IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(*Electronically Filed November 15, 2021*)

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

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

This case concerns the Environmental Protection Agency's ("EPA's") response to an emergency caused by an incident at the Gold King Mine (the "Mine") during an EPA removal site evaluation which released three million gallons of acid mine drainage. The water released initially emptied into Cement Creek, a tributary to the Animas River in the San Juan Mountains in southwestern Colorado.

EPA had been investigating the drainage of contaminated water from the Mine for several years prior to the August 5, 2015 incident. During that period, EPA accessed the Mine and several of Plaintiff's other properties, including the property at issue here, the Gladstone property, pursuant to a Consent for Access to Property. According to Plaintiff's Complaint, the access agreement pre-dated the alleged breach by several years. Subsequently, in response to that inadvertent release, EPA initiated an emergency action which included construction of a water treatment system to treat the acid mine discharge.

Plaintiff freely acknowledges that EPA did not intend to breach the Mine, which the Complaint describes as resulting in a "massive blowout of the Gold King Mine, . . . releasing three million gallons of acid mine drainage and sludge, and 880.000 pounds of metal." Compl. ¶ 36; Rather, the Complaint alleges that an EPA contractor inadvertently caused the release while conducting an investigation. *Id.* ¶¶ 33-38. Nor does Plaintiff allege that EPA's response to the resulting emergency was unreasonable or unnecessary.

Indeed, EPA and Plaintiff reached an oral agreement that permitted EPA to construct and operate a water treatment plant on the Gladstone parcel. That agreement was memorialized in writing on at least sixteen occasions in successive access agreements between November 2015 and January 2021, when the EPA issued an Administrative Order directing Plaintiff to continue to allow access. Plaintiff does not dispute that he consented to EPA's access to the

Mine in writing. Rather, now, six years after he granted EPA access to the property, Plaintiff for the first time alleges that his written consent was coerced and should be considered invalid.

The facts alleged in the Complaint, many of which the United States disputes, do not state a viable takings claim. With respect to the initial August 5, 2015 incident, the *accidental* release of contaminated water from the Mine allegedly caused by an EPA contractor cannot provide the basis for a takings claim. With respect to EPA's emergency response, Plaintiff's oral and repeated written consents permitting EPA to access his property vitiate any takings claim for the time periods covered by those agreements. Plaintiff was represented by counsel all sixteen times he consented to EPA's access to his property. An after-the-fact claim of coercion, by a party who has had the benefit of legal counsel, is not plausible. Moreover, under the doctrine of necessity and the police power doctrine, it is well-established that the government does not incur takings liability to protect the public from what Plaintiff himself describes as an environmental emergency.

The Court should dismiss the Complaint under Rule 12 of the Rules of the Court of Federal Claims ("RCFC") for four reasons. First, the doctrine of necessity bars takings liability arising from EPA's response to an actual emergency. The Complaint acknowledges that the alleged breach was accidental, not intended, and resulted in an emergency event. Plaintiff fails even to allege that EPA's response was unnecessary or unreasonable in light of the risks posed by that event. Thus, the Complaint does not adequately allege a taking. Second, the alleged negligence of an EPA contractor does not give rise to takings liability. Any claim based on unauthorized, inadvertent action by a government contractor sounds in tort, and this Court lacks jurisdiction to entertain such a claim. Third, Plaintiff's consent to entry precludes takings liability for EPA's response. Plaintiff consented to EPA's construction and operation of a

water treatment plant on his property, EPA reasonably relied on that grant of access, and EPA did not exceed the terms of Plaintiff's consent. Plaintiff's complaint also fails to plausibly allege coercion. This Court does not recognize the threat of financial loss or a lawsuit or a misrepresentation of law as coercion, particularly when a plaintiff is represented by counsel. Fourth, Plaintiff is not entitled to recover consequential damages, such as alleged lost business opportunities, in a takings action.

