IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(*Electronically Filed January 28, 2022*)

TODD HENNIS,	)	
Plaintiff,	)	21-1654L
v.	)	Senior Judge Mary Ellen Coster Williams
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

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INTRODUCTION

Plaintiff Todd Hennis's Complaint alleges that two distinct actions of the Environmental Protection Agency ("EPA") effected a taking of his property. First, Plaintiff asserts that the alleged breach of the Gold King Mine ("the Mine"), which released millions of gallons of acid mine drainage that flowed onto his property, and/or EPA's initial response to that emergency, constituted a taking. Second, Plaintiff alleges that the EPA's subsequent construction of a water treatment facility on his property is a taking. The Complaint fails to allege a viable takings claim under either theory.

First, Plaintiff's consent to EPA's use of his property is fatal to either of the above theories. It is undisputed that Plaintiff, while represented by counsel, first orally consented to EPA's entry onto his property and thereafter signed fifteen written access agreements, styled as Consents for Access to Property, consenting to EPA's entry. Those written agreements explicitly authorized EPA to construct, operate, and maintain an interim water treatment facility and take any other actions necessary to address releases from the Mine. Plaintiff's consent precludes takings liability for periods covered by the agreements. Plaintiff's attempt to avoid the effect of those agreements based on coercion or duress must be rejected. The possibility of what Plaintiff characterizes as "soul-crushing civil penalties" is not sufficient as a matter of law to establish the requisite duress to render an agreement unenforceable. And the fact that Plaintiff was represented by counsel every time he consented to EPA's access is the final nail in the coffin of Plaintiff's "duress" defense.

Second, to state a valid takings claim for the alleged flooding of Plaintiff's property, the Complaint must assert that the alleged flooding was the direct, natural, or probable result of an authorized government action. It does not. The Complaint nowhere alleges that the EPA's ongoing investigation of acid drainage at the Mine was not an authorized activity; nor could it.

Instead, the Complaint alleges that, contrary to EPA instruction, common practice, and precedent, an EPA contractor drained the Mine without first performing a hydraulic pressure test that "would have left no doubt that it was unsafe to remove the backfill[.]" As explained in the United States' Motion to Dismiss and below, such statements cannot plausibly be read to allege that the flooding that began on August 5, 2015 was an expected or intended outcome of EPA's authorized remedial investigation. At best, the Complaint alleges that the release of millions of gallons of contaminated water onto Plaintiff's property was a mistake and not the intended result of that authorized federal project. Thus, as a matter of law, the alleged flooding of Plaintiff's property cannot give rise to a takings claim.

Third, even if it could be concluded that: (1) the alleged Mine breach and resultant flooding was the intended or expected result of an authorized government project; and (2) Plaintiff could avoid the legal effect of his oral and written agreements permitting EPA's access – Plaintiff's takings claim still fails. Under the doctrine of necessity and the police power doctrine, the government does not incur takings liability to protect the public from what the Complaint repeatedly characterizes as an environmental emergency. Plaintiff's attempt to create fact issues as to the necessity defense must be rejected. Given the Complaint's allegations, the necessity doctrine clearly applies to immunize – at a minimum – EPA's immediate response to the emergency created by the Mine release. But, even if emergency conditions subsided soon after the alleged breach as Plaintiff now claims (notwithstanding the Complaint's affirmative allegation that acid mine seepage continued), any takings claim is vitiated by Plaintiff's consent to EPA's entry and the unauthorized nature of the activities that caused the alleged breach.

Fourth, in response to the United States' showing that the Complaint seeks to recover consequential damages that are not compensable under takings jurisprudence, Plaintiff argues

that "the scope and amount of Plaintiff's damages and just compensation are a matter for trial and cannot be decided on a motion to dismiss." This is simply not true. Though litigants are entitled to pursue claims properly before the Court, takings jurisprudence precludes its consideration of consequential damages such as the supposed frustration of a prospective plan to develop condominiums, or an even more speculative plan to explore, mine, or otherwise develop mineral assets. As a matter of law, even if Plaintiff could establish liability, Plaintiff is not entitled to such sums under the Fifth Amendment – just compensation is the value of any property interest taken on the date of the taking.

