiana Fish & Game III*), *cert. denied*, 78 U.S.L.W. 3392 (U.S. Jan. 11, 2010) (No. 09-516), to the facts of the present case.

Plaintiffs filed their supplemental brief on September 25, 2009. Plaintiffs' supplemental brief provided the factual information requested by the court and addressed each of the legal issues raised by the court. Plaintiffs assert that the stabilization doctrine set forth in *Dickinson* applies in this case and argue that their takings claims accrued under that doctrine no earlier than September 2004. Plaintiffs further argue that the Federal Circuit's recent decision in *Louisiana Fish & Game III* did not change the relevant legal standards for determining the scope and applicability of the federal navigational servitude. According to plaintiffs, the servitude simply does not apply in this case because defendant's discharges are not related to the improvement of navigation. In addition, plaintiffs further claim that the case stands for the proposition that the navigational servitude never applies to cases in which a governmental action results in the flooding of private property.

Defendant filed its supplemental brief on October 16, 2009. Defendant argues that plaintiffs' suit is barred by the six-year statute of limitations because

defendant has been discharging large volumes of water from Lake Okeechobee into the St. Lucie River for almost eighty years, and the environmental impacts attributable to those discharges have existed since the 1950s. While it does not believe the stabilization doctrine of *Dickinson* applies in this case, defendant asserts that the application of that doctrine would nonetheless fail to invest the court with jurisdiction over plaintiffs' takings claims. Because each of the injuries alleged by plaintiffs first occurred decades ago, any claims related to those injuries would have accrued long before November of 2000. Finally, defendant rejects plaintiffs' argument that the federal navigational servitude never applies in flooding cases and asserts that the Federal Circuit's recent decision in *Louisiana Fish & Game III* supports the government's argument that plaintiffs' claims in this case are barred by the federal navigational servitude.

The court has received *amicus curiae* briefs from the City of Stuart, Florida, Martin County, Florida, and the South Florida Water Management District. The court heard oral argument on the parties' motions on December 4, 2009. The parties' motions are fully briefed and ripe for a decision by the court.

DISCUSSION

Plaintiffs assert that defendant's discharges have resulted in the physical taking of a number of protected property rights. Plaintiffs' allegations represent a number of distinct takings claims, which fall into two broad categories. First, plaintiffs have argued that the release of polluted water into the St. Lucie River through the S-80 control structure has harmed the river itself. According to plaintiffs, the environmental harm to the St. Lucie River has resulted in the physical taking of plaintiffs' asserted riparian right to pollution-free water in the river as well as their riparian rights to fish, swim, boat and view wildlife in the river. Second, plaintiffs have alleged that defendant's discharges have damaged certain of plaintiffs' upland parcels above the ordinary high water line. This second category includes the claims related to the alleged flooding of the Guys' garage, the alleged contamination of the Barattas' well, the alleged destruction of Ann MacMillan's mangrove trees and the alleged invasion of certain of plaintiffs' properties by noxious odors from the river. Because there are a number of legally significant distinctions between the two classes of plaintiffs' takings claims, the court will address these two classes of claims separately. Plaintiffs' claims alleging a taking of their riparian rights due to the environmental degradation of

the St. Lucie River are addressed in Section II. Plaintiffs' remaining claims alleging a physical invasion of certain of their upland parcels are addressed in Section III.

I. Standards of Review

A. Standard of Review under RCFC 12(b)(1)

In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), this court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). The relevant issue in a motion to dismiss under RCFC 12(b)(1) "'is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) (quoting *Scheuer*, 416 U.S. at 236). The plaintiff bears the burden of establishing subject matter jurisdiction, *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and must do so by a preponderance of the evidence, *Reynolds*, 846 F.2d at 748 (citations omitted). The court may look at evidence outside of the pleadings in order to determine its jurisdiction over a case. *Martinez v. United States*, 48 Fed. Cl. 851, 857 (2001) (citing *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-62 (Fed. Cir. 1998); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)), *aff'd in relevant part*, 281 F.3d 1376 (Fed. Cir. 2002). "Indeed, the court may, and often must, find facts on its own." *Id.* If jurisdiction is found to be lacking, this court must dismiss the action. RCFC 12(h)(3).

B. Standard of Review under RCFC 56

"[S]ummary judgment is a salutary method of disposition designed to secure the just, speedy and inexpensive determination of every action." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (internal quotations and citations omitted). The moving party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the

movant is entitled to judgment as a matter of law." RCFC 56(c)(1). A genuine issue of material fact is one that could change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A summary judgment "motion may, and should, be granted so long as whatever is before the . . . court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (quoting former version of Fed. R. Civ. P. 56(c)). However, the non-moving party has the burden of producing sufficient evidence that there is a genuine issue of material fact in dispute which would allow a reasonable finder of fact to rule in its favor. *Anderson*, 477 U.S. at 256. Such evidence need not be admissible at trial; nevertheless, mere denials, conclusory statements or evidence that is merely colorable or not significantly probative is not sufficient to preclude summary judgment. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 249-50; *see also Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984) (noting that a party's bare assertion that a fact is in dispute is not sufficient to create a genuine issue of material fact). "The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." *Barmag*, 731 F.2d at 836. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

II. Claims Alleging a Taking of Plaintiffs' Riparian Rights

Plaintiffs allege that defendant's discharges of polluted non-saline water into the St. Lucie River have taken their riparian rights by causing the environmental condition of the river to deteriorate. Defendant responds that plaintiffs' claims related to the environmental condition of the river are untimely because they accrued more than six years before the instant suit was filed. In addition,

defendant claims that plaintiffs have failed to demonstrate that they possess a compensable property right under state law in the use or condition of the St. Lucie River. In the alternative, defendant argues that plaintiffs' claims alleging a taking of any state-created riparian rights are preempted by the federal navigational servitude.

A. Defendant's Motion to Dismiss - Timeliness of Plaintiffs' Claims

The Fifth Amendment of the United States Constitution provides in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Pursuant to the Tucker Act, this court has exclusive jurisdiction over all takings claims against the United States seeking more than $10,000 in compensation. 28 U.S.C. § 1491(a)(1) (2006). Defendant has filed a motion to dismiss the instant suit under RCFC 12(b)(1) on the basis that certain of plaintiffs' claims sound in tort and are therefore beyond this court's limited jurisdiction under the Tucker Act. Because that argument does not apply to the alleged taking of plaintiffs' riparian rights due to the environmental degradation of the St. Lucie River, it will not be addressed in this section.

In addition to defendant's original jurisdictional challenge to plaintiffs' claims, the court also directed the parties to address the separate jurisdictional issue of timeliness. *See Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988) (holding that a trial court must raise the question of its own jurisdiction *sua sponte* whenever it appears to be in doubt). For the reasons discussed below, the court holds that plaintiffs' claims alleging a taking of their riparian rights accrued more than six years before the instant suit was filed and are therefore untimely. Accordingly, those claims are dismissed for lack of jurisdiction.

1. Applicable Legal Framework

A suit for just compensation under the Fifth Amendment must be filed in this court within six years of the date on which the takings claim first accrues. 28 U.S.C. § 2501 (2006). The six-year statute of limitations is jurisdictional and cannot be waived by the government. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008) (holding that the court's statute of limitations is jurisdictional in nature and is thus not subject to waiver or estoppel). Plaintiffs filed the instant suit on November 13, 2006. In order to be considered timely

under 28 U.S.C. § 2501, plaintiffs' claims must have accrued no earlier than November 13, 2000. If plaintiffs' claims accrued before that date, then this court is without jurisdiction to hear them.

In general, a claim against the government under the Tucker Act first accrues "when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). In determining whether plaintiffs knew, or should have known, of the requisite factual predicates establishing the government's alleged liability in this case, the court must apply an objective standard. *See Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) (holding that "a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue"). Because plaintiffs bear the burden of establishing subject matter jurisdiction, they must demonstrate by a preponderance of the evidence that they could not have reasonably known of the facts fixing defendant's alleged liability prior to November 13, 2000.

When the government physically appropriates or permanently occupies private property for a public use, the date of claim accrual is usually clear. *See, e.g., United States v. Dow*, 357 U.S. 17, 22 (1958) ("The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking."). When a public project gradually results in cumulative physical damage to private property over a long period of time, however, it may be difficult to ascertain the precise date on which the takings claim first accrued. In *Dickinson*, 331 U.S. at 748-49, the United States Supreme Court held that the six-year statute of limitations does not begin to run in such circumstances until the situation has become "stabilized." When damage to private property is the direct result of a gradual physical process caused by the government's actions,

> there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of

> inundation have so manifested themselves that a final account may be struck.

Id. at 749. The stabilization doctrine is designed to ensure that "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.'" *Id.*

Plaintiffs argue that the stabilization doctrine should be applied in this case because the alleged environmental damage to the St. Lucie River has been "gradual and intermittent." Pls.' Suppl. Brief at 19. According to plaintiffs, defendant operated the C&SF Project for many years with "little or no adverse impacts on South Florida water ecology." *Id.* at 19-20. Plaintiffs further claim that in recent years, however, defendant's massive discharges of polluted lake water into the St. Lucie River have had substantial adverse impacts on the natural condition of the estuary. According to plaintiffs, the gradual environmental degradation of the St. Lucie River caused by those discharges did not stabilize until September of 2004. If plaintiffs are correct in asserting that their takings claims first accrued in 2004, then their suit was filed within the applicable limitations period.

According to defendant, the common elements necessary for application of the stabilization doctrine set forth in *Dickinson* are as follows: (1) a continuing physical process that results in a direct invasion of a landowner's property; (2) an inability to reasonably foresee whether the physical invasion is permanent in duration; and (3) an inability to reasonably foresee the portion of the landowner's property that will be affected by the government's permanent physical invasion. Def.'s Suppl. Brief at 12. Defendant argues that the stabilization doctrine should not be applied in this case because there is no evidence that plaintiffs' land has been physically invaded by defendant's discharges into the St. Lucie River. Although the government argues strenuously against utilization of the stabilization doctrine in this case, neither of the parties has proposed a potential date of claim accrual that is not dependent upon the application of this doctrine. Although defendant claims that the doctrine established in *Dickinson* does not supplant traditional accrual principles, it fails to discuss how those principles might apply to the facts of the present case to the exclusion of the stabilization doctrine.

Finally, and in fact determinative of this issue, the Federal Circuit recently applied the stabilization doctrine in a physical takings case involving facts quite similar in many respects to those present in this case. *See N.W. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1290-91 (Fed. Cir. 2006) (*Louisiana Fish & Game I*) (applying the stabilization doctrine to a takings claim alleging that the federal government's refusal to lower the level of a navigable river resulted in uncontrolled aquatic weed growth in an adjacent lake located on property managed by a state wildlife commission). The court therefore concludes that the stabilization doctrine is likewise applicable to plaintiffs' takings claims in this case.

Under the stabilization doctrine articulated in *Dickinson*, a claim seeking just compensation for a gradual physical taking does not accrue until "the environmental damage has made such substantial inroads into the property that the permanent nature of the taking is evident and the extent of the damage is foreseeable." *Boling v. United States*, 220 F.3d 1365, 1372 (Fed. Cir. 2000). In other words, a claim for a gradual physical taking does not accrue until two separate conditions are met. First, it must be reasonably apparent that the government's physical invasion is permanent in duration. Second, the ultimate extent of the damage caused by the government's actions must be reasonably foreseeable. The six-year statute of limitations does not begin to run until both of these conditions have been met.

The Federal Circuit has further held, however, that the accrual of a takings claim may be postponed by ongoing governmental efforts to repair or mitigate the environmental damage attributable to its actions to the extent that such efforts create "justifiable uncertainty" regarding the permanence of the physical invasion. *Applegate v. United States*, 25 F.3d 1579, 1583-84 (Fed. Cir. 1994). Here, if the permanence of defendant's alleged invasion was reasonably apparent before November 13, 2000, and if the ultimate extent of the environmental damage caused by that invasion was reasonably foreseeable prior to that date, in order to avoid being barred by the statute of limitations, plaintiffs would have to demonstrate that governmental mitigation efforts postponed the accrual of their takings claims until after that date. The following discussion analyzes and applies the applicable legal framework, as outlined above, to the facts of the present case.

2. Timeliness of Claims Alleging a Taking of Plaintiffs' Riparian Rights

a. Permanence of the Physical Invasion

High volumes of non-saline water from Lake Okeechobee have been discharged into the St. Lucie River through the S-80 control structure in almost every year since 1931. Ferguson 2d Suppl. Decl. Table 1. The releases into the river were initially made by the Everglades Drainage District. In 1937, the federal government assumed control of the Okeechobee Waterway and became responsible for the operation of the S-80 control structure. Although the annual discharges through the S-308 and S-80 control structures in 2003 through 2005 were relatively high due to unusually high precipitation and lake inflows during those years, Zediak Decl. ¶ 2, defendant points out that the total discharges during that period were significantly lower than its discharges in many prior years.[7] Between 1931 and 2008, for example, annual discharges into the St. Lucie River through the S-80 control structure exceeded 400 billion gallons in fifteen different years, and discharges exceeded one *trillion* gallons in 1960. Ferguson 2d Suppl. Decl. Table 3. Although the annual discharges into the St. Lucie River through the S-80 control structure in 2004 and 2005 were significantly higher than the releases during the immediately preceding years, those two years rank only twenty-eighth and sixteenth, respectively, in annual discharges between 1931 and 2008. Ferguson 2d Suppl. Decl. Table 3. In fact, annual discharges through S-80 in 1947, 1959 and 1960 *each* exceeded the total discharges in 2003, 2004 and 2005 *combined*. *Id.* According to defendant, the amount of water released from Lake Okeechobee into the St. Lucie River between 2003 and 2005 was not unprecedented – nor even particularly unusual – when viewed in historical context. In short, defendant asserts that the volume and permanence of its discharges into the St. Lucie River have been apparent for decades.