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

FACTUAL BACKGROUND

A. Plaintiff's Acquisition of the Gold King Mine and the Gladstone Property[1]

The Upper Animas River basin in the San Juan Mountains of southwestern Colorado contains numerous inactive or abandoned mines. There are more than 400 abandoned or inactive mines in the immediate area. EPA has concluded that: "Historic mining operations have contaminated soil, groundwater, and surface water with heavy metals." *See* Ex 3, January 6, 2021 Administrative Order at 4.[2] It has further concluded that dozens of mining-related features – from at least 35 mines -- are contributing to the release of hazardous substances into the environment, including acid mine drainage. The Mine is one of them. *Id.* According to the Complaint, ore production began on the seven levels of the Mine in 1896. Compl. ¶ 13. The lowest transportation and ore haulage level of the Mine was renamed the "American Tunnel in 1959. *Id*. at ¶ 14.

[1] The Factual Background section relies on facts alleged in the Complaint, which are assumed to be true solely for purposes of this motion.

[2] To provide additional context for the Court, some background facts – not necessary to decide this motion -- are taken from EPA's January 2021 Administrative Order referenced in the Complaint.

In 1988, Sunnyside Gold Corporation upgraded an existing water treatment facility at the historic town of Gladstone. *Id.* at ¶ 15. The facility received acid mine drainage from the American Tunnel, capturing and treating the discharge in compliance with Clean Water Act regulations and Colorado-issued discharge permits. *Id.* at ¶ 16. In 2005, Sunnyside Gold discontinued using the facility pursuant to a Consent Decree entered into with the Colorado Water Quality Control Division. *Id.*

Plaintiff acquired the Mine and the 33.4-acre Gladstone property in 2005. Compl. ¶ 18. The Gladstone property consists of three mining claims—the Herbert Placer, the Anglo Saxon, and the Harrison Millsite—and has historically been used for a variety of purposes, including for water treatment, light and heavy industrial activities, storage of industrial equipment, use as a staging area for access to and operations of surrounding mines, high density town site, and other large scale activities. *Id.* at ¶¶ 18, 19.

B. The August 5, 2015 Alleged Breach of the Gold King Mine[3]

In 2008, Plaintiff consented to permit EPA, the United States Bureau of Land Management ("BLM"), and the Colorado Division of Reclamation, Mining and Safety ("DRMS") to enter the Mine site and other properties owned by Plaintiff for the purpose of monitoring the integrity of the Mine. *Id.* at ¶ 25. On May 12, 2011, before the existing grant of access had expired, but after Plaintiff refused to grant access to the Mine, allegedly based on a concern that EPA would create a pollution disaster. EPA issued an Administrative Order Directing Compliance with Request for Access which provided for substantial statutorily-authorized daily penalties if he did not allow EPA, BLM, and DRMS access to the Mine. *Id.* at

[3] The United States recites Plaintiff's allegations as to how the alleged breach occurred solely for purposes of this motion. The United States is disputing many of them in multidistrict litigation related to that incident.

¶¶ 25, 26. Plaintiff and EPA renewed the consent for access several more times, including on August 8, 2014 and lasting through the end of 2015. *Id.* at ¶ 26.

In early August 2015, EPA was conducting a removal investigation to assess on-going releases of acid mine drainage from the Mine, and assess the feasibility of further Mine remediation.[4] The Complaint alleges that EPA had considered drilling into the Mine from above to measure the water level before beginning excavation work at the entrance of the Mine. Compl. ¶ 28. It did not. According to the Complaint, taking this step would have led EPA to discover that the Mine contained a vast quantity of highly pressurized water, which would have enabled it to change course and potentially avoid the release that later occurred. *Id*.

The Complaint further alleges that EPA's On-Scene Coordinator at the Mine, instructed EPA and DRMS employees and the EPA's contractor, not to excavate the debris blocking the portal and not to drain the mine without first setting up the equipment necessary to handle the discharge. *Id.* at ¶ 29. The Complaint also alleges that Mr. Way instructed the crew at the Mine to wait until after he returned from vacation and consulted with an engineer from the United States Department of Interior's Bureau of Reclamation ("USBR") about the risks of draining the mine. *Id.* at ¶ 30.