In its opening brief, and based only on the facts alleged, the United States provided four reasons why the Court should dismiss the Complaint under Rule 12 of the Rules of the Court of Federal Claims ("RCFC"). Plaintiff repeatedly authorized in writing EPA's access to and use of his property. Plaintiff's disappointment in the parties' inability to reach an agreement for the lease or sale of his property during the more than five years he consented to said use has no place in a takings claim and does not somehow render the access agreements unenforceable.

Thus, as explained in greater detail below, the Court should dismiss Plaintiff's Complaint.

ARGUMENT

I. Plaintiff Fails to State a Viable Takings Claim Under RCFC 12(b)(6)

In opposition to a Rule 12(b)(6) motion to dismiss, a plaintiff must identify factual allegations that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citations omitted). Here, however, Plaintiff has not alleged facts that could allow the Court to draw the reasonable inference that the United States is liable for a taking. Plaintiff has not overcome the United States' showing that the alleged breach was not the expected or intended

result of an authorized government project. Moreover, any takings claim was vitiated by Plaintiff's consent to EPA's use of his property, which explicitly authorized EPA to construct and operate the water treatment facility. Finally, the allegations in the Complaint demonstrate that in entering Plaintiff's property, EPA was responding to an emergency event. And in any event, neither of the alleged lost business opportunities is compensable under the Fifth Amendment.

1. **Plaintiff's Repeated Consent to the EPA's Use of His Property Vitiates Any Takings Claim for Periods Covered by Those Agreements.**

Plaintiff, represented by counsel, consented in writing no less than fifteen times over a period of five years to EPA's use of his property following the Mine release. Complaint ("Compl.") ¶ 94, ECF No. 1. Those agreements explicitly authorized EPA to use Plaintiff's property to construct and operate a water treatment facility. Mot. to Dismiss, ("Mot."), ECF No. 7, Ex. 7-2. Previously, beginning as far back as 2008, Hennis had entered into similar, serial agreements authorizing EPA to access his property to conduct a remedial investigation. Compl.. ¶ 25. At the time of the alleged breach, the Consent for Access to Property that Hennis signed in 2014 was in place. *Id.* ¶ 26. Immediately following the August 2015 breach, Plaintiff concedes that he orally authorized EPA "to temporarily use a portion of the Gladstone Property for an emergency staging area for equipment and supplies, recognizing that time was of the essence in addressing the environmental catastrophe caused by the EPA." *Id*. ¶ 55.

As explained in the United States' Motion to Dismiss (ECF No. 7), as a matter of law, Plaintiff's consent to EPA's access vitiates any takings claim for periods covered by those consents. EPA was acting pursuant to Plaintiff's access agreements from August 5, 2015 until February 28, 2021, when Plaintiff refused to sign a further extension of the access agreement in place at the time. Compl. ¶ 99. Thereafter, EPA has accessed the property pursuant to a January

26, 2021 Administrative Order and January 27, 2021 Modified Administrative Order (the "2021 AO"). Mot., Ex. 7-3

In an effort to salvage his takings claim, Plaintiff argues that: (1) he "provided sufficient facts . . . that he was coerced into allowing the Government access to his property;" (2) he "presented facts showing that he never waived his right to seek compensation from the [United States] when he provided access in the face of the Government's threat to ruin him financially if he refused;" and (3) even if the United States had not coerced his consent and he had not reserved his right to seek compensation, the access agreements would be unenforceable because they were not signed by the government and lacked consideration. Pl.'s Resp. at 35, ECF No. 10. All of Plaintiff's arguments are meritless.