The U.S. Supreme Court has noted that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *Dickinson*, 331 U.S. at 748. The court must therefore

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[7]/ The annual discharge statistics for the S-80 control structure cited by the government were not challenged or otherwise disputed by plaintiffs.

determine when the permanence of defendant's discharges became sufficiently apparent such that plaintiffs should reasonably have known that a significant burden had been imposed upon their riparian interests. In that regard, plaintiffs should have been aware of the permanence of defendant's discharges into the St. Lucie River long before November 13, 2000. Defendant has released lake water into the river in almost every year since assuming control of the Okeechobee Waterway in 1937, and plaintiffs have presented no evidence suggesting a reasonable basis for believing that the discharges would ever be terminated. In fact, plaintiffs note that "[e]ven the Government concedes that the Corps has no plans to change its operation of Lake Okeechobee to stop the destructive releases of polluted water in the St. Lucie." Pls.' Reply at 18. In view of the foregoing, the court finds that the permanence of defendant's discharges into the river was apparent before November 13, 2000.

b. Reasonable Foreseeability of Damage

Although the stabilization doctrine may sometimes delay the date of claim accrual, the Federal Circuit has emphasized that a takings claimant may not be permitted to wait until all of the alleged damage caused by the government's action has occurred before filing suit. On the contrary,

> stabilization occurs when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, *not when the process has ceased or when the entire extent of the damage is determined.* Thus, during the time when it is uncertain whether the gradual process will result in a permanent taking, the plaintiff need not sue, but once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run.

Boling, 220 F.3d at 1370-71 (emphasis added); *see also Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249, 251 (Ct. Cl. 1958) (holding that the rule set forth in *Dickinson* does not allow a plaintiff in a gradual takings case to wait until the risk of further damage has been completely removed before filing suit). In short, plaintiffs must demonstrate that they could not have reasonably foreseen the

degree of damage that would be caused by defendant's discharges prior to November 13, 2000.

Plaintiffs argue that the environmental damage to the estuary did not stabilize until September of 2004. Pls.' Suppl. Brief at 2-3. Plaintiffs assert that the environmental effects of defendant's discharges first became apparent in the late 1990s, and the negative consequences of those releases dramatically increased between 2003 and 2005, dealing an irreversible "knock-out blow" to the estuary in 2004. *Id.* at 2; Henderson Decl. ¶ 10. In 2004, for example, when defendant released 190 billion gallons of water from Lake Okeechobee into the St. Lucie Canal, the salinity level of the St. Lucie River near the Roosevelt Bridge fell to zero for an extended period of time, the river experienced large algal blooms, and state officials issued warnings against swimming in the river due to high levels of fecal coliform bacteria. Pls.' Suppl. Brief at 2-3. In 2005, moreover, when defendant released more than 300 billion gallons of water from the lake, county health officials issued multiple warnings against any physical contact with the St. Lucie River and posted "no swimming" signs along the North Fork of the river. *Id.* at 3-4. Plaintiffs further claim that defendant's discharges in 2005 resulted in the death of an estimated 116 acres of oyster beds and massive fish kills. *Id.* at 4, 7, 12-13. Because the adverse impacts of defendant's discharges did not, according to plaintiffs, become stabilized until 2004, plaintiffs claim that the present suit was filed well within the applicable limitations period.

Defendant responds that the ultimate extent of the damage caused by its discharges into the St. Lucie River was foreseeable far more than six years before the present suit was filed. In fact, defendant claims that all of the environmental impacts now alleged by plaintiffs have existed since at least the 1950s and were widely reported in contemporaneous newspaper articles, government reports and other publicly available documents. Def.'s Suppl. Brief at 18-24. Defendant attached as exhibits to its supplemental brief a number of articles, letters and reports detailing the extensive environmental damage to the St. Lucie River allegedly caused by defendant's discharges. *Id.* Exs. E to R.

The court finds that the undisputed evidence presented by defendant demonstrates that the asserted environmental damage to the St. Lucie River had occurred and was in evidence almost fifty years before plaintiffs filed their complaint, and repeatedly occurred thereafter. Although plaintiffs make a number

of conclusory statements that appear to contradict defendant's evidence on this issue, plaintiffs have presented no relevant evidence to support those statements. Plaintiffs claim, for example, that defendant's *recent* discharges of polluted non-saline water into the St. Lucie River have caused the disappearance of fish, oysters, sea grasses and other organisms that can survive only within a narrow salinity range. *See, e.g.*, Pls.' Suppl. Brief at 19-20 (asserting that defendant operated the C&SF Project for many years "with little or no adverse impacts on South Florida water ecology"). As early as 1952, however, one local newspaper observed that "irreparable damage has been done to the St. Lucie River basin by siltation when [the] St. Lucie Canal has discharged into it in the past." Def.'s Suppl. Brief Ex. E.

Additionally, in a federal report on the St. Lucie Canal issued in 1957, defendant discussed longstanding local opposition to precisely the same environmental impacts now alleged by plaintiffs:

> Local interests have contended for many years that the release of lake-regulation discharges through the St. Lucie Canal causes serious damage to fishing and boating in the St. Lucie estuary . . . . [T]he turbid fresh-water discharges replace the brackish water in the river and cause many fish to leave the area; that marine life unable to leave is killed by the fresh water; and that sediment carried by the releases is deposited in the estuary.

Def.'s Suppl. Brief Ex. C at 10. That report also discussed the results of even earlier studies on the environmental impacts caused by defendant's discharges:

> Past studies of the sedimentation problem in [the] St. Lucie Canal have concluded that (1) the release of turbid fresh water through the canal seriously affects sport fishing and other recreational activities in the Stuart area; (2) during long discharge periods the salt water in the St. Lucie River is almost completely replaced by fresh water; (3) the releases carry fine sands, fragments of shell, and organic material into the St. Lucie estuary, much of which is deposited in the Palm City shoal; (4) an insignificant amount of sediment enters the estuary from

> uncontrolled drainage points and from the natural watershed of [the] St. Lucie River and its North and South Forks; (5) bank caving has contributed materially to the sediment load; and (6) in the mixing zone of fresh and salt water, the colloidal matter carried by the fresh water precipitates into a dark gray flocculent which settles to the bottom in places where there are low current velocities and little turbulence, and after reaching the bottom compacts gradually into a sticky clay deposit that resists subsequent removal by currents and turbulence more effectively than do sand, shell, or noncolloidal silts.

Id. at 10-11. The environmental damage described in the 1957 report closely mirrors the injuries alleged in plaintiffs' complaint.

Defendant's discharges also received documented public attention in the 1970s. A Wall Street Journal editorial published in 1970, for example, noted that "the once-clear St. Lucie is black with mud, and Corps officials in Florida admit their agency is largely to blame. Nearly all the fish are gone. Gone, too, are most of the oysters, clams, pelicans, ospreys and wild ducks." Def.'s Suppl. Brief Ex. H at 1. In that same year, an internal memorandum prepared by defendant noted that its discharges through the St. Lucie Canal "erode the canal banks, fill the estuary with shoals, discolor the water, deny boating in the estuary, and drive out the fish each time regulatory discharges are required from Lake Okeechobee." Def.'s Suppl. Brief Ex. G at 2. In 1978, defendant held a public hearing on an interim regulation schedule for Lake Okeechobee. *See* Def.'s Suppl. Brief Ex. I. During that hearing, witnesses presented testimony concerning the damaging environmental consequences of defendant's discharges into the St. Lucie River. Specifically, those witnesses discussed the adverse impacts of the regulatory discharges on oysters, aquatic vegetation and fish communities. *Id.* at 65, 75-76.

In the 1980s and 1990s, the local community continued its attempts to limit or eliminate defendant's discharges into the St. Lucie River. In 1985, for example, the Board of Commissioners for *amicus* Martin County adopted a resolution requesting that defendant reduce the rate of regulatory discharges into the river. Def.'s Suppl. Brief Ex. J. The resolution noted that defendant's discharges damage sea grass beds and that "the loss of marine grass beds produce[s] long term

negative impacts on both sport and commercial fisheries, wildlife, general ecology, quality of life and property values . . . [.]" *Id.*

In 1991, a number of plaintiffs helped form the St. Lucie River Initiative (Initiative). As evidenced by the newsletters, news articles and other documents submitted by defendant, the Initiative has been tirelessly working for almost twenty years to stop defendant's discharges and to restore the environmental health of the St. Lucie River. *See* Def.'s Suppl. Brief Exs. K to S. There is no question that plaintiffs have been acutely aware of the effects of defendant's discharges on the river for many years.

Plaintiffs' assertion that the current environmental damage to the river is qualitatively different from the damage that occurred in earlier years and did not "peak" until 2004 or 2005 is irrelevant to the applicable legal standard for determining whether plaintiffs' claims are timely. *See* Pls.' Mot. at 14; Pls.' Suppl. Brief at 4 (claiming that defendant's "record-high levels of discharges in 2004 and 2005 essentially dealt a 'knock-out blow' to the St. Lucie from which it has never recovered"). As the Federal Circuit has observed, the "contention that *Dickinson* stands for the proposition that the filing of a lawsuit can be postponed until the full extent of the damage is known has been soundly rejected." *Boling*, 220 F.3d at 1371. Plaintiffs must demonstrate that the damage to the river was not reasonably foreseeable more than six years before this suit was filed. The evidence in this case leads to the unavoidable conclusion that the environmental damage to the St. Lucie River was foreseeable – and, indeed, had already clearly manifested itself – prior to November 13, 2000.

c. Governmental Mitigation Activities

Plaintiffs assert that the accrual of their takings claims was delayed by defendant's repeated promises to mitigate or eliminate the environmental damage to the St. Lucie River caused by its discharges. Pls.' Suppl. Brief at 21-24. Plaintiffs claim that a number of specific government actions resulted in justifiable uncertainty regarding the permanence of discharges into the river.

In 1994, for example, the state legislature passed the Everglades Forever Act, Fla. Stat. § 373.4592 (1994). Pls.' Suppl. Brief at 22. Pursuant to that law, defendant prepared an Everglades Reconnaissance Report, which discussed a

number of alternative plans designed in part to reduce the impact of regulatory discharges on coastal estuaries. One of those options was referred to as Plan 6 and involved sending up to 7,000 cubic feet per second of lake water southward in a large sheet between the Miami and New River Canals. *Id.*

In 1998, defendant proposed the construction of a new 40,000-acre storage reservoir adjacent to the St. Lucie Canal (the C-44 Reservoir) to moderate damaging releases of polluted fresh water into the St. Lucie River. *Id.* at 22-23. Congress authorized the construction of the C-44 Reservoir in the Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572, and the president included funding for construction of the reservoir in the federal budget in 2000. Pls.' Suppl. Brief at 23.

Finally, defendant adopted a new lake regulation schedule in 2000, which was designed in part to reduce high-volume releases into the coastal estuaries by maintaining Lake Okeechobee at a lower stage. *See* Ferguson 2d Suppl. Decl. ¶ 12. The lake regulation schedule adopted in 2000, WSE, is the schedule that was in effect during the period in which plaintiffs allege their property interests were taken by defendant's discharges into the St. Lucie River. Plaintiffs claim that the adoption of WSE represented a promise that the environmental damage caused by defendant's discharges into the St. Lucie River would be mitigated.

Unfortunately, according to plaintiffs, none of the proposed mitigation measures ever had any significant impact on the damage caused by defendant's discharges. Plan 6 was never adopted, and the C-44 Reservoir was never constructed. Pls.' Suppl. Brief at 22-24. Plaintiffs also note that defendant's adoption of a new lake regulation schedule in 2000 predictably failed to mitigate the environmental damage to the St. Lucie River because it was based on faulty data. *Id.* at 24. Nonetheless, plaintiffs allege that defendant's failed mitigation activities between 1994 and 2000 further postponed the accrual of their takings claims. *Id.* at 13-14, 21-22.

Defendant responds that none of the alleged mitigation measures referenced by plaintiffs could have produced any reasonable uncertainty regarding the predictability or permanence of defendant's discharges into the St. Lucie River. Def.'s Suppl. Brief at 24-27. According to defendant, Plan 6 never received congressional or agency approval and was just one of many alternatives considered

and rejected by defendant during a comprehensive study of the C&SF Project. *Id.* at 25. The Everglades Reconnaissance Report merely concluded that further examination of a number of alternatives, including Plan 6, was appropriate. *Id.* In April 1999, moreover, defendant issued the C&SF Project Comprehensive Review Study Final Integrated Feasibility Report and Programmatic Environmental Impact Statement (C&SF Restudy), which recommended against proceeding with Plan 6. *Id.*

Although the construction of the C-44 Reservoir was approved by Congress, defendant claims that the project was never expected to have a significant impact on regulatory discharges into the St. Lucie River. *Id.* at 26. On the contrary, the reservoir was designed to capture *local runoff* within the C-44 watershed and to provide fresh water to the St. Lucie River during periods of low rainfall. *Id.* at 25. Defendant points out that the maximum capacity of the proposed C-44 Reservoir would be approximately 13 billion gallons, which would accommodate only 3.25 percent of regulatory discharges through the St. Lucie Canal in years when releases through the S-80 control structure amounted to 400 billion gallons. *Id.* at 26; Ferguson 2d Suppl. Decl. ¶ 10. According to defendant, the construction of the C-44 Reservoir would have no more than a negligible impact on discharges into the St. Lucie River and could not provide any reasonable basis for uncertainty regarding the permanence or frequency of those discharges.