According to the Complaint, on August 4, 2015, contrary to Mr. Way's instructions, the crew began excavating at the entrance of the mine, leaving only a small portion of a drainage pipe. *Id.* at ¶ 33. On August 5, 2015, the crew removed the last remnants of DRMS-installed pipes, backfilled the excavated area, and built an earthen berm. *Id.* at ¶¶ 34, 35. The crew then dug a channel on the right side of the berm, positioned planks so that water flowing from the entrance could be directed to the drainage channel that DRMS had previously installed, and

[4] *See* https://www.epa.gov/goldkingmine/how-did-august-2015-release-gold-king-mine-happen.

resumed digging at the mouth of the entrance until the operator reported hitting what was thought to be a spring. *Id.* at ¶¶ 35, 36. Plaintiff alleges that, within minutes, acid mine drainage and sludge began flowing out of the Mine entrance and into Cement Creek, a tributary of the Animas River, where it eventually traveled through Colorado and into New Mexico, the Navajo Nation, and Utah, reaching Lake Powell one week later. Compl. ¶¶ 36, 48. The Release spilled three million gallons of acid mine drainage and 880,000 pounds of metals. *Id.* at ¶ 36. On August 8, 2015, then-Governor of Colorado, John Hickenlooper, declared the affected area a disaster zone. *Id.* at ¶ 51.

C. Plaintiff Consents to the EPA's Construction and Operation of an Interim Water Treatment Plant on the Gladstone Property

Shortly after the August 2015 alleged breach, Mr. Hennis verbally authorized EPA to use the Gladstone property for an emergency staging area for equipment and supplies, recognizing that time was of the essence in addressing the release. Compl. ¶ 55.

On November 10, 2015, in negotiating a written consent for access to memorialize and extend the oral agreement between the parties, EPA wrote to Plaintiff's counsel that "under the current consent for access, the EPA . . . constructed an interim water treatment facility . . . to treat the acid mine discharge from the Gold King Mine[.]" Def. Ex. 1 at 1. The letter noted that "the EPA determined that the Gladstone area . . . provided the optimal location for the [facility]" and "offered the best combination of accessibility . . . existing power infrastructure . . . existing site conditions that minimize construction time and costs . . . and site improvements that could be used as part of the mine water management systems." *Id.* The letter also stated that the EPA "is willing to discuss arrangements with you to leave . . . improvements in place . . . once the EPA's use of the properties is completed."

On November 20, 2015, Plaintiff signed an agreement, styled as a Consent for Access to Property, consenting to EPA, BLM, U.S. Forest Service, and the State of Colorado's "constructing, operating, and maintaining the mine water management system, including but not limited to pipelines, treatment/settling ponds and interim water treatment facility . . . and any other actions the EPA determines are necessary to address releases from the Gold King Mine." Def. Ex. 2 at 1. Plaintiff entered into similar agreements permitting government access to the Mine 15 or more times thereafter. In November 2020, Plaintiff declined to sign an access agreement that would have extended the existing access rights, which were to expire on December 31, 2028, for an additional eight years. Compl. ¶ 99. Instead, Plaintiff permitted access only up to February 28, 2021. *Id.*

On January 6, 2021, EPA issued an Administrative Order Directing Compliance with Request for Access. Def. Ex. 3; *see also* Compl. ¶¶ 99, 100. The Order noted that "[s]ince August 2015, EPA has requested and negotiated the terms of access with [Plaintiff] at least sixteen times." Def. Ex. 3 at 7. The Order also stated that failure to comply with its terms would result in substantial monetary penalties. *Id.* at ¶ 100.

On January 27, 2021, EPA issued a Modified Administrative Order Directing Compliance with Request for Access. *Id.* at ¶ 102. Modifications to the January 6 Order included a statement that "[n]othing in this Order constitutes a waiver, bar, release, or satisfaction of or a defense to any cause of action which Respondent has now or may have in the future against . . . the United States[.]" *Id.* The Modified Order remains in effect until the earliest of three events: (1) Plaintiff signs a five-year consent form; (2) Plaintiff enters into a lease agreement for the Gladstone Property; or (3) December 31, 2025. *Id.*

STANDARD OF REVIEW

Dismissal is appropriate where a plaintiff's complaint fails to state a claim upon which relief can be granted. *See* RCFC 12(b)(6). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Although a complaint need not contain "detailed factual allegations," the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* A plaintiff's complaint must allege "factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged," and "more than a sheer possibility that a defendant has acted unlawfully." *Terry v. United States*, 103 Fed. Cl. 645, 651 (2012) (citations omitted).