First, the facts alleged in the Complaint fall far short of the type of force or duress that must be shown to nullify consent. *See*, *e.g.*, *Fruhauf Sw. Garment Co. v. United States*, 126 Ct. Cl. 51, 62 (1953) (holding that "to successfully defend on the ground of force or duress, it must be shown that the party benefited thereby constrained or forced the action of the injured party"). As explained in the United States' opening brief, "the 'threat of considerable financial loss' is insufficient to establish duress." *See Waverley View Investors, LLC. v. United States*, 135 Fed. Cl. 750, 793 (2018) (quoting *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed. Cir. 2003)). Plaintiff's argument that *Waverley View* is inapposite because it was not a ruling on a motion to dismiss is baseless. To avoid dismissal for failure to state a claim, Plaintiff must at least plausibly allege facts which, if proven, constitute coercion or duress. The Complaint fails to include any allegations that could conceivably rise to the level of coercion sufficient to void Plaintiff's consent – particularly where Plaintiff had advice of counsel. Allegations that the threat of "soul-crushing civil penalties" coerced Plaintiff to sign consents for access are insufficient as

a matter of law to establish coercion. *See* Compl. ¶ 90. The Complaint does not allege, for example, that the United States "constrained or forced" Plaintiff's consent. Although he "may have subjected [himself] to liability . . . under CERCLA," Plaintiff could have refused to sign an access agreement in the first instance, or at any point before February 28, 2021, after which time he refused to extend the then-current access agreement.[1]

Plaintiff's ultimate refusal to allow access clearly demonstrates that, in fact, he did have a choice, which is fatal to his coercion defense. *See Waverley View Inv'rs*, 135 Fed. Cl. at 793. Indeed, Plaintiff appears to tacitly concede that his consent to EPA's use of his property effected a waiver of any right to seek compensation in arguing that he still has a takings claim for the period after he refused to further extend the existing consent agreement originally signed in 2020. Pl's Resp. at 43. The United States does not dispute that Hennis's consents preclude takings liability only for the time periods when they were in effect. – *i.e.*, through February 28, 2021. However, to the extent Plaintiff claims that, during the effective periods of the consents, EPA exceeded the scope of the agreed access, that would constitute, at most, a breach of contract, not a taking. *See Hughes Commc'n Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). Plaintiff's Response fails to address this point.

Second, *Waverley View* also forecloses Plaintiff's theory that because "[n]one of the consent for access documents . . . required him to waive any rights or entitlements . . . [he] retain[ed] the right to seek compensation for the Government's physical occupancy, use and

[1] Plaintiff's reliance on language in the January 27, 2021 Administrative Order that nothing in the Order "constitutes a waiver, bar, release, or satisfaction of or a defense to any cause of action which [Hennis] now has or may have in the future against the EPA,[or] the United States" also cannot serve to resurrect claims he already – over a period of five years – relinquished in agreeing to EPA's use of the property. By 2021, Plaintiff had repeatedly relinquished any such claims by consenting to EPA's use of his property. *See* Pl's Resp. at 41.

taking of his property." *See* Compl. ¶ 98. Unlike Hennis's agreements, the access agreement in *Waverley View* included a provision purporting to reserve the plaintiff's right to bring a takings action. But even that written reservation of rights was found ineffective to preserve a takings claim. *See Waverley* 135 Fed. Cl. at 786. "[I]t is an established canon that, '[w]hen interpreting [an agreement], the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts.'" *Id.* at 794. And the Court in *Waverley View* rejected the notion that the access agreement's reservation of rights language rendered the Army liable for the very conduct that the agreement purportedly authorized because such a construction would swallow the entire bargained-for-agreement. Thus, the reservation of rights did not preserve any takings claim that arose within the scope and duration of the access agreement. *See id.* at 795. Hennis's construction of the Consents for Access to Property, which include no purported reservation of rights, similarly swallows the entire bargained-for-agreement.

Third, Plaintiff argues that the consent forms "do not represent 'valid contracts' as they were never signed by the Government and there was no consideration provided[.]" To begin with, even if it could be concluded that the consent forms are not valid contracts – and it cannot – those documents nonetheless evidence Plaintiff's express written consent to EPA's access. Even if they are simply revocable licenses, they are irrefutable evidence of Plaintiff's consent to EPA's access to and use of his land.