Finally, defendant claims that the adoption of WSE was expected to represent only a "modest improvement" over the prior regulation schedule with respect to the impacts on the St. Lucie River. Def.'s Suppl. Brief at 26. According to defendant, the primary purpose of maintaining Lake Okeechobee at a lower level, as contemplated under WSE, was to improve the environmental condition of *the lake*. *Id.* Defendant argues that high-volume discharges would be necessary under any regulation schedule in the absence of a dramatic increase in the system's storage capacity. *Id.* at 26-27; Ferguson 2d Suppl. Decl. ¶ 13. In other words, the adoption of a new regulation schedule for Lake Okeechobee could never, defendant argues, create justifiable uncertainty regarding the permanence or frequency of regulatory discharges into the St. Lucie River.

Despite the conflicting contentions by the parties, in the final analysis, the question of whether or not the government made promises to fix the problem is not dispositive of the claim-accrual issue. While it is true that public mitigation efforts

creating justifiable uncertainty regarding the permanence of a governmental invasion of private property may postpone the accrual of a takings claim, such efforts cannot resurrect a stale takings claim years (or decades) after the applicable limitations period has expired. As noted above, defendant has been discharging water into the St. Lucie River since the 1930s, and the environmental consequences of those discharges have been apparent since at least the 1950s. The mitigation efforts cited by plaintiffs, on the other hand, did not commence until the mid-1990s. Thus, even if the mitigation efforts cited by plaintiffs could be viewed as reasonably raising an expectation of improvement, those hopes arrived too late in face of a long-expired statute of limitations. In view of the foregoing discussion, the court therefore holds that all of plaintiffs' claims alleging a taking of their riparian rights due to the environmental condition of the St. Lucie River are untimely and must be dismissed for lack of jurisdiction.

B. Cross Motions for Summary Judgment

As noted above, a party's motion for summary judgment should be granted if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson*, 477 U.S. at 247-48. Plaintiffs have moved for summary judgment on the issue of liability, whereas defendant has moved for summary judgment on the basis that plaintiffs cannot meet their burden of proof on that issue. In support of its motion, defendant argues that plaintiffs have failed to demonstrate the existence of a compensable property right under Florida law. In addition, defendant further argues that any state-created riparian rights in the use or condition of the St. Lucie River are preempted by the federal navigational servitude.[8] Although the court has already found that plaintiffs' claims alleging a taking of their riparian rights due to the environmental degradation of the St. Lucie River are untimely, the court will nonetheless examine and address the merits of those claims as if they had been timely filed. For the reasons discussed below, defendant's motion for summary judgment with respect to those claims is granted, and plaintiffs' cross motion for summary judgment is denied.

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[8]/ Defendant also claims that its discharges did not cause the alleged environmental damage to the St. Lucie River because intervening natural events caused plaintiffs' injuries. Because the court concludes that plaintiffs' claims alleging a taking of their riparian rights are both untimely and barred by the federal navigational servitude, the court need not address defendant's causation arguments with respect to those claims.

1. Plaintiffs' Property Rights under Florida Law

The Federal Circuit has adopted a two-part approach for the analysis of takings claims. Before determining whether a particular governmental action has effected a taking of private property requiring the payment of just compensation, a court must first "inquire into the nature of the . . . owner's estate to determine whether the use interest proscribed by the governmental action was part of the owner's title to begin with, *i.e.*, whether the . . . use interest was a 'stick in the bundle of property rights' acquired by the owner." *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). The first step of the analysis is a threshold inquiry. *See, e.g., Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004) ("First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment."); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993) (noting that as "part of a takings case, the plaintiff must show a legally-cognizable property interest"). If the court determines that the particular interest alleged to have been taken is not a cognizable property right to which the Fifth Amendment might apply, then the takings analysis can proceed no further.

In this case, plaintiffs assert the possession of two distinct property interests under state law. First, each plaintiff claims to hold fee simple title to the fast land located above the ordinary high water line of the adjacent navigable waterway.[9] In addition to the ownership of those upland parcels, each plaintiff further asserts the possession of certain riparian rights in the use and enjoyment of the adjacent navigable waterway as an incident of their fee simple ownership of riparian land.[10] According to plaintiffs, riparian landowners in Florida possess protected property rights in the use of an adjacent stream for fishing, swimming, boating and the viewing of wildlife. In addition to those recreational rights, plaintiffs also assert

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[9]/ Plaintiffs have presented no evidence that they are in fact the record owners of the upland parcels at issue in this case. For purposes of the pending motions, defendant has not disputed plaintiffs' asserted ownership of those parcels. Def.'s Suppl. Brief at 9 n.5.

[10]/ The court notes that one of the plaintiffs in this case does not own riparian property adjacent to the St. Lucie River. John Patteson's property is located on the St. Lucie Canal. Patteson Decl. ¶ 1. Although a riparian landowner may possess riparian rights in an artificial canal, it is clear that Mr. Patteson does not possess any riparian rights in the use or condition of the St. Lucie River.

the possession of a compensable property right to pollution-free water in the St. Lucie River. Plaintiffs claim that defendant's discharges of polluted non-saline water into the river have deprived them of those property rights without the payment of just compensation as required under the Fifth Amendment.

According to defendant, plaintiffs do not possess any compensable property rights in the use of the St. Lucie River under Florida law because such rights are held in common with the general public under the public trust doctrine. Because the asserted riparian rights are non-exclusive in nature, defendant contends that those rights are not compensable under the Fifth Amendment. In the alternative, defendant argues that the federal navigational servitude preempts any state-created riparian rights possessed by plaintiffs with respect to the use and enjoyment of the St. Lucie River. For these reasons, defendant argues that plaintiffs are not entitled to compensation for the alleged damage to the St. Lucie River.

The Takings Clause of the Fifth Amendment does not create property rights. Rather, such rights "'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *see also Bartz v. United States*, 633 F.2d 571, 577 (Ct. Cl. 1980) (noting that "the issue of what constitutes a 'taking' is a 'federal question' governed entirely by federal law, but . . . the meaning of 'property' as used by the Fifth Amendment will normally obtain its content by reference to state law") (citing *Johnson v. United States*, 479 F.2d 1383, 1390 (Ct. Cl. 1973)).[11] In determining whether plaintiffs hold a compensable property interest in the use and enjoyment of the St. Lucie River, the court must examine the nature and scope of riparian property rights under applicable state law.

Under Florida law, all navigable waterways as well as the submerged lands beneath them are held in trust by the state for the benefit of the general public. *See Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 644 (Fla. 1909) (*Ferry Pass*) (holding that the state, "by virtue of its sovereignty holds in trust for all the inhabitants of the state the title to the

[11]/ Although property rights are generally defined by state law, federal law may also create compensable property interests protected by the Fifth Amendment. *See Conti v. United States*, 291 F.3d 1334, 1340 n.4 (Fed. Cir. 2002).

lands under the navigable waters within the state including the shore or space between high and low water marks"); *see also* Fla. Const. Art. X, § 11 ("The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.").

Although the state may convey legal title to submerged lands to private owners, any rights thus conveyed are always subject to the state's overriding obligation to protect the public rights of swimming, bathing, fishing and navigation. The Florida Supreme Court has noted that

> [t]he navigable waters in the state and the lands under such waters, including the shore or spaces between ordinary high and low water marks, are the property of the state or of the people of the state in their united or sovereign capacity. Such lands are not held for purposes of sale or conversion into other values, or for reduction into several or individual ownership, but for the use of all the people of the state for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters thereon.

Brickell v. Trammell, 82 So. 221, 226 (Fla. 1919). Plaintiffs do not own, nor do they claim to own, the St. Lucie River. They do, however, claim to own several parcels of riparian land, as well as a number of appurtenant riparian rights in the use and environmental condition of the St. Lucie River. Specifically, plaintiffs claim to possess compensable property rights in the use of the river for swimming, boating, fishing and wildlife viewing. Plaintiffs also assert a compensable property right to pollution-free water within the river. The court will address each of plaintiffs' asserted property interests *seriatim*.

a. Fishing, Swimming, Boating and Recreational Rights

Plaintiffs first argue that defendant's discharges into the St. Lucie River have effected a physical taking of their riparian rights to swim, fish, view wildlife and operate their boats in the St. Lucie River. Defendant responds that those navigational and recreational rights are held in common with the general public

and are therefore non-compensable under the public trust doctrine. Although plaintiffs do not argue that their swimming, fishing and boating rights are in any way superior to the concurrent rights of the public to engage in those activities, they nonetheless maintain that such rights cannot be taken from riparian landowners without the payment of just compensation.

The court notes at the outset that plaintiffs have failed to cite any legal authority supporting the existence of a compensable property right in a riparian landowner's ability to observe wildlife in a navigable waterway. Although plaintiffs might derive an economic benefit from the ability to view wildlife from their property, the Supreme Court has noted that

> not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law has long recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute 'property rights' in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption.

United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). The plaintiff in a takings case bears the burden of proving the existence of a cognizable property right. Because there is no apparent legal basis for plaintiffs' assertion of a right to view wildlife in the St. Lucie River, the court must dismiss plaintiffs' claims with respect to the taking of that purported property interest.

While Florida courts have traditionally recognized riparian rights to swim, bathe, navigate and fish in navigable waters, they have uniformly held that those rights are not exclusive because they are held concurrently with the general public. *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008), *cert. granted*, 129 S. Ct. 2792 (2009) (noting that "upland owners have no rights in navigable waters and sovereignty lands that are superior to other members of the public in regard to bathing, fishing, and navigation"); *Ferry Pass*,

48 So. at 645 ("As to mere navigation in and commerce upon the public waters, riparian owners as such have no rights superior to other inhabitants of the state."). However, plaintiffs point to a number of cases ostensibly supporting the proposition that the deprivation of a non-exclusive riparian right by the government requires the payment of just compensation under the Fifth Amendment. As discussed below, the referenced cases provide no support for the arguments advanced by plaintiffs in this case.

In *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189 (Fla. 1981) (*Lake Islands*), cited by plaintiffs, the Florida Supreme Court invalidated an administrative regulation prohibiting the use of motorboats and air boats on a navigable lake during duck hunting season. *Lake Islands* is inapposite for at least two reasons. First, the court in that case did not address whether the challenged regulation effected a compensable taking of a protected property right. On the contrary, the court held that the regulatory prohibition was an arbitrary and unreasonable restriction that violated the minimal requirements of due process. Second, the court found that the challenged prohibition had the effect of completely depriving the plaintiffs, owners of islands within the lake, access to their property. As discussed in more detail below, the right of access is one of four special riparian rights that is not shared with the general public.

Plaintiffs further claim that *Walton County*, 998 So. 2d at 1111-12, and *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909), both stand for the proposition that riparian rights "whether or not held in common with the public, are property and may not be taken without just compensation . . . ." Pls.' Mot. at 25-26. However, neither of those decisions supports plaintiffs' assertion. In *Walton County*, for example, the Florida Supreme Court stated that there are only four exclusive riparian rights that cannot be taken by the government without the payment of just compensation. 998 So. 2d at 1111. The court expressly noted, moreover, that riparian owners do not possess any fishing, bathing or navigation rights that are superior to the rights held by the public. *Id.*

Plaintiffs quote the following passage from *Broward* in support of their argument that non-exclusive riparian rights are compensable under the Fifth Amendment:

> Those who own land extending to [the] ordinary high-water mark of navigable waters are riparian holders who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of waters opposite their holdings; among them being the right of access from the water to the riparian land and perhaps other easements allowed by law. These special rights are easements incident to the riparian holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law.

Broward, 50 So. at 830. The quoted language, however, merely states that the "special riparian rights" – *i.e.*, the rights of access, unobstructed view, reasonable domestic use and additions due to accretion and reliction – are easements that may not be taken without compensation. The passage does not suggest that the public trust rights of navigation, commerce, fishing and boating are likewise compensable, and specifically draws a distinction between them and the so-called "special rights."

The remaining cases cited by plaintiffs likewise fail to support their assertion of a compensable property right to fish, boat, swim or view wildlife in a navigable waterway. *See Bd. of Trustees of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934 (Fla. 1987) (*Sand Key Associates*) (holding in a quiet title action that littoral owners are entitled to additions to their upland parcels caused by government-induced accretion); *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957) (determining the respective property rights of two owners of littoral land adjacent to a navigable bay); *Webb v. Giddens*, 82 So. 2d 743 (Fla. 1955) (holding that the construction of a road across an arm of a navigable lake, which completely eliminated the plaintiff's access to the main body of the lake from his property, was a deprivation of the plaintiff's special littoral right of access); *Bd. of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209 (Fla. 2d Dist. Ct. App. 1973) (*Medeira Beach Nominee*) (holding that littoral owners acquired title to new beachfront land created through a public beach renourishment programs).

Plaintiffs have failed to demonstrate the existence of a compensable property right under Florida law regarding the ability to fish, swim, bathe, view wildlife or operate a boat in navigable waters. Florida case law draws a clear distinction between exclusive riparian rights, which are compensable, and public trust rights, which are not. A Florida appellate court, for example, held that the loss of a public trust right by a riparian owner "amounts to a deprivation of a right of navigation which will affect the public as a whole . . . [and that] eminent domain statutes protect only private rights; not rights which accrue to the public as a whole." *Cent. & S. Fla. Flood Control Dist. v. Griffith*, 119 So. 2d 423, 425 (Fla. 3d Dist. Ct. App. 1960).

The United States Court of Claims, the predecessor of the Federal Circuit, has also rejected takings claims in which a landowner asserted the possession of a compensable property right in the ability to hunt or to fish in navigable waters:

> [i]t has been uniformly held that there is no property right in any private citizen or group to wild game or to freely-swimming migratory fish in navigable waters. Fish are *ferae naturae*, capable of ownership only by possession and control. No citizen has any right to the fish nor to exclude any other citizen from an equal opportunity to exercise his right to possession.

Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778, 785 (Ct. Cl. 1968). In *Bishop v. United States*, 126 F. Supp. 449, 451 (Ct. Cl. 1954), moreover, the court held that the "[p]laintiffs' allegation . . . that the right to hunt wild geese is a property right cannot be taken seriously. . . . No citizen has a right to hunt wild game except as permitted by the State." The property owners in *Bishop*, moreover, were claiming a right to hunt geese on their own land. If there is no protected property right to hunt wild animals on one's own property, then there can certainly be no such right to fish in navigable waters that are under the exclusive control of the state.

b. Exclusive or Special Riparian Rights

Although the state's navigable waterways are not themselves subject to private ownership or control, the owners of riparian land do possess certain rights

in the use of those waterways as an incident of their ownership. In addition to the rights held in common with the general public, the owners of riparian property possess four exclusive property rights with respect to the adjacent body of water. *See generally Walton County*, 998 So. 2d at 1111. First, riparian landowners have a protected right to access the adjacent waterway from their upland parcels. *Lake Islands*, 407 So. 2d at 191-93 (holding that a regulation prohibiting boats on a navigable lake during duck hunting season unreasonably deprived the owners of islands within that lake access to their property from the water). Second, riparian owners possess the right to divert a reasonable amount of water from the adjacent waterway for domestic purposes. *Cf. Taylor v. Tampa Coal Co.*, 46 So. 2d 392, 394 (Fla. 1950) (holding that a riparian landowner on a non-navigable lake possessed a right to use the water in the lake only to the extent that such use did not interfere with the enjoyment of an equal right by other riparians). Third, the owners of riparian land are entitled to gradual additions to their property resulting from the natural processes of accretion and reliction. *Medeira Beach Nominee*, 272 So. 2d at 211-12 (holding that a littoral property owner was entitled to accreted land created by a public beach renourishment program). Finally, riparian landowners possess a right to an unobstructed view of the water from their upland property. *Lee County v. Kiesel*, 705 So. 2d 1013, 1015-16 (Fla. 2d Dist. Ct. App. 1998) (holding that the construction of a bridge that completely blocked a riparian landowner's view of the water effected a taking of the special right of unobstructed view). Although these four special rights are subject to reasonable regulation by the government, they "are private property rights that cannot be taken from upland owners without just compensation." *Walton County*, 998 So. 2d at 1111; *see also Brickell*, 82 So. at 227 (holding that the four riparian rights listed above "are easements incident to the riparian holdings and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law").

Plaintiffs do not claim that the challenged discharges have deprived them of access to the river from their upland property, an unobstructed view of the river from that property, or additions to their parcels due to accretion or reliction. Plaintiffs continue to enjoy each of those special rights without interference. Plaintiffs do argue, however, that the special riparian right to reasonable use of the water must be interpreted to include all uses of the navigable waterway, including fishing, swimming, boating and viewing wildlife. The court does not view the relevant case law as supporting plaintiffs' expansive interpretation of the right of

reasonable use. Plaintiffs have failed to cite any controlling decisions which support their contentions and, indeed, pertinent case law discerned by the court has also failed to yield support. In *Ferry Pass*, 48 So. at 645, for example, the Florida Supreme Court described the right of reasonable use as "the right to a reasonable use of the water for domestic purposes." *See also Lake Islands*, 407 So. 2d at 191 (noting that riparian landowners possess "the right to a reasonable use of the water for domestic purposes").

The only cases that might initially appear to support plaintiffs' interpretation are clearly distinguishable from the case at bar. In cases addressing the littoral or riparian rights held by owners of land adjacent to *non-navigable* lakes and streams, Florida courts have generally held that such landowners do possess a compensable property right in the recreational or navigational use of the adjacent body of water.[12] In *Taylor*, 46 So. 2d 392, for example, the Florida Supreme Court held that owners of land abutting a non-navigable lake possess an enforceable property right in any lawful and reasonable use of the water in the lake, as long as the exercise of that right does not interfere with the equal rights of other riparians:

> It is the rule that the rights of riparian proprietors to the use of waters in a non-navigable lake such as the one here involved are equal. Except as to the supplying of natural wants, including the use of water for domestic purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor, each riparian owner has the right to use the water in the lake for all lawful purposes, so long as his use of the water is not detrimental to the rights of other riparian owners. . . . The fact that one riparian owner may choose to use the water in the lake for recreational purposes while another may desire to divert it for an artificial use such as irrigation, will not give the latter a superior right to take water to the detriment of the former, for in this jurisdiction there is no distinction in respect to use between a farm and a summer residence.

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[12]/ As previously noted, the parties are in agreement that the St. Lucie River is a navigable waterway.

Id. at 394 (internal citation omitted). Because the general public does not possess any right to use non-navigable waterways for recreation or navigation, however, those rights are properly viewed as compensable property rights that are held exclusively by the owners of adjacent riparian or littoral land. *Taylor* and other similar cases do not apply here, where any rights of recreation or navigation are held in common with the general public.

c. Plaintiffs' Asserted Right to Pollution-Free Water

Plaintiffs claim to possess a compensable property right under Florida law to pollution-free water in the St. Lucie River and argue that defendant has taken that right because the water discharged into the river contains high concentrations of nutrients and sedimentary material.[13] Compl. ¶ 31. In support of that assertion, plaintiffs point to ten words embedded within an extended passage in a 100-year-old decision of the Florida Supreme Court:

> Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and dereliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper or lower riparian owners or others, *the right to have the water kept free from pollution*, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his

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[13]/ Plaintiffs also claim that the addition of non-saline water into the St. Lucie River has effected a taking of their riparian rights by altering the existing salinity level within the river. The Federal Circuit, however, has rejected the existence of such a right, *see Avenal v. United States*, 100 F.3d 933, 936-37 (Fed. Cir. 1996) (holding that the plaintiffs did not suffer a compensable taking when a government project changed the salinity level of a navigable waterway in which those plaintiffs held leases to cultivate oysters), and plaintiffs have cited no authority that supports the existence of such a right under state law.

> property, the right to use the water in common with the public for navigation, fishing, and other purposes in which the public has an interest.

Ferry Pass, 48 So. at 644-45 (emphasis added). The quoted passage was subsequently reproduced in its entirety in the Florida Supreme Court's decision in *Lake Islands*, 407 So. 2d at 191. There is no question that the language cited by plaintiffs constituted *obiter dicta* in both *Ferry Pass* and *Lake Islands*. Neither of those cases required the court to recognize the existence of a protected property right in pollution-free water.

The Federal Circuit has noted that "it is well established that a general expression in an opinion, which expression is not essential to the disposition of the case, does not control a judgment in a subsequent proceeding."[14] *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988); *see also Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."); *United States v. Hunter*, 172 F.3d 1307, 1310 (11th Cir. 1999) (Carnes, J., concurring) ("The holdings of a prior decision can reach only as far as

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[14]/ The cautionary words of one Florida court on this issue are particularly instructive:

> The bench and bar not infrequently fall into the error of accepting as binding precedent all of the views expressed in the written opinion of an appellate court. Necessarily, the views and decisions of an appellate court on issues which are properly raised and decided in disposing the case are, unless reversed or modified by a higher court, binding on the lower court as the law of the case. Additionally, under the doctrine of stare decisis, an appellate court's decision on issues properly before it and decided in disposing of the case, are, until overruled by a subsequent case, binding as precedent on courts of lesser jurisdiction. But a purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple. While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value.

Bunn v. Bunn, 311 So. 2d 387, 389 (Fla. 4th Dist. Ct. App. 1975).

the facts and circumstances presented to the Court in the case which produced that decision."). Because the statements cited by plaintiffs were not essential to the dispositions in *Ferry Pass* and *Lake Islands*, this court is not bound by those statements in interpreting and applying Florida law.

Plaintiffs have failed to cite a single case in which a Florida court has held that the pollution of a navigable waterway by a governmental entity effected a compensable taking of property.[15] The pollution of the St. Lucie River, moreover, does not inflict any special injury on plaintiffs; it is an injury that is sustained by the general public. As noted in the *amicus* brief filed by the South Florida Water Management District, the Florida Constitution grants all citizens of the state an equal right to adequate laws for the abatement of water pollution. *See* Amicus Brief of the South Florida Water Management District at 6; *see also* Fla. Const. Art. II, § 7. Because any legal interest in pollution-free water is shared equally by all Florida residents, any infringement of that interest is not compensable as a taking under the Fifth Amendment.[16]

The court further notes that awarding compensation to plaintiffs for the alleged taking of a "property right" that is held in common with the general public would be inconsistent with the compensatory purposes of the Takings Clause. The Supreme Court has observed that the "Fifth Amendment's guarantee that private

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[15]/ In their supplemental brief, plaintiffs cite a 1999 decision from one of the state's intermediate appellate courts as standing for the proposition that the government's pollution of a navigable waterway effects a taking of the property rights of riparian landowners. Pls.' Suppl. Brief at 2. The only issue discussed in the referenced opinion is whether a particular parcel of property was riparian or not; the opinion does not, directly or indirectly, address whether there is a riparian right under state law to pollution-free water. *See Teat v. City of Apalachicola*, 738 So. 2d 413 (Fla. 1st Dist. Ct. App. 1999).

[16]/ In addition to lacking any substantial basis in existing law, the radical redefinition of riparian rights proposed by plaintiffs would be unworkable in practice. While the abatement of water pollution is an important public policy that is codified in the state's constitution, *see* Fla. Const. Art. II, § 7(a), the complete elimination of pollution from Florida's navigable waters would be incompatible with a number of other state and federal policies and objectives. For example, National Pollutant Discharge Elimination System (NPDES) permits issued pursuant to Section 402 of the Clean Water Act expressly authorize the discharge of pollutants into navigable waters. *See* 33 U.S.C. § 1342 (2001). If the court were to recognize a compensable property right in pollution-free water, each of the thousands of NPDES permits issued in Florida would represent a potentially compensable taking of property requiring compensation.

property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (noting that the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). In seeking compensation for the alleged taking of their asserted right to pollution-free water, plaintiffs would turn the *Armstrong* principle on its head. In essence, plaintiffs seek individual compensation for burdens that are shared by the public as a whole. Such a holding would be unprecedented and one for which this court finds no authority.

2. Federal Navigational Servitude

Defendant argues that even if plaintiffs possess compensable property rights in the use and condition of the St. Lucie River under Florida law, their riparian takings claims are nonetheless barred by the federal navigational servitude. Plaintiffs respond that the federal navigational servitude is inapplicable in this case for two reasons. First, plaintiffs claim that defendant's discharges into the river are unrelated to navigation and are therefore beyond the scope of the navigational servitude. In that regard, plaintiffs contend that flood control, not navigation, is the primary purpose of defendant's regulatory releases from Lake Okeechobee. Second, plaintiffs argue that the navigational servitude never applies in flooding cases. According to plaintiffs, the navigational servitude may not be invoked as a defense in this case because defendant's discharges have the effect of flooding the St. Lucie River. Contrary to plaintiffs' assertions, the court concludes that the federal navigational servitude operates in this case as an inherent limitation on plaintiffs' riparian rights, and any claims alleging the taking of those rights are therefore barred by the servitude.

a. Applicable Legal Framework

In *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992), the Supreme Court held that the government "may resist compensation . . . if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." In other words, if governmental action results in restrictions on the use of property that merely

duplicate limitations that already "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon . . . ownership," then there can be no taking. *Id.* at 1029. The background principles defense to a takings claim is not limited to state nuisance and property law; on the contrary, such principles may have their basis in federal law. *See, e.g., Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1384 (Fed. Cir. 2000) (*Palm Beach Isles*) ("In light of our understanding of *Lucas* and the other cases we have considered, we hold that the navigational servitude may constitute part of the 'background principles' to which a property owner's rights are subject, and thus may provide the Government with a defense to a takings claim.").

The Federal Circuit has explained that "[t]he 'navigational servitude' derives from the Commerce Clause of the Constitution, and gives the United States a 'dominant servitude' – a power to regulate and control the waters of the United States in the interest of commerce." *Id.* at 1382 (footnote omitted). In other words,

> the government's navigational servitude is a dominant servitude which reflects the superior interest of the United States in navigation and the nation's navigable waters. . . . Thus, upon the determination of Congress to improve navigation, the navigational servitude defines the appropriate boundaries within which the United States can assert its power to supersede private ownership interests without creating an obligation to pay just compensation under the Eminent Domain Clause of the Fifth Amendment.

Owen v. United States, 851 F.2d 1404, 1408 (Fed. Cir. 1988) (en banc) (citations omitted); *see also United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913) (noting that title to riparian land "is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, it is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers").

The navigational servitude shields the government from compensation liability for damage to riparian interests that occur within the bed of a navigable waterway:

> The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

United States v. Rands, 389 U.S. 121, 123 (1967). While a riparian landowner may possess compensable, state-created property rights in the use of a navigable waterway, the federal navigational servitude is an inherent limitation on such rights. *See United States v. Twin City Power Co.*, 350 U.S. 222, 227 (1956) ("It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely preempt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment."). In other words, while the taking of exclusive riparian rights by a state or local government may require compensation, no such compensation is required when the federal government takes those same rights in the exercise of its navigational power.

Although all riparian property located along a navigable waterway is subject to the federal navigational servitude, it is clear that the servitude applies only to those governmental actions and projects that are related to the improvement of navigation. The Federal Circuit has stated that

> [t]he precedents clearly establish that the Government's purpose must be related to navigation if it wishes to avoid paying compensation for the regulation or control of private property.
>
> . . .

> And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.

Palm Beach Isles, 208 F.3d at 1384 (quoting *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926)) (citations omitted). If a public project is wholly unrelated to navigation, the government is not shielded from compensation liability by the federal navigational servitude.