The Court is not required to accept as true allegations that "contradict matters properly subject to judicial notice or by exhibit." *Id.* at 652 (citation omitted). The purpose of RCFC 12(b)(6) "is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *Id.* at 651 (citation omitted).

LEGAL ARGUMENT

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

The Complaint alleges that at least two distinct EPA actions resulted in a taking of Plaintiff's property. First, Plaintiff asserts that the alleged breach of 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 the Gladstone parcel, with his consent, is a taking. Neither claim is viable. As explained below, the Court should dismiss the Complaint

because: (1) the doctrine of necessity bars takings liability for EPA's reasonable response to an actual emergency; (2) the alleged negligence of an EPA contractor cannot give rise to takings liability under the Fifth Amendment; (3) Plaintiff's consent to entry onto his property precludes liability for a taking; and (4) Plaintiff is not entitled to compensation for consequential losses, including alleged lost business opportunities.

1. EPA's Reasonable Response to an Actual Emergency Does Not Give Rise to Takings Liability

The inadvertent release of millions of gallons of acid mine drainage from the Mine was an emergency event. Plaintiff does not contend otherwise. The doctrine of necessity is a common law constraint on property ownership where an emergency has arisen. Because EPA's presence on Plaintiff's property was reasonably tailored to address the risks the alleged breach posed, such occupation does not give rise to a takings claim. Plaintiff acknowledges that the Release was an emergency event, noting that "time was of the essence," calling the consequences of the alleged breach "catastrophic," referring to his property as "ground zero," and describing the risk of serious harm to himself and his property as "substantial." *See* Compl. ¶ 78. As the Complaint itself states, the alleged breach "released a toxic sludge of over three million (3,000,000) gallons of acid mine drainage and 880,000 pounds of heavy metals into the Animas River watershed[.]" *See* Compl. ¶ 21.

Plaintiff has thus acknowledged that EPA's response to the alleged breach was an exercise of its police power in an emergency that was reasonably calculated to prevent "catastrophic" harm to both Plaintiff and the general public. 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). Indeed, the government may even be absolved of liability "for the destruction of 'real and personal property, in cases of actual necessity, to

prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992) (quoting *Bowditch v. City of Boston*, 101 U.S. 16, 18-19 (1880)); *see also Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969) (holding that the "temporary, unplanned occupation of petitioners' buildings" due to military necessity was not a taking). In *Miller,* Virginia landowners were required to cut down cedar trees under a Virginia statute enacted to prevent cedar rust infections to the state's susceptible apple orchards. *Id.* at 277. The United States Supreme Court held that landowners were not entitled to compensation for trees lost because the statute was enacted "under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity." *Id*. at 279. Here as well, the Complaint explicitly alleges that the Release created an extreme threat to public health, safety, and welfare requiring immediate action by EPA. Access to Plaintiff's property was essential to respond to the emergency, *i.e.*, to remediate extant environmental damage while protecting the health and safety of persons and property downstream.

The "common law ha[s] long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *United States v. Caltex*, 344 U.S. 149, 154 (1952). "This principle, 'absolving the State . . . of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent" . . . or forestall . . . grave threats to the lives and property of others,' is commonly referred to as the 'doctrine of necessity' or the 'necessity defense.'" *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1377 (Fed. Cir. 2013) ("*TrinCo I"*) (ellipses in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992)). The doctrine of necessity requires "an imminent danger and an actual emergency giving rise to actual necessity." *Id.* at 1378. If the facts as

pleaded in a complaint asserting 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.