Plaintiff, like the claimant in *Waverley View*, does not cite a single case supporting the notion that the consent forms are invalid because they are not supported by consideration. Though Plaintiff now claims, without support, that EPA's treatment of acid mine drainage cannot be consideration because EPA caused the drainage in the first place, the Complaint demonstrates that, regardless of fault for the release, EPA's ongoing treatment of that drainage --

which the Complaint suggests was occurring before the release -- benefits Plaintiff as the owner of the Mine. *See* Compl. ¶ 22 ("Water had been accumulating in and seeping from the Gold King Mine for years.").[2] Additionally, despite the insinuation that EPA's promise to leave certain improvements and remedy features on the property at Plaintiff's request is so vague as to be "inadequate consideration," these are terms that Plaintiff and his counsel negotiated not once but fifteen times over the course of at least five years. Once consideration is established, "courts do not weigh the adequacy of that consideration." *Davis Wetlands Bank, LLC v. United States,* 114 Fed. Cl. 113, 124, n. 9 (Fed. Cl. 2013) (citing WILLISTON ON CONTRACTS, § 7.21 (Adequacy of consideration) ("[S]o long as the requirement of a bargained-for-benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant[.]")). And in any event, consideration is not necessary for a property owner to give consent; an entirely gratuitous right to enter Plaintiff's property would likewise defeat Plaintiff's takings claim.

Similarly, Plaintiff does not cite a single case in support of the contention that the consent forms are not valid because they were never signed by the EPA. A contract requires: (1) mutuality of intent to contract; (2) offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States. *See 7800 Ricchi, LLC v. United States*, 152 Fed. Cl. 331, 336 (2021). This case is distinguishable from *7800 Ricchi*, in which a building owner brought action against the United States for breach of contract. The building owner argued that the U.S. Postal Service's letter of intent constituted an offer to extend the

[2] In his Complaint, Plaintiff admits that acid mine drainage had been flowing from the Mine prior to EPA's August 5, 2015 response. In fact, the Mine had been continuously discharging acid mine drainage for the entirety of Plaintiff's ownership of the property, which preceded EPA's investigation of the Mine by nearly ten years. The Complaint does not allege that Plaintiff ever took any steps to address the ongoing acid mine drainage during the pendency of his ownership.

parties' existing lease that the owner then accepted by signing. Conversely, the United States argued that the letter did not constitute an offer because it included a lease amendment form with a blank signature line for a U.S. Postal Service representative. The Court found that the letter was not a valid extension of the lease because, based on the lease amendment form, the building owner had reason to know that the U.S. Postal service did not intend to conclude a bargain until it had made a further manifestation of assent. *See id.* at 337. Hennis, however, can make no such claim. Not only is there no signature line for a government representative, but the consent form is the one and only document the parties exchanged. Unlike the letter of intent in *7800 Ricchi*, the consent form was not merely a "step in the preliminary negotiation of terms," but a final offer that Hennis accepted by signing. Furthermore, as noted above, a property owner need not enter into a bilateral contract to give a valid right of entry.

Plaintiff's consent to EPA's access to his property, including to construct and operate a waste treatment facility on his land, precludes as a matter of law any takings claim for periods prior to 2021, when Hennis refused to extend the existing access agreement and the EPA issued the 2021 AO. As set forth in the United States' opening brief, Plaintiff's Complaint suffers from other fatal defects, discussed below.

2. Temporary Alleged Flooding of Plaintiff's Property Supposedly Caused By An EPA Contractor's Disregard of EPA Instructions and Known Risks of Mine Excavation Sound in Tort and Cannot Support a Takings Claim

To the extent Plaintiff claims that the alleged flooding of his property immediately following the Mine release (as opposed to EPA's use of the property) constitutes a temporary taking, that claim also fails. As the United States explained in its opening brief, the government's liability for a taking does not turn, as it would in tort, on its level of care. *See St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018). Rather,

Plaintiff must allege that the United States intended to invade his property, or that the asserted invasion was the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). The Complaint includes no such allegations.