The determination of whether a particular project will improve navigation, however, is a matter entirely within the broad discretion of the legislative branch. The Supreme Court has noted that

> [i]t is not for courts . . . to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should respect that decision until and unless it is shown "to involve an impossibility . . . ." If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced.

Twin City Power, 350 U.S. at 224 (citations omitted); *see also United States v. Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596 (1941) (*Chicago Railroad*) (noting that "the determination of the necessity for a given improvement of

navigable capacity, and the character and extent of it, is for Congress alone"). Thus, the Supreme Court has made it clear that courts should not second-guess the legislature's determination that a particular governmental project will serve the interests of navigation.

The spatial boundaries of the federal navigational servitude are marked by the ordinary high water lines along the banks of a navigable waterway, and the effect of the servitude is not limited to those portions of a river or stream that are actually navigable in fact. *See Allen Gun Club v. United States*, 180 Ct. Cl. 423, 429 (1967) (holding that "[t]he navigation easement is not limited to the thread of the stream where vessels pass, but extends from ordinary high water on one side to ordinary high water on the other"). The ordinary high water line marks both the vertical and the horizontal boundaries of the servitude. *See Owen*, 851 F.2d at 1410 (noting that "Supreme Court precedent properly limits the range of the navigational servitude to the land *beneath and within* the navigable stream's high-water mark") (emphasis added). The navigational servitude does not protect the government against liability for property damages that occur beyond the horizontal and vertical limits established by the ordinary high water line, *see Tri-State Materials Corp. v. United States*, 550 F.2d 1, 5-9 (Ct. Cl. 1977) (holding that the permanent invasion of an underground mine located below the elevation of the ordinary high water line but beyond the horizontal limits of the riverbed was beyond the reach of the navigational servitude), nor does it apply to riparian property located on a *non-navigable* waterway, *see United States v. Cress*, 243 U.S. 316, 325-26 (1917) (holding that takings claims related to the flooding of property located along a non-navigable stream were not barred by the servitude).[17]

[17]/ The Supreme Court has similarly held that when the government appropriates or damages riparian land located above the ordinary high water line, the quantum of compensation to be paid to the landowner may not include any additional increment of value resulting from the property's riparian location or attributable to the flow of the adjacent navigable waterway. *See, e.g., United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 629 (1961).

b. Applicability of the Federal Navigational Servitude to Claims Alleging a Physical Taking of Plaintiffs' Riparian Rights Due to the Environmental Degradation of the St. Lucie River

(i) Navigational Purpose of the C&SF Project

Plaintiffs argue that defendant's discharges into the St. Lucie River are unrelated to navigation and are therefore beyond the protection of the federal navigational servitude. Plaintiffs first note that the government report incorporated by reference in the Flood Control Act of 1948 expressly states that the navigational benefits of the C&SF Project are "small and incidental" when compared to the project's primary flood control purpose. Pls.' Mot. at 16-17, 38-43. Plaintiffs also assert that the quantity of water released into the river that is attributable to navigational locks is minuscule compared to the massive quantities of water discharged for flood control, irrigation and other purposes.

Plaintiffs point to the comprehensive plan for the C&SF Project in support of their argument that defendant's discharges into the St. Lucie River are not related to navigation. The report states that the project's "navigation benefits are relatively small and incidental when compared with the primary features of flood protection and water control . . . ." H.R. Doc. No. 80-643 at 2. For that reason, the report recommends that the "project should be considered henceforth as one for flood control and other purposes, and that its further consideration should be under the provisions of flood-control law." *Id.* Because the comprehensive plan was adopted and authorized by Congress in the Flood Control Act of 1948 and the Flood Control Act of 1954, plaintiffs argue that it represents the unambiguous position of Congress that the C&SF Project does not serve the purposes of navigation.

Despite plaintiffs' arguments on this point, it is clear that the federal navigational servitude applies if the governmental project bears *any* substantial relation to navigation. *See Palm Beach Isles*, 208 F.3d at 1384. There is no requirement that navigation be the sole – or even the principal – purpose of the challenged public project. *See United States v. Commodore Park*, 324 U.S. 386, 391-92 (1945) ("'The fact that purposes other than navigation will also be served

could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional Power.'") (quoting *State of Arizona v. State of California*, 283 U.S. 423, 456 (1931)).

Federal acquisition of the existing St. Lucie Canal was authorized by the Rivers and Harbors Act of 1930, Pub. L. No. 71-520, 46 Stat. 918. Although that statute was designed to further a number of public purposes, its principal objective was the improvement of navigation. A governmental report on the Okeechobee Waterway describes the legislative history of the specific provisions of the Rivers and Harbors Act of 1930 authorizing the acquisition of the waterway by the federal government:

> An Act to adopt the Lake Okeechobee project by the Federal Government was introduced in December of 1929, and referred to the Flood Control Committee of the House of Representatives. After several weeks of hearings it became apparent that the long standing policy of the Congress not to become involved in flood control projects was too strong. The Act was referred to the Rivers and Harbors Committee where navigational projects had traditionally been accepted as being of Federal interest. After months of deliberations, the Congress adopted the project as a navigational project with due consideration to be given to flood control.

Okeechobee Waterway Report at 3-15 to 3-16.

Plaintiffs correctly note that the comprehensive report on the C&SF Project states that the navigational benefits of the project would be "relatively small and incidental when compared with the primary features of flood protection and water control." H.R. Doc. No. 80-643 at 2. However, the fact that those navigational benefits are small or incidental is irrelevant for purposes of determining the applicability of the federal navigational servitude. The Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1175, states that the purposes of the project include "the benefit of navigation and the control of destructive floodwaters . . . ." In

addition, the comprehensive plan referenced by plaintiffs discusses the navigational benefits of the C&SF Project at length. For example, the report notes that "the proposed channels and control works would afford the basic framework for a system of interlocking navigable waterways throughout central and southern Florida, which would connect at several points with the Intracoastal Waterway." H.R. Doc. No. 80-643 at 2. The report further provides that

> [t]he comprehensive plan contemplates enlargement of the St. Lucie Canal and the Caloosahatchee River and navigable channels around Lake Okeechobee, which would incidentally provide the 8-foot waterway authorized by the River and Harbor Act of March 2, 1945. Since the cost of the comprehensive plan includes the 8-foot waterway the annual navigation benefits of this work, amounting to $176,000, are credited to the improvement. The proposed improvements would also result in some expansion of recreational boating throughout this area, and in considerable local use of the improved canals for access and for movement of supplies and equipment. Such incidental navigation uses are believed to be substantial but have not been evaluated.

Id. at 49.

The Flood Control Act of 1948 and the comprehensive plan for the C&SF Project both state that the approved project was authorized as an expansion and modification of the projects first authorized in the Rivers and Harbors Act of 1930. *See* Pub. L. No. 80-858, 62 Stat. 1175; H.R. Doc. No. 80-643 at 2. Even if the modification and expansion authorized under the 1948 Act did not further any navigational interests, those modifications could not change the primary navigational purpose of the underlying project. Primary management responsibility for the central features of the original project – Lake Okeechobee and the Okeechobee Waterway – was assumed by the federal government due to the importance of those features to navigation across the state. Those are precisely the features of the project that are now challenged by plaintiffs in this case.

Significantly, the United States Court of Claims has held that the entire C&SF Project, and the levees surrounding Lake Okeechobee in particular, serve a navigational purpose. In *Coastal Petroleum Co. v. United States*, 524 F.2d 1206 (Ct. Cl. 1975), the court rejected the argument that the C&SF Project did not serve any navigational purpose. The plaintiffs in that case, like plaintiffs here, argued that the federal navigational servitude did not preclude their claims against the government for the alleged taking of state leases to mine limestone within Lake Okeechobee because the primary purpose of the levee project was flood control rather than navigation. The court held that the plaintiffs' claims in that case were barred by the federal navigational servitude.

The Court of Claims first noted that the government's invocation of the servitude was supported by the express language of the Flood Control Act of 1948:

> The statute under which many flood control undertakings, including the Central and Southern Florida Flood Control Project, are authorized states that the projects are "for the benefit of navigation and the control of destructive flood waters and other purposes." . . . Such a declaration has consistently been held conclusive to determine the navigation purpose of the project.

Id. at 1210.

The court next held that in determining whether a governmental action is protected by the navigational servitude, a court must examine the purposes of the *entire project*, rather than the specific actions challenged by a takings claimant:

> The Lake Okeechobee project must be considered as authorized as a whole, for construction as found proper by the Corps of Engineers. When the Corps decided . . . to use limestone found below ordinary high water within the navigable waters in order to build the levee, there was "not an invasion of any private property right in such

> lands for which the United States must make compensation. The damage sustained resulted not from a taking of the . . . owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject."

Coastal Petroleum, 524 F.2d at 1211-12 (quoting *Chicago Railroad*, 312 U.S. at 597); *see also Commodore Park*, 324 U.S. at 393 (holding that the federal government may, without compensation, "block navigation at one place to foster it at another"); *Allen Gun Club*, 180 Ct. Cl. at 430 (noting that "Congress, and those to whom it has delegated authority, may, without Fifth Amendment liability, employ land submerged under navigable water in the way that in their best judgment helps accomplish the overall purpose even if, intentionally or not, they impair navigation for some purposes in some areas"). In other words, the navigational servitude would have applied even if the levees surrounding Lake Okeechobee served no independent navigational purpose because the project as a whole furthered the interests of navigation.

Although it was not required to go further, the Court of Claims also held that the levees surrounding Lake Okeechobee served an independent navigational purpose:

> Furthermore, the particular action which forms the basis of this suit, the construction of the Lake Okeechobee levee, was included in the project in large part because of the benefits it would provide for navigation on the Intracoastal Waterway, and this was one of the few parts of the project over which the Federal Government retained control after construction. We hold, therefore, that the project involved here is entitled to the benefits of the navigation servitude.

Coastal Petroleum, 524 F.2d at 1210 (citation omitted).

The Court of Claims rejected the plaintiffs' distinction between the purposes of flood control and navigation as a false dichotomy, noting that those

> categories are not so distinct. In *Allen Gun Club* . . . , we held that flood control projects on the Mississippi and its source streams were also, because of the disastrous effects flooding has on navigation, projects in aid of navigation and that the navigation servitude therefore applied.

Id.

Although Congress may decline to exercise the federal navigational servitude in authorizing a particular public works project, *see United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950) (finding a clear legislative intent to compensate property owners for the loss of riparian rights taken by construction of a reclamation project), the Court of Claims held that Congress had reserved its immunity from compensation liability under the federal navigational servitude in authorizing the C&SF Project:

> Congress may, of course, decide in a particular case not to rely on the servitude, but rather to compensate owners of submerged land in navigable waters for actions which, like those to which the servitude is applicable, are grounded in the power of the Federal Government to regulate commerce. But where a project has a legitimate navigation purpose, and there is no ascertainable Congressional intent to pay compensation, the presumption is that Congress intended to exercise both its navigation power and the navigational servitude. That presumption is strengthened here by the proviso in the statute authorizing the project that "nothing herein shall impair or abridge the powers now existing in the Department of War with respect to navigable streams. . . . We find nothing to persuade that Congress, despite its

> traditional right to use the submerged property without compensation, desired to make payment to the owners.

Coastal Petroleum, 524 F.2d at 1210 (citations omitted).

Given the express language of the Flood Control Act of 1948, the extensive description of the C&SF Project's navigational benefits in the comprehensive plan, and the holding of the Court of Claims in *Coastal Petroleum*, there is simply no basis for this court to refrain from applying the federal navigational servitude to plaintiffs' claims in the instant case. The primary purpose of defendant's regulatory discharges into the St. Lucie River is to protect the structural integrity of the levees surrounding Lake Okeechobee. The Court of Claims has held that the construction of those levees was a project in aid of navigation. Defendant's releases of water from the lake in this case therefore constitute a project in aid of navigation as well.

Plaintiffs' argument that only a small percentage of the water released into the St. Lucie River is attributable to navigational locks is likewise without merit. First, as previously noted, the relevant inquiry is not whether a particular element of a public project will further navigation, but whether the entire project is related to that purpose. As discussed above, defendant's regulatory releases from Lake Okeechobee – which represent the largest source of discharges into the river – serve an important navigational purpose by protecting the Herbert Hoover Dike. In addition, defendant also releases water from the lake to maintain minimum navigational depths within the St. Lucie Canal. Geller Decl. ¶¶ 20, 22; Ferguson Decl. ¶ 6. However, as discussed *supra*, most significant and dispositive of the issue in the present case, the predecessor of the Federal Circuit has already made a determination that the specific project in dispute here serves a navigational purpose and is therefore subject to the navigational servitude.

(ii) Applicability of Plaintiffs' Asserted Flooding Exception to the Navigational Servitude

Plaintiffs further argue that the federal navigational servitude may not be raised as an affirmative defense when a public project results in the flooding of

private property. Pls.' Suppl. Brief at 30-31. It is true that the navigational servitude does not shield the government from liability when its actions result in the permanent inundation of, or damage to, upland property located above or beyond the ordinary high water line. *See, e.g.*, *Owen*, 851 F.2d at 1410; *Tri-State Materials*, 550 F.2d at 5-9. Plaintiffs are incorrect, however, in their assertion that defendant's discharges into the St. Lucie River are likewise beyond the scope of the servitude.