In determining whether a response is necessary, the proper focus is on whether the government's action was reasonable under the circumstances. *See Trin-Co Inv. Co. v. United States*, 130 Fed. Cl. 592, 599–600 (2017). As this Court has observed, "[a] more common thread in necessity defense cases is a concern that the destruction of private property have a reasonable basis, *i.e.*, that at the time of the emergency the course of action chosen by the government was a reasonably tailored response to imminent danger under the circumstances." *Id.* This Court concluded that, "takings jurisprudence demands that the government's response to an actual emergency and imminent danger simply be reasonable in order to satisfy a necessity defense." *Id.* at 600. This Court also identified the "temporal framework" for analyzing the necessity defense: "'[w]hether a taking is necessary must be judged at the time the taking occurs'. . . . the necessity of an 'actually necessary' response[] must be measured *at the time of the actual emergency and imminent danger*, not in hindsight." *Id.* at 601 (quoting *Brewer v. State of Alaska*, 341 P.3d 1107, 1118 (Alaska 2014)) (internal citation omitted). Further, this assessment must consider the information available at the time. *Id.*

Plaintiff does not and could not allege that the EPA's response to the alleged breach of the Mine was not reasonably necessary to address the emergency created. From the outset, Plaintiff acknowledges the risks posed to the surrounding communities, noting that it "released a toxic sludge of over three million . . . gallons of acid mine drainage and 880,000 pounds of heavy metals into the Animas River[.]" *See* Compl. ¶ 21. He also alleges that even before the alleged

breach, he "refused to grant access to the [Gold King] Mine and surrounding properties based on his concern that EPA would create a 'pollution disaster.'" *See id.* ¶ 25. Plaintiff not only admits that "the then-Governor of Colorado . . . declared the affected area a disaster zone," but he refers to his property as "'ground zero' of this catastrophe." *See* Compl. ¶¶ 51, 78. Further, Plaintiff alleges that "EPA and its employees knew of and disregarded the substantial risk of serious harm to Plaintiff," and he describes the day of the alleged breach as a "tragic day." *Id.* ¶¶ 47, 52. In short, the Complaint does not allege that the EPA's initial response to the alleged breach at the Mine was unnecessary or unreasonable – quite the opposite.

Nor does the Complaint allege that the subsequent construction of a water treatment facility on Plaintiff's property was unreasonable or unnecessary. And there is no factual basis for such an allegation. As was communicated to Plaintiff after the parties' oral agreement:

> As part of its response to the August 5, 2015 release, the EPA determined that the Gladstone area within the Harrison Millsite, Anglo Saxon claim, and Herbert Placer provided the optimal location for the interim water treatment facility. That location offered the best combination of accessibility (maintained County road through the winter), existing power infrastructure close at hand, existing site conditions that minimize construction time and costs (size of the properties and the properties were fairly flat), and site improvements that could be used as part of the mine water management systems.

See Def. Ex.1 at 1. Provided the circumstances—the release of, per the Complaint, millions of gallons of acid mine drainage and hundreds of thousands of pounds of heavy metals into the Animas River—the EPA's response to locate the treatment facility on the most accessible and cost efficient property was and remains reasonable.

Plaintiff's claim is therefore unsound because, based on the allegations of the Complaint establishing that the doctrine of necessity applies, the United States is not liable to Plaintiff for a taking.

2. The Alleged Negligence of the EPA Contractor Does Not Give Rise to Takings Liability

Plaintiff's claim that "breaching the Gold King Mine . . . constituted a physical invasion" of his property because it "releas[ed] massive quantities of contaminated water and heavy metals" onto his property sounds in tort and does not give rise to takings liability. *See* Compl. ¶ 190. The United States disputes Plaintiff's allegations as to how the Release occurred. But accepting them as true for purposes of this Motion, the facts alleged cannot support a takings claim. Those allegations -- including that: (1) the "EPA's On-Scene Coordinator . . . at the Gold King Mine . . . had instructed . . . EPA's contractor . . . *not* to excavate the earthen debris blocking the portal and *not* to drain the mine without first setting up the equipment necessary to handle the discharge" and (2) "[i]f EPA had pursued [a hydraulic pressure test] it would have been able to determine the water level in the mine and changed its course of action, thereby avoiding this disaster"— are insufficient to establish takings liability. Plaintiff further alleges that EPA's contractor disregarded the instructions provided by EPA's On-Scene Coordinator. There was simply no deliberate act by EPA to cause the alleged breach. Rather, as alleged in the Complaint, the Release was inadvertent. Such an alleged accidental or negligent act may sound in tort; it does not effect a Fifth Amendment taking.