Instead, the Complaint alleges that on August 5, 2015, contrary to the explicit instruction of EPA's On-Scene Coordinator, an EPA contractor excavated earthen debris blocking the portal of the Mine and drained the Mine without first setting up the equipment necessary to handle the discharge. *See* Compl. ¶ 29. Plaintiff further alleges that despite the contractor's mistaken belief that it had hit a spring, it had actually breached the portal and begun releasing three million gallons of acid mine drainage and sludge and 880,000 pounds of metals. *See id.* ¶ 36. The consequences of such "reckless, deliberately indifferent, and outrageous" conduct have been "catastrophic." *See id.* ¶¶ 47, 49. And "Plaintiff's property was 'ground zero' of this catastrophe. *See id.* ¶ 78. Moreover, in speaking to the level of care exercised at the Mine prior to the release, the Complaint states that "[a] hydraulic pressure test would have left no doubt that it was unsafe to remove the backfill . . . and that EPA needed to take additional precautions[.]" *See id.* ¶ 28. "If EPA had pursued this approach, it would have been able to determine the water level in the mine and changed its course of action, thereby avoiding this disaster." *Id.* Additional examples of negligence-related allegations abound. The Complaint alleges that "EPA ignored this long-understood and well-established risk." *Id.* ¶ 22. It further references the "incomplete safety plan, an inadequate site evaluation, and lack. . .[of] necessary equipment" for excavating the Mine. Finally, the Complaint alleges that EPA's conduct "disregarded the substantial risk of serious harm to Plaintiff and his property rights." *Id.* ¶ 47. Although the foregoing allegations might be relevant to a tort claim, they do not give rise to a takings claim.

Reversing course in his Response, Plaintiff now argues that "[w]hile [he] has provided examples of why EPA should not have done what it did, and described in detail the problems with the decisions that were made, [he] does not claim such actions constituted negligence." Pl.'s Resp. at 30. But that does not mean that the Complaint states a viable takings claim. It does not. The Complaint nowhere states that the alleged flooding of Plaintiff's property was intended, or that it was the direct, natural, or probable result of an authorized activity, rather than the incidental or consequential injury inflicted by the action. In fact, the allegations clearly state that the flooding was not the intended result of the authorized CERCLA investigation, but rather, the unintended result of the contractor's alleged failure to follow EPA instructions and disregard of known risks. Such allegations cannot support a takings claim.[3]

Plaintiff also argues that "[t]he cases cited by Defendant provide it with no safe-haven from liability" because a case such as *Ridge Line* "involved a full-blown trial with appellate review . . . [and] was not decided on a motion to dismiss." *See id.* at 33. However, the United States did not cite *Ridge Line* for a factual comparison but to note the two-part legal test the Federal Circuit established to distinguish physical takings from torts. *See* ECF No. 7 at 14. If the United States had cited *Ridge Line* to provide a factual comparison, it would have noted that the project in *Ridge Line* was constructed in *accordance with government's plans*. If, as in this case, plaintiff's adjacent property had flooded as a result of the negligent construction of a Postal

[3] Plaintiff's response argues that the United States "is intent upon deflecting attention from the Government's culpability in this case by implying that it was the EPA contractor's negligence that caused the catastrophe and taking at hand[.]" *See* Pl.'s Resp. at 31. However, in demonstrating that the facts alleged in the Complaint do not assert a takings claim, the United States is simply showing that it cannot be liable for a taking that Plaintiff himself has not alleged.

facility by third-party contractors who disregarded the Postal Service's explicit instructions, the result in *Ridge Line* would have been dismissal.