In support of its argument that the servitude does not apply in flooding cases, plaintiffs point to this court's decision in *N.W. La. Fish & Game Pres. Comm'n v. United States*, 79 Fed. Cl. 400 (2007) (*Louisiana Fish & Game II*), *aff'd*, 574 F.3d 1386 (Fed. Cir. 2009). In that case, a state commission managed a wildlife preserve adjacent to the Red River in Louisiana. The preserve contained a navigable lake that drained through a slough and into the Red River. In order to prevent the growth of unwanted aquatic vegetation in the lake, the commission periodically discharged water from the lake into the river. Following the government's construction of a series of locks and dams on the Red River, the river was raised to a level that prevented the release of water from the lake. The commission asked the federal government to temporarily lower the level of the river to allow the partial drainage of the lake, but the federal government refused the request. The commission then filed a takings claim against the United States in this court, claiming that the government's refusal to lower the level of the river resulted in uncontrolled weed growth within the lake. The government moved to dismiss the commission's suit on the basis that its claims were barred by the federal navigational servitude. This court dismissed the commission's claims related to the alleged weed growth within the lake, but declined to dismiss an additional claim alleging that the federal government's actions resulted in the physical invasion of upland property adjacent to the lake. The commission appealed the dismissal of its claims related to the environmental impacts upon the lake itself, and the Federal Circuit affirmed. *Louisiana Fish & Game III*, 574 F.3d at 1386.

The court's refusal to dismiss the claim related to the alleged invasion of the commission's upland property was based on the well-established principle that the federal navigational servitude does not extend above or beyond the ordinary high water line. Here, all of plaintiffs' claims related to the environmental condition of the St. Lucie River concern riparian rights in the use of the river below the ordinary

high water line. Those claims are therefore within the scope of the navigational servitude.

The differential treatment accorded plaintiffs' upland parcels, on the one hand, and their asserted rights in the use and condition of the St. Lucie River, on the other, highlights a fundamental flaw in plaintiffs' claims alleging a physical taking of the latter. The Supreme Court has explained that the unique *per se* treatment accorded to permanent physical occupations of private property is based on the fact that such invasions deprive the property owner of one of the most essential sticks in its bundle of property rights: the right to exclude. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests."); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (noting that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted). In this case, plaintiffs have never possessed a right to exclude anyone from the use or enjoyment of the St. Lucie River.

The Supreme Court has repeatedly emphasized the distinction between claims involving an actual physical occupation or invasion of land and those involving governmental activities outside of the land that result in incidental damages to the land:

> Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982).

The Federal Circuit, moreover, has emphasized the narrow scope of the *per se* rule for physical takings set forth in *Loretto*:

> The holding of *Loretto* is quite narrow. It applies only to permanent physical occupations either by the government or by a third party acting under government authority.
>
> . . .
>
> A physical occupation, as defined by the Court, is a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of the property.

Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002).

In each of the flooding cases cited by the parties in which a court has awarded or upheld compensation for a physical taking of private property, the government had engaged in activity that resulted in the permanent flooding, destruction or invasion of fast land located above or beyond the ordinary high water line or along a non-navigable body of water. *See, e.g.*, *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 805-11 (1950) (holding that the subsurface invasion of fast land beyond the bed of a navigable river was beyond the scope of the servitude); *Dickinson*, 331 U.S. at 747-50 (holding that flooding and erosion of land located above the ordinary high water line was not barred by the federal navigational servitude); *Cress*, 243 U.S. at 319-28 (holding that the construction of a dam that resulted in the flooding of riparian land located on a non-navigable stream was beyond the scope of the servitude); *Owen*, 851 F.2d at 1408-16 (holding that public improvements to a navigable river that caused a house located on upland property to collapse into the river were not protected by the navigational servitude); *Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987) (holding that the inundation of upland property that resulted in the destruction of trees was beyond the scope of the navigational servitude); *Tri-State Materials*, 550 F.2d at 4-9 (holding that the construction of a lock and dam system that flooded an underground mine located on non-riparian land was beyond the scope of the servitude); *Barnes v. United States*, 538 F.2d 865, 870-73 (Ct. Cl. 1976) (holding

that the government's construction of a pair of dams that resulted in the subsurface flooding of riparian and non-riparian land beyond the ordinary high water line of a navigable river was not protected by the navigational servitude); *Kingsport Horizontal Prop. Regime v. United States*, 46 Fed. Cl. 691, 693-96 (2000) (holding that erosion damage to upland property located beyond the scope of an easement acquired for the construction of a canal was not barred by the navigational servitude).

In contrast, courts have uniformly rejected claims alleging the taking of riparian property adjacent to a navigable waterway when the government did not physically invade that property. *See, e.g.*, *Willow River Power*, 324 U.S. at 502-11 (holding that the servitude barred a claim by a power company alleging that the government had raised the level of a navigable river and interfered with the operation of its mill); *Commodore Park*, 324 U.S. at 390-93 (holding that the government's deposit of fill material into a navigable stream, which eliminated the plaintiff's access to an adjacent bay from his property, was protected by the navigational servitude); *Chicago Railroad*, 312 U.S. at 596-97 (reversing a trial court's award of compensation for damage to an embankment located below the ordinary high water line of a navigable river); *Scranton v. Wheeler*, 179 U.S. 141, 162-64 (1900) (holding that a takings claim related to the government's construction of a pier in a navigable waterway, which completely eliminated a riparian owner's access to the water from his land, was barred by the federal navigational servitude); *Gibson v. United States*, 166 U.S. 269, 271-76 (1897) (holding that a takings claim related to the government's construction of a dike below the ordinary high water line, which eliminated a riparian owner's access to the water from her land, was barred by the federal navigational servitude); *Allen Gun Club*, 180 Ct. Cl. at 428-31 (holding that government-induced shoaling in a non-navigable portion of a navigable river was within the scope of the servitude); *City of Demopolis v. United States*, 334 F.2d 657, 658-60 (Ct. Cl. 1964) (holding that the federal navigational servitude barred a municipality's takings claim alleging that the government's creation of a reservoir on a navigable river interfered with the operation of its sewage disposal system).

In the absence of a permanent occupation or an intermittent but inevitably recurring invasion of land, there can be no physical taking of that property. *See Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) ("The government effects a physical

taking only where it *requires* the landowner to submit to the physical occupation of his land."). In contrast to many of the cases cited by plaintiffs, *see, e.g.*, *Coates v. United States*, 93 F. Supp. 637 (Ct. Cl. 1950) (holding that the government effected a physical taking when improvements to a navigable river resulted in the deposit of hundreds of thousands of tons of sand on a riparian landowner's upland property); *Bassett, New Mexico LLC v. United States*, 55 Fed. Cl. 63 (2002) (holding that the government effected a physical taking of property when it deposited large quantities of hazardous waste in a quarry located on the plaintiff's land); *Martin v. City of Monticello*, 632 So. 2d 236 (Fla. 1st Dist. Ct. App. 1994) (holding that a municipality effected a physical taking of private property when it discharged treated sewage effluent directly into a non-navigable wetland located on the plaintiff's land), plaintiffs' claims alleging a physical taking of plaintiffs' riparian rights due to the environmental degradation of the St. Lucie River do not involve a physical invasion or permanent occupation of their upland property.

Plaintiffs' extremely expansive definition of the word "flooding" essentially deprives that term of all meaning. *See* Gray Decl. ¶ 22 (claiming that defendant's discharges through the S-80 control structure have "flooded" the St. Lucie River). In the context of takings cases involving the inundation of private property, the term "flooding" has invariably been used to refer to an actual physical invasion of land located above the ordinary high water line or mean high tide line. *See, e.g.*, *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 181 (1871) (holding that the construction of a government-authorized mill may effect a taking when other land "is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it"). Here, there have been no allegations that plaintiffs' riparian rights have been harmed by a physical invasion of water upon their properties. As noted above, plaintiffs do not own the St. Lucie River, so the discharge of water into that river in no way "floods" their property.

In accordance with the foregoing, the court holds that all of plaintiffs' claims alleging a taking of their asserted riparian rights due to the environmental degradation of the St. Lucie River are barred by the federal navigational servitude. Although the court also finds that plaintiffs, beyond their special riparian rights unaffected by the Corps' actions, do not possess any compensable property rights in the use or condition of the St. Lucie River, a contrary finding would not change the

result in this case because any state-created property rights are preempted by the servitude. The court therefore holds that defendant is entitled to summary judgment with respect to those claims alleging a taking of plaintiffs' asserted riparian rights.

III. Claims Alleging a Physical Invasion of Plaintiffs' Upland Parcels

In addition to their claims that defendant's discharges of polluted non-saline water into the St. Lucie River effected a physical taking of their asserted riparian rights in the use and condition of the river, certain plaintiffs further claim that those discharges resulted in a permanent physical invasion of their upland parcels. This second category includes the claims related to the alleged flooding of the Guys' garage, the alleged contamination of the Barattas' well, the alleged destruction of Ann MacMillan's mangrove trees, and the alleged invasion of certain of plaintiffs' properties by noxious odors. The court will refer to these claims as plaintiffs' upland parcel claims.

A. Jurisdictional Concerns

1. Defendant's Tort Claims Argument

Defendant asserts that this court lacks subject matter jurisdiction over plaintiffs' upland parcel claims because those claims sound in tort. The Tucker Act provides in relevant part that the

> United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages *in cases not sounding in tort.*

28 U.S.C. § 1491(a)(1) (2006) (emphasis added). Specifically, defendant has argued that plaintiffs' upland parcel claims do not constitute a taking of property requiring compensation. Defendant has therefore moved to dismiss those claims under RCFC 12(b)(1).

The Federal Circuit has held that torts and takings may spring from the same operative facts. *Moden v. United States*, 404 F.3d 1335, 1339 n.1 (Fed. Cir. 2005) (noting that "the same operative facts may give rise to both a taking and a tort") (citations omitted). Thus, in the takings context, this court does not dismiss claims under RCFC 12(b)(1) simply because the facts alleged might support a tort claim. *See id.* ("Whether the government's actions separately give rise to a tort action is irrelevant . . . ."). For this reason, defendant's argument that plaintiffs' upland parcel claims sound in tort does not lend anything to this court's jurisdictional analysis. Plaintiffs allege in their upland parcel claims that their property interests were taken by the actions of the government. If timely, these claims are within the jurisdiction of this court. *See Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008) ("In determining whether the Court of Federal Claims has jurisdiction, all that is required is a determination that the claim is founded upon a money-mandating source and the plaintiff has made a non-frivolous allegation that it is within the class of plaintiffs entitled to recover under the money-mandating source.").

2. Timeliness of Claims Alleging a Physical Invasion of Plaintiffs' Upland Parcels

Defendant did not raise a statute of limitations defense to plaintiffs' upland parcel claims. The court raises this issue *sua sponte*, as it must. *See Arctic Corner*, 845 F.2d at 1000 ("A court may and should raise the question of its jurisdiction *sua sponte* at any time it appears in doubt."). The court recites here the factual allegations relevant to the timeliness of plaintiffs' upland parcel claims.

Certain plaintiffs claim that their properties were invaded by noxious odors whenever defendant discharged polluted water into the St. Lucie River. *See* Crispin Decl. ¶ 2; Jordan Decl. ¶ 2; Mildenberger Decl. ¶ 3; Robert Paré Decl. ¶ 2; Patteson Decl. ¶ 2; Rutzke Decl. ¶ 2; Tafoya Decl. ¶ 2; Wakeman Decl. ¶ 2. Plaintiffs have

not asserted that those odors only began to invade their upland parcels within six years of the filing of this suit. Given the long history of pollution in the river, it appears unlikely that the odors occurred only after November 13, 2000. On the other hand, plaintiffs assert that the degree of pollution in the discharged water has increased significantly in recent years. The record currently before the court is inconclusive as to the accrual of this claim.

Ann MacMillan merely notes that "[w]hile mangrove trees originally thrived on my waterfront, now I have to keep replacing them because they will not grow or stick, especially near the water." MacMillan Decl. ¶ 2. Unfortunately, Ms. MacMillan does not indicate when mangrove trees thrived on her waterfront or when they first began to die. Ms. MacMillan acquired her upland parcel in 1987. Pls.' Suppl. Brief at 25. Plaintiffs have not indicated when the alleged destruction of Ms. MacMillan's trees first occurred or when the permanence of the situation (*i.e.*, the inability to grow mangrove trees on the property) became apparent. The accrual of this claim therefore cannot be determined from the record before the court.

Plaintiff Robert Baratta asserts that he and his wife stopped using the well on their property because its water had become contaminated. Baratta Decl. ¶ 2. According to Mr. Baratta, the "well water leaves an orange-brown stain on anything it touches, including plants, trees, and the side of my house." *Id.* Plaintiffs have presented no allegations, however, which demonstrate when the Barattas' well was first contaminated by polluted water from the river, nor have they expressed any basis for believing the contamination is a permanent condition. The Barattas acquired their upland parcel in 2000. Pls.' Suppl. Brief at 25. Robert Baratta's declaration implies that he and his wife used their well to water their trees and plants for some period of time before the water became contaminated, so it is a reasonable inference that the subsequent contamination of the well likely occurred sometime after November 13, 2000. The Barattas' upland parcel claim may be timely, but the record is not conclusive on this issue.

William Guy states that his "property has also been damaged when the river floods during the Corps' discharges, specifically damaging our garage and destroying everything on the floor of our garage." Guy Decl. ¶ 2. Once again, however, plaintiffs have failed to discuss when the alleged invasion of the parcel

occurred. Because William and Stella Guy acquired their upland parcel in 2002, Pls.' Suppl. Brief at 25, one could infer that the permanence of the flooding did not become apparent until after that date. If that inference is correct, then the takings claim related to the alleged flooding of the Guys' garage was timely filed. Based on the record currently before the court, however, the reasonableness of that inference is uncertain. Because the magnitude of defendant's discharges between 2003 and 2005 pales in comparison to its discharges in many prior years, it is likely that any flooding experienced by the Guys was preceded by multiple occurrences of inundation in earlier years. Without further development of the record, the court is unable to make a determination on this issue.