Finally, Plaintiff cites an over 100-year old case for the proposition that "[g]overnment-induced flooding can constitute a taking." *See* Pl.'s Resp. at 32. But Plaintiff's recitation of law is beside the point. Rather, the United States maintains that the facts here allege that the EPA's use of Plaintiff's property resulted from an EPA contractor recklessly disregarding explicit EPA instruction and precedent. There was simply no deliberate act by EPA to cause the mine's breach.

3. The EPA's Use of Plaintiff's Property - "Ground Zero" of an "Environmental Catastrophe" - Was and Remains a Reasonable Response to an Emergency

Accepting the Complaint's allegations as true, it is clear that: 1) the alleged August 20015 breach of the Mine portal and resulting release of mine waste was not the intended or expected result of EPA's remedial investigation; and 2) Plaintiff's oral consent and successive written agreements authorizing EPA to access his property (including to build a water treatment facility) preclude takings liability for the period from August 5, 2015 through February 28, 2021. Thus, the Court need not reach the necessity doctrine, as the above defenses fully insulate EPA from takings liability.

The necessity doctrine, however, provides yet another defense to Plaintiff's takings claim. As the United States explained in its opening brief, EPA's use of Plaintiff's property to respond to the emergency created by the Mine release does not give rise to takings liability because there is no compensable taking when the government acts to avert an imminent threat to public health, safety, or welfare. *See Miller v. Schoene*, 276 U.S. 272, 279-80 (1928). The necessity doctrine requires "an imminent danger and an actual emergency giving rise to actual necessity." *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1378 (Fed. Cir. 2013). Where, as

here, the factual allegations supporting a Fifth Amendment takings claim demonstrate that the event at issue created an imminent danger and an actual emergency necessitating the government action, then the complaint fails to state a claim upon which relief can be granted. *See TrinCo*, 722, F.3d at 1380.

Though the proper focus in determining whether a particular response is necessary is on whether the government's action was reasonable under the circumstances, the Complaint nowhere alleges that EPA's response to the Mine release was unreasonable or unnecessary. *See Trin-Co Inv. Co. v. United States*, 130 Fed. Cl. 592, 599-60 (2017). Rather, Plaintiff now argues that "there is simply no 'response' to judge; EPA did not make any effort to contain the release of the contaminated water, nor to prevent it from flooding over the embankment and downstream." *See* Pl.'s Resp. at 24, n. 3. Plaintiff posits that "protect[ing] the lives and property of others . . . would most likely have required the immediate construction of a dam across the Animas River to prevent the contaminated water from rushing downstream[,]" as if anything short of such a feat cannot be a "response" under the necessity doctrine. *See* Pl.'s Resp. at 25, 27, 28.

Plaintiff's own Complaint contradicts the assertion in his response brief that the necessity doctrine is inapplicable because EPA did *nothing* until the emergency had "played itself out." Plaintiff's property did not suddenly cease to be "ground zero" of an event the Complaint describes as an "environmental catastrophe" no less than five times because some of the mine water had already reached the Animas River. *See* Pl.'s Compl. ¶¶ 2, 55, 58, 108. Moreover, Plaintiff's assertion that "[t]he Government . . . watched that catastrophe unfold in its entirety" and "did nothing to stop [contaminated water from reaching downstream communities, landowners, and individuals]," the United States points the Court to EPA's Action Memorandum

documenting the emergency removal action at the Mine.[4] The facts recounted in the memorandum are not critical to deciding this motion, they do provide greater context, confirm Plaintiff's own allegations of an emergency and imminent danger, and describe immediate steps that EPA took to mitigate impacts on downstream communities. Such steps included but were not limited to: stabilizing the Mine waste rock dump, temporarily treating the acid mine discharge in treatment ponds, removing waste rock deposited in Cement Creek from the Mine release, instituting flow control measures in the portal, and providing alternative water supplies and feed for livestock.