The court is unable to determine whether the claims alleging a permanent physical invasion of plaintiffs' upland parcels first accrued before or after November 13, 2000. The court notes that plaintiffs' upland parcel claims have received little discussion in the parties' briefing and, as noted above, key information is missing. The court therefore defers ruling on the timeliness of these claims, but reminds plaintiffs that going forward they bear the burden of establishing the court's jurisdiction over their upland parcel claims and the timeliness of those claims. *See Alder Terrace*, 161 F.3d at 1377 ("As the plaintiff in the underlying suit, the burden of establishing jurisdiction, including jurisdictional timeliness, must be carried by the . . . [plaintiff].") (citing *McNutt*, 298 U.S. at 189).

B. Cross Motions for Summary Judgment - *Ridge Line* Test

The parties' briefing has focused almost exclusively on those claims related to the alleged taking of plaintiffs' riparian rights due to the environmental degradation of the St. Lucie River. Because the parties have not adequately addressed plaintiffs' remaining claims alleging a physical invasion of several of plaintiffs' upland parcels, the court is unable to grant summary judgment with respect to those claims.[18] This court has previously recognized that an incomplete

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[18]/ Defendant has not disputed that plaintiffs possess protected property rights in the fee simple ownership of their upland parcels. The court presumes for the purposes of its analysis that those rights are not limited by the federal navigational servitude. As discussed in Section II.B.2 *supra*, the federal navigational servitude does not extend beyond the horizontal and

(continued...)

factual record may make it impossible to overcome the reasonable inference accorded to each non-moving party's facts, and may prevent the court from granting summary judgment to either party. *Lockheed Martin Corp. v. United States*, 49 Fed. Cl. 241, 245-46 (2001) ("[When] the facts developed do not allow the court to determine the central question [before it], it denies both motions for summary judgment . . . .") (citations omitted). In addition, even when the court is convinced that one of the parties may be entitled to judgment as a matter of law, the court possesses the discretion to deny a motion for summary judgment on a factual record that does not allow a reasoned consideration of the claims and defenses asserted by the parties. *See Ehlers-Noll, GmbH v. United States*, 34 Fed. Cl. 494, 499 (1995) ("'The court has no discretion to grant a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be denied, and the case fully developed.'") (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)).

Although plaintiffs' non-frivolous allegation of an uncompensated taking is sufficient to overcome defendant's motion to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), the court must nonetheless undertake a separate analysis to determine whether plaintiffs' claims are most appropriately treated under takings law or as torts.[19] *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (holding that a takings claimant "must establish that treatment under takings law, as opposed to tort law, is appropriate under the circumstances").

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[18]/ (...continued)
vertical boundaries of the riverbed established by the ordinary high water line. *See Owen*, 851 F.2d at 1410 (holding that "Supreme Court precedent properly limits the range of the navigational servitude to the land beneath and within the navigable stream's high-water mark"). None of the alleged injuries to plaintiffs' upland parcels are certain to have occurred below the ordinary high water line. The court therefore presumes that all of the plaintiffs alleging a permanent physical invasion of their upland parcels possess a compensable property right that is unencumbered by the federal navigational servitude.

[19]/ Because the court has already held that plaintiffs' claims related to the alleged taking of their riparian rights are both untimely and preempted by the federal navigational servitude, the court's analysis of plaintiffs' suit under *Ridge Line* will be limited to those claims alleging damage to their upland parcels above and beyond the ordinary high water line.

The Federal Circuit has adopted a two-pronged test to discover whether a physical taking has occurred. First, plaintiffs must demonstrate that defendant intended to invade a protected property interest or that the alleged invasion of plaintiffs' property was the direct, natural, or probable result of defendant's intentional actions. *Ridge Line*, 346 F.3d at 1355. Second, plaintiffs must demonstrate that defendant appropriated a benefit for itself at plaintiffs' expense or preempted plaintiffs' right to enjoy their property for an extended period of time. *Id.* at 1356. In order to satisfy the second prong of the test, plaintiffs must prove that defendant's interference with plaintiffs' property rights "was substantial and frequent enough to rise to the level of a taking." *Id.* at 1357; *see also Moden*, 404 F.3d at 1342 (holding that a takings claimant "must show that the invasion appropriated a benefit to the government at the expense of the property owner, or at least by preempting the property owner's right to enjoy its property for an extended period of time, rather than merely by inflicting an injury that reduces the property's value"). Plaintiffs must satisfy both prongs of the *Ridge Line* test to demonstrate that their claims are properly analyzed under takings law.

1. Foreseeability of the Alleged Invasion of Plaintiffs' Upland Parcels

Plaintiffs do not claim that defendant intended to take their upland parcels. Plaintiffs must therefore demonstrate that the alleged invasion of their rights was the direct, natural, or probable result of defendant's discharges. *Ridge Line*, 346 F.3d at 1355. Both foreseeability and causation are required elements of any physical takings claim. *See Cary v. United States*, 552 F.3d 1373, 1379-80 (Fed. Cir.), *cert. denied*, 129 S. Ct. 2878 (2009) ("Foreseeability and causation are separate elements that must both be shown (when intent is not alleged).") (citing *Moden*, 404 F.3d at 1343). In determining whether plaintiffs have met the first prong of the *Ridge Line* test, the court will first ascertain whether the injuries allegedly suffered by plaintiffs were a reasonably foreseeable consequence of the government's actions at the time those actions occurred. *Moden*, 404 F.3d at 1343 ("However, proof of causation, while necessary, is not sufficient for liability in an inverse condemnation case. In addition to causation, an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury.") (citation omitted). In short, plaintiffs must demonstrate that the government knew, or should have known, that its discharges would result in the

alleged invasion of plaintiffs' upland parcels at the time those discharges were made.

Based on the evidence presented by the parties, it is not clear whether defendant could have reasonably foreseen the alleged damage to plaintiffs' upland parcels. Plaintiffs have not presented any evidence indicating that defendant should have anticipated the contamination of the Barattas' well, the flooding of the Guys' garage, the destruction of Ann MacMillan's mangrove trees, or the invasion of certain of plaintiffs' parcels by noxious odors. On the other hand, defendant has not presented any evidence suggesting that those alleged harms were not reasonably foreseeable. The court therefore concludes that there is a genuine issue of material fact concerning the foreseeability of the alleged damage to plaintiffs' upland parcels. For that reason, summary judgment is not appropriate with respect to this issue.

2. Causation[20]

Defendant has argued that its discharges were not the cause of the injuries alleged by plaintiffs. The relevant question in determining causation is whether the challenged governmental action was the direct and proximate cause of the plaintiff's alleged injuries. *See, e.g.*, *Cary*, 552 F.3d at 1379-80 (holding that in addition to finding that an alleged injury was a reasonably foreseeable result of the government's action, "the court must determine that no break in the chain of causation existed between the suspected government authorized action and the injury"). If the alleged damage would have occurred even in the absence of the challenged governmental action, then the causation requirement has not been met.

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[20]/ The Federal Circuit has traditionally treated the causation requirement as a necessary element of any takings claim, which is separate and distinct from the tort versus takings inquiry embodied in the *Ridge Line* test. In some recent cases, however, the court has addressed the foreseeability prong of the *Ridge Line* test in tandem with the required but-for causation analysis. *See, e.g.*, *Cary*, 552 F.3d at 1378-81; *Moden*, 404 F.3d at 1342-46. Because of the logical affinity between the requirements of foreseeability and causation, the court will address both within the overall framework established in *Ridge Line*.

Defendant has raised two distinct causation arguments. First, defendant argues that it was not the original source of the nutrients and sediment present in the water that was discharged into the St. Lucie River. According to defendant, pollutants from a number of different agricultural and urban sources were intervening causes that broke the chain of causation between defendant's discharges into the river and the injuries alleged by plaintiffs. Defendant further argues that unusually high rainfall between 2003 and 2005 was another intervening event that broke the chain of causation in this case. According to defendant, the discharges into the St. Lucie River were necessary due to high lake levels, which were caused by high rainfall during that period. Defendant's second causation argument is based on the assertion that plaintiffs' damages would have occurred even in the absence of defendant's discharges because the St. Lucie River receives inflows of polluted fresh water from a number of sources other than Lake Okeechobee. The court addresses both of defendant's causation arguments below.

Defendant's first causation argument is inconsistent with both case law and the commonly understood meaning of the term "intervening cause."[21] Defendant does not dispute that significant quantities of nutrients and sediment were present in the discharged water before it was released into the St. Lucie River. It is simply inaccurate to characterize the nutrients and sediment as intervening causes of plaintiffs' alleged injuries because those pollutants entered the water management system *prior to* defendant's discharges. In contrast, in each of the cases cited by defendant, the intervening event that broke the chain of causation occurred *subsequent to* the challenged governmental action. In *Cary*, for example, the plaintiffs asserted that the government's land management policies had resulted in a forest fire that damaged the plaintiffs' properties. 552 F.3d at 1375. The court held that the government had not caused the plaintiffs' alleged injuries because the fire was started by a lost hunter. *Id.* at 1376-80. Because the fire would not have occurred in the absence of the subsequent action of the hunter, the government could not be held liable for the alleged taking of the plaintiffs' properties. Here, the pollution *first* entered the water management system, and *then* defendant discharged the polluted water into the St. Lucie River. The nutrients and sediment in the

[21]/ An intervening cause is typically defined as an "event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury." Black's Law Dictionary 250 (9th ed. 2009).

discharged water were not an intervening cause that broke the chain of causation between defendant's actions and plaintiffs' alleged injuries.

Defendant states that high rainfall was the cause of its discharges into the St. Lucie River. In addition, however, defendant makes the contradictory assertion that high rainfall was an intervening cause between its discharges and the alleged damage to plaintiffs' upland parcels. The evidence supports defendant's claim that its releases of water into the river were made to protect the structural integrity of the Herbert Hoover Dike in response to both actual and anticipated precipitation.[22] Once again, however, defendant's characterization of rainfall as an "intervening cause" between the discharges and plaintiffs' alleged injuries is inconsistent with both precedent and the common definition of that term. The water *first* enters the lake as rainfall or runoff, and is *subsequently* discharged into the St. Lucie Canal and the St. Lucie River. Although high rainfall is certainly a *contributing* cause of plaintiffs' alleged injuries, it is not an *intervening* cause between defendant's actions and those injuries.

Defendant's second causation argument is more plausible than its first. According to defendant, the St. Lucie River receives substantial additions of nutrients and sediment from sources other than Lake Okeechobee. Because plaintiffs have failed to prove that their alleged injuries would not have occurred in the absence of defendant's discharges, defendant argues that they have failed to

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[22]/ Defendant claims that, given the effect of sustained high lake levels on the structural integrity of the Herbert Hoover Dike, it had no reasonable alternative to making high-volume releases of water into the St. Lucie River. Although the absence of practical alternatives does not transform high rainfall into an intervening cause of plaintiffs' injuries, it might have provided an additional defense to plaintiffs' claims under the doctrine of actual necessity. Under that doctrine, the government may be relieved of compensation liability under the Takings Clause when the government damages or destroys private property in order to avoid even greater damage to other property. *See, e.g.*, *United States v. Caltex*, 344 U.S. 149 (1952) (holding that the government's intentional destruction of private oil terminal facilities in the Philippines during World War II to prevent their seizure by advancing Japanese forces was not a compensable taking of private property); *Bowditch v. City of Boston*, 101 U.S. 16 (1879) (holding that the destruction of buildings by a municipal fire department to prevent the spread of a fire was not a compensable taking). As previously stated, the lion's share of discussion and briefing was directed to riparian rights as opposed to upland parcels. Thus, inadequate factual and legal development prevents the court from addressing this issue further.

meet their burden on the issue of causation. Unless defendant can demonstrate that all of the asserted damage to plaintiffs' upland parcels would have occurred even in the absence of defendant's discharges, however, the evidence that there are other contributing sources of pollution into the river will be relevant only to the calculation of damages. In other words, defendant must prove that all of the alleged damage to plaintiffs' upland parcels would have occurred even if defendant had made no discharges into the St. Lucie River between 2003 and 2005. The determination of causation in flooding cases is particularly difficult. *See, e.g.*, *Hendricks v. United States*, 14 Cl. Ct. 143, 149 (1987) (observing that "[c]ausation of flooding is a complex issue which must be addressed by experts"). The court is unable to determine the extent of plaintiffs' damage attributable to defendant's discharges into the river because causation, on this record, poses genuine issues of material fact.[23]

3. Permanence of the Governmental Invasion

In addition to proving that the alleged invasion of plaintiffs' upland parcels and the alleged damage to those parcels were reasonably foreseeable consequences of the government's actions, plaintiffs must also demonstrate that defendant's discharges represented a permanent invasion of private property, rather than an isolated event. *See Ridge Line*, 346 F.3d at 1357 ("The second prong of the taking-tort inquiry . . . requires the court to consider whether the government's interference with any property rights . . . was substantial and frequent enough to rise to the level of a taking."); *Wilfong v. United States*, 480 F.2d 1326, 1329 (Ct. Cl. 1973) (holding that in order "to support a Fifth Amendment taking via inverse condemnation there must be not only a Federal activity or project which is permanent in nature, but that such activity or project must impose on private property certain consequences which are themselves permanent, and that their recurrence is inevitable even if only intermittent").

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[23]/ Defendant has also introduced evidence that appears to demonstrate that its discharges into the St. Lucie River have no significant influence on water levels within the river. *See* Zediak Decl. ¶ 10. Although such evidence appears to undermine plaintiffs' argument that defendant's discharges have physically invaded plaintiffs' upland parcels above the ordinary high water line, plaintiffs have failed to respond to it.

The court is unable to discern whether the alleged injuries to plaintiffs' upland parcels are physical invasions of sufficiently permanent duration and intensity to satisfy the second prong of the *Ridge Line* test. This court has previously held that the government's contamination of groundwater located below private land can provide the basis for a takings claim in appropriate circumstances. *See, e.g.*, *Hansen v. United States*, 65 Fed. Cl. 76, 122-24 (2005). Here, however, plaintiffs have failed to provide sufficient evidence to support their claim that the alleged contamination of the Barattas' well has effected a compensable taking of their property. Robert Baratta's declaration states that he and his wife "no longer use the water from my well since it is contaminated by the River" and further observes that the water drawn from the well "leaves an orange-brown stain on anything it touches, including plants, trees, and the side of our house." Baratta Decl. ¶ 2. Without more evidence regarding the exact nature of the alleged contamination and the effect of that contamination on the reasonable use of the property, however, the court cannot determine whether the alleged infiltration of the Barattas' well by polluted river water rises to the level of a taking. In *Hansen*, for example, the groundwater below the plaintiff's ranch had been contaminated by a deadly pesticide that had migrated from leaking containers buried on adjacent government property. *Hansen*, 65 Fed. Cl. at 88-93. Because the continued operation of the ranch required a clean supply of groundwater, the alleged contamination had a severe impact on the use of the property. In this case, the evidence before the court does not indicate the nature or degree of the harm to the Barattas' well water, whether the alleged contamination is permanent, or whether that contamination will have any substantial impact on the continued use of the property.

Plaintiffs have likewise failed to present sufficient evidence to support their claim that the alleged flooding of the Guys' garage should be treated as a physical taking of property instead of a tort. The permanent inundation of land is one clear example of a physical invasion that rises to the level of a compensable taking, *see Pumpelly*, 80 U.S. at 181, and the Supreme Court has held that an intermittent invasion of land may be sufficient in some cases, *see, e.g.*, *Cress*, 243 U.S. at 328 (holding that the repeated, though temporary, inundation of land located along a non-navigable stream was a physical taking requiring compensation). On the other hand, a single incident of inundation clearly does not rise to the level of a compensable taking. *See, e.g.*, *B Amusement Co. v. United States*, 180 F. Supp. 386, 389 (Ct. Cl. 1960) (holding that a single flooding does not constitute a taking if

the plaintiff cannot demonstrate that such flooding will inevitably recur); *North Counties Hydro-Electric Co. v. United States*, 70 F. Supp. 900, 903 (Ct. Cl. 1947) ("It is clear under the authorities that the flooding of an owner's land on but one occasion does not constitute a taking. Before there can be a taking a servitude must have been imposed upon the land, that is to say, a subjection of the land for a more or less definite time to a use inconsistent with the rights of the owner."). William Guy's declaration merely states that his "property has also been damaged when the river floods during the Corps' discharges, specifically damaging our garage and destroying everything on the floor of our garage." Guy Decl. ¶ 2. The declaration does not indicate whether the Guys' garage has been flooded more than once, nor does it assert whether such flooding will inevitably recur.

With respect to the alleged destruction of Ann MacMillan's mangrove trees, Ms. MacMillan asserts that "[w]hile mangroves originally thrived on my waterfront, now I have to keep replacing them because they will not grow or stick, especially near the water." MacMillan Decl. ¶ 2. There is no explanation in the declaration as to whether defendant's discharges are related to the death of Ms. MacMillan's mangrove trees or to her inability to grow new trees on her property. The Federal Circuit has previously held that live trees located on private land are compensable property interests for purposes of the Fifth Amendment and may not be taken or destroyed by the government without the payment of compensation. *See, e.g.*, *Cooper*, 827 F.2d at 763-64 (holding that the destruction of timber caused by government-induced flooding was a compensable taking of private property). In this case, however, there is no evidence of any relationship between defendant's actions and the death of the mangrove trees on Ms. MacMillan's property.

Finally, defendant argues that plaintiffs' claims alleging a physical invasion of certain of their upland properties by noxious odors amount to no more than a potentially tortious injury that should not be viewed through the lens of takings law. Plaintiffs respond that the invasion of private property by noxious odors can rise to the level of a compensable taking. In support of that proposition, plaintiffs point to the Supreme Court's decision in *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914). In *Richards*, a railroad company constructed a ventilation shaft that directed all of the smoke and exhaust in a railway tunnel directly onto an adjacent parcel of land. The plaintiff in that case filed a private nuisance suit against the railroad company, and the company responded that the ventilation shaft was not a

nuisance because its construction was authorized by the government. The Court held that government authorization cannot immunize private parties from nuisance liability if the challenged activities would have amounted to a compensable taking if carried out by the government itself. In that case, the Court concluded that government construction of the ventilation shaft, and the resulting injury to the plaintiff's property, would have constituted a taking requiring the payment of just compensation under the Fifth Amendment.

Richards appears to undermine defendant's categorical assertion that the physical invasion of private property by noxious odors or fumes could *never* give rise to a compensable taking. On the other hand, plaintiffs have failed to cite a single case in which a federal court has awarded or upheld compensation for a taking due to the invasion of private property by unpleasant odors. In further support of their argument, plaintiffs cite the Federal Circuit's decision in *Argent v. United States*, 124 F.3d 1277 (Fed. Cir. 1997). In that case, the Federal Circuit held that frequent low-altitude flights in close proximity to the plaintiff's land could effect a taking of that property when the noise and vibrations caused by the aircraft significantly impaired the owner's use and enjoyment of his land. *Id.* at 1281-85. Here, however, plaintiffs have not demonstrated that the alleged invasion of their upland parcels by noxious odors has significantly impaired their use or enjoyment of those properties. In *Richards*, the Supreme Court emphasized that incidental noises, vibrations and odors normally associated with the non-negligent operation of a railroad will not support a private nuisance claim. *Richards*, 233 U.S. at 553-54. Similarly, the Federal Circuit noted in *Argent* that the normal noises and vibrations associated with the operation of government aircraft do not give rise to a compensable taking. *Argent*, 124 F.3d at 1284. Without further development of the evidentiary record, the court cannot determine whether the alleged invasion of plaintiffs' upland parcels by odors is properly characterized as a taking or a tort.

Because the evidence presented by the parties on the issues of foreseeability, causation and permanence presents several genuine issues of material fact, the court must deny the parties' cross motions for summary judgment with respect to plaintiffs' upland parcel claims.

CONCLUSION

The St. Lucie River is, by all accounts, a national treasure. The long-term environmental consequences of defendant's massive discharges into the river are tragic, and the court takes note of plaintiffs' tireless efforts to reverse that damage. The court is not free, however, to ignore applicable statutes of limitation, to invent new property rights out of whole cloth or to create novel standards of takings liability in order to reach a laudable outcome. As the United States Court of Claims observed in an earlier case, "[m]uch as we may regret the destruction of unspoiled natural game and fishing areas in navigable waters, the remedy lies in the hands of Congress, not the courts." *Allen Gun Club*, 180 Ct. Cl. at 431.

In conclusion, the court holds as follows:

First, plaintiffs' claims alleging a physical taking of their riparian rights due to the environmental degradation of the St. Lucie River accrued more than six years before the instant suit was filed and are therefore untimely. For that reason, defendant's motion to dismiss those claims pursuant to RCFC 12(b)(1) is hereby granted.

Second, although the court dismisses as untimely plaintiffs' claims alleging a taking of their riparian rights, it further notes that those claims would likewise fail on the merits as well. Plaintiffs have failed to demonstrate the existence of any compensable property rights under Florida law in the use or environmental condition of the St. Lucie River, and any such rights would be barred in any event by the federal navigational servitude.

Third, the court denies defendant's motion to dismiss those claims related to plaintiffs' upland parcels pursuant to RCFC 12(b)(1) on the basis that they sound in tort. Plaintiffs have made a non-frivolous assertion that they are within the class of plaintiffs protected by a money-mandating provision of the United States Constitution. Specifically, plaintiffs have alleged that defendant has taken their property without the payment of just compensation in violation of the Takings

Clause of the Fifth Amendment. That assertion is sufficient to survive defendant's motion to dismiss.

Fourth, the court is unable to determine whether plaintiffs' claims alleging a physical invasion of certain of their upland parcels were filed within the six-year statute of limitations applicable to takings claims in this court. Thus, the court defers ruling on the timeliness of those claims.

Fifth, the evidence presented by the parties is insufficient to permit a determination by the court of whether plaintiffs' upland parcel claims survive the *Ridge Line* test for physical takings. The court must therefore deny the parties' cross motions for summary judgment on that issue.

For the foregoing reasons, it is hereby **ORDERED** that:

(1) Defendant's motion to dismiss plaintiffs' suit under RCFC 12(b)(1), filed January 16, 2009, is **GRANTED in part**, as to plaintiffs' claims alleging a physical taking of their riparian rights, and **DENIED in part**, as to plaintiffs' claims alleging a physical invasion of certain of their upland parcels;

(2) Defendant's motion for summary judgment under RCFC 56, filed January 16, 2009, is **GRANTED in part**, as to plaintiffs' claims alleging a physical taking of their riparian rights, and **DENIED in part**, as to plaintiffs' claims alleging a physical invasion of certain of their upland parcels;

(3) Plaintiffs' cross motion for summary judgment under RCFC 56, filed March 16, 2009, is **DENIED** as to defendant's liability on plaintiffs' claims alleging a physical taking of their riparian rights and plaintiffs' claims alleging a physical invasion of certain of their upland parcels;

(4) Pursuant to RCFC 54(b), insofar as there is no just reason for delay,[24] the Clerk's Office is directed to **ENTER** judgment for defendant as to plaintiffs' claims alleging a physical taking of their riparian rights, and to **DISMISS** these claims;

(5) The parties are directed to **CONFER** to determine how they wish to proceed with respect to plaintiffs' upland parcel claims and whether these matters may be settled by the parties;

(6) The parties shall **FILE** a **Joint Status Report** by **February 26, 2010** proposing the next steps in this litigation; and

(7) No costs.

/s/ Lynn J. Bush
LYNN J. BUSH
Judge

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[24]/ The court believes that a final and expeditious resolution of plaintiffs' claims alleging a physical taking of their riparian rights in the St. Lucie River would promote judicial economy and conserve the parties' resources. Plaintiffs' riparian-rights claims appear to involve an issue of first impression in this court, and, if challenged, a final resolution of that issue by the Federal Circuit would provide valuable guidance not only to the parties in the present case, but to similarly situated plaintiffs in future takings cases. In addition, the two separate categories of takings claims involved in this case – *i.e.*, plaintiffs' riparian-rights claims and their upland-parcel claims – present distinct issues of both fact and law. Any further proceedings related to plaintiffs' upland-parcel claims are unlikely to have any relevance to their riparian-rights claims.

In the United States Court of Federal Claims

No. 06-760 L

JOHN R. MILDENBERGER, ET AL.,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Published Opinion and Order, filed January 29, 2010, granting in part and denying in part defendant's motion to dismiss plaintiffs' suit under RCFC 12(b)(1), filed January 16, 2009, granting in part and denying in part defendant's motion for summary judgment under RCFC 56, filed January 16, 2009, and denying as to defendant's liability on plaintiffs' claims alleging a physical taking of their riparian rights and plaintiffs' claims alleging a physical invasion of certain of their upland parcels, plaintiffs' cross-motion for summary judgment under RCFC 56, filed March 16, 2009, stating that there is no just reason for delay as provided in Rule 54(b),

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant as to plaintiffs' claims alleging a physical taking of their riparian rights, and these claims are dismissed. No costs.

Hazel C. Keahey
Clerk of Court

January 29, 2010 By: s/Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

United States Court of Appeals
for the Federal Circuit
No. 2010-5084

MILDENBERGER v. UNITED STATES,

DECLARATION OF AUTHORITY PURSUANT TO 28 U.S.C. § 1746 AND FEDERAL CIRCUIT RULE 47.3(d)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am an employee of Counsel Press's Washington DC Office. Counsel Press was retained by Marzulla Law, LLC, Attorneys for Plaintiffs-Appellants to print the enclosed documents.

The attached Brief for Plaintiffs-Appellants has been submitted to Counsel Press, by the above attorneys, electronically and/or has been reprinted to comply with the Court's rules. Because of time constraints and the distance between counsel of record and Counsel Press, counsel is unavailable to provide an original signature, in ink, to be bound in one of the briefs. Pursuant to 28 U.S.C. § 1746 and Federal Circuit Rule 47.3(d), I have signed the documents for Nancie G. Marzulla, with actual authority on her behalf as an attorney appearing for the party.

April 20, 2010

John C. Kruesi, Jr.

United States Court of Appeals
for the Federal Circuit
No. 2010-5084

MILDENBERGER v US,

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by MARZULLA LAW, LLC Attorneys for Plaintiffs-Appellants, to print this document. I am an employee of Counsel Press.

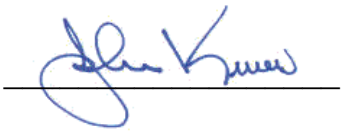
On the **20th Day of April 2010**, I served the within **Brief for Plaintiffs-Appellants** upon:

Justin R. Pidot, Esq.
U.S. Dept. of Justice
Environment and Natural Resources Division
P.O. Box 23795
Washington, DC 20026-3795
(202) 514-3977

via Express Mail, by depositing 2 true copies of each, enclosed in a properly addressed wrapper, in an official depository of the U.S. Postal Service.

Unless otherwise noted, 12 copies have been filed with the Court on the same date via hand delivery.

April 20, 2010



CERTIFICATE OF COMPLIANCE WITH FEDERAL CIRCUIT RULE 32(a)(7)

Counsel for Plaintiff-Appellants states that this brief complies with the type-volume limitations of the Federal Circuit Rule 32(a)(7)(B). The brief contains 13,464 words, including the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). In addition, counsel for Plaintiff-Appellants states that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in proportionally spaced typeface using Microsoft Word 2003, in 14 font, Times New Roman typeface.

Nancie Marzulla

Nancie G. Marzulla
Attorney for Plaintiffs-Appellants