Moreover, although the water treatment facility was first operational a few months after the initial release of acid mine drainage, the Complaint also contradicts Plaintiff's current argument that the emergency was over by that time. The Complaint acknowledges that the emergency was the release of highly acidic water laced with heavy metals, and further alleges that the water treatment facility "was constructed to treat ongoing seepage from the [Mine]." *See* Compl. ¶ 23; Pl.'s Resp. at 2. Until it was retained and treated by the settling ponds EPA constructed and operated, the ongoing acid mine drainage presented a danger and risk to downstream residents and properties. *See* Pl.'s Compl. ¶¶ 21, 49. Thus the necessity doctrine precludes takings liability for EPA's response to that emergency.[5]

Relatedly, Plaintiff argues that none of the cases the United States cited "can be likened to the scenario we are dealing with here" because "none involved a situation where the emergency had . . . long passed when the government began physically occupying" the property and none involved a situation where "the taking of the property had nothing to do with

[4] https://www.epa.gov/sites/default/files/2016-01/documents/action_memo_gkm_release.pdf
[5] Indeed, in responding to the breach and flooding, EPA was operating under an emergency removal authorization until 2017 long after the water treatment plant had been constructed.

preventing the emergency from happening in the first place[.]" *See* Pl.'s Resp. at 25. Despite Plaintiff's assertion that the necessity doctrine shields from liability only those agencies that somehow know in advance where and when an emergency will occur, the Court has never applied the doctrine so narrowly. Plaintiff seized on one example the Court provided in *TrinCo Inv. Co. v. United States* where fire-engineers "demolished a building that was not yet burning, but was located at a place of danger in the immediate vicinity of a fire, to arrest the spreading of the fire." *See* 722 F.3d at 1378 (citing *Bowditch v. City of Boston*, 101 U.S. 16 (1879)). However, the point was not that the fire-engineers "prevented the emergency from happening in the first place" but that "the measure [i.e., destroying the building] stopped the progress of the fire." *Id.* And in constructing and operating the water treatment facility on Plaintiff's property, EPA stopped untreated acid mine drainage from reaching Cement Creek and the Animas River.

Until treated, the acid waste seeping from the Mine in October 2015 continued to present a danger and risk to downstream residents and properties. Here, as in the cases the United States cited, EPA reasonably responded to an emergency event by occupying the claimant's property because the requisite CERCLA work was best performed on that property. Plaintiff fails to even allege that the United States' response was unreasonable or unnecessary. The only distinction between this case and most of the other cases the United States cited is that Hennis first consented to his property's use.

4. Plaintiff's Alleged Frustration of Future and Speculative Uses Does Not Support a Present Takings Claim

Plaintiff argues that he "is entitled to pursue his claims and present evidence regarding the losses that he has suffered as a result of Defendant's taking of his property." Pl.'s Resp. at 40. Yet he does not cite a single case that supports his demand to be compensated for allegedly lost business opportunities. Instead, Plaintiff simply quotes language from *Waverley View* that

reaffirms the Supreme Court's definition of just compensation as "the value of [property that the owner] has been deprived of and no more." 135 Fed. Cl. at 813, quoting *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

Although litigants are entitled to pursue claims properly before the Court, it is settled law that "just compensation" does not include remuneration for consequential damages -- such as the frustration of a prospective plan to develop condominiums or an even more speculative plan to explore, mine, or otherwise develop mineral assets. The Supreme Court held long ago that, "the sovereign must pay only for what it takes, not for opportunities which the owner may lose . . . settled rules of law preclude a consideration of consequential damages for losses of a business." *United States ex. rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 281-283 (1943). A Fifth Amendment claimant such as Plaintiff is not guaranteed a return on his investment, including profits attributable to enterprises he might have hoped to launch in the future, such as the development of condominiums or mineral assets. *See id.* at 285. The allegation that EPA's access to and use of Plaintiff's property – which he consented to, no less – frustrated his speculative business development plans falls outside the scope of a takings claim.

CONCLUSION

For these reasons, the United States respectfully requests that the Court grant the United States' Motion to Dismiss, dismiss the Complaint and enter judgment in favor of the United States.

Respectfully submitted,

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