"On a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government. 'The government's liability for a taking does not turn, as it would in tort, on its level of care.'" *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018) (quoting *Moden v. United States*, 404 F.3d 1335, 1345 (Fed. Cir. 2005)). Rather, a claimant in a Fifth Amendment case bears the burden of showing "the government intend[ed] to invade a protected property interest or 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.'" *Ridge Line*, 346 F.3d at 1355 (citation omitted).

In *Ridge Line, Inc. v. United States*, the Federal Circuit established a two-part test to draw the line "distinguishing potential physical takings from possible torts." 346 F.3d 1346, 1355 (Fed. Cir. 2003). The test can be "characterized as causation and appropriation." *Cary v. United States*, 552 F.3d 1373, 1376-77 (Fed. Cir. 2009). To satisfy the causation prong, it must be shown that "the government intend[ed] to invade a protected property interest 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.'" *Ridge Line*, 346 F.3d at 1355 (citation omitted). However, "not every 'invasion' of private property resulting from government activity . . ." constitutes a taking. *Id.* (citation omitted). A plaintiff can satisfy the first part of the test with either proof of intent or proof that the injury was the "direct, natural, or probable result" of authorized government action such that intent can be properly inferred.

Plaintiff's allegations that EPA's contractor negligently caused the alleged breach do not give rise to a taking. In *Thune v. United States*, Jerome Thune asserted a Fifth Amendment takings claim based on damage to his hunting camp that he alleged was the result of a controlled burn by the U.S. Forest Service. *See* 41 Fed. Cl. 49 (1998). Similarly, Mr. Hennis alleges that, in failing to exercise the requisite level of care, someone's negligence caused damage to his property. *See* 41 Fed. Cl. 49, 52 (1998). Mr. Thune claimed that the damage to his property occurred because the U.S. Forest Service was negligent in its failure to maintain and control the fire. *Id.* Here, Mr. Hennis claims that the damage to his property occurred because an EPA contractor failed to follow the EPA On-Scene Coordinator's instructions not to excavate earthen

debris blocking a portal structure that held back water within the Mine and not to drain the mine without first setting up the equipment necessary to handle the discharge. Compl. ¶ 29.

Based on analogous allegations of negligence and failure to exercise due care, this Court found that Mr. Thune's claim sounded in tort and could not constitute a taking. *See Thune*, 41 Fed. Cl. at 52. "A claim for damages resulting from the government's faulty, negligent or improper implementation of an authorized project sounds in tort." *Id.* (citations omitted). Mr. Thune asserted that government negligence caused fire to escape and destroy his hunting camp. *See id.* Similarly, Mr. Hennis alleges that the EPA's negligence caused acid mine drainage and toxic heavy metals to escape and damage his property. *See, e.g.,* Compl. ¶ 28. Mr. Thune's hunting camp was not within the intended burn area, indicating that its destruction was not a natural consequence of the fire as designed. *See Thune*, 41, Fed. Cl. at 52. Similarly, as alleged in the Complaint, the alleged breach resulted from the "faulty, negligent, or improper implementation" of EPA's authorized remedial site investigation.

Just as this Court held in *Thune*, while Mr. Hennis's property loss certainly is partially attributable to an authorized government project -- the Gladstone property would not have been damaged but for the alleged breach of the Mine -- the complaint makes clear that the damage was not a direct, natural, and probable consequence of the project functioning as designed. *See Thune*, 41, Fed. Cl. at 54. Rather, the damage resulted from an inadvertent "intervening [act] . . . and for this reason no intent 'to do an act the natural consequence of which was to take [plaintiff's] property' can be established." *Id.* (citation omitted). "Plaintiff's claim is based on '[a]ccidental or negligent impairment of the value of property [which] is not a taking, but, at most, a tort, and as such is not within the jurisdiction conferred on [this court] by Congress.'" *Id.* (citation omitted).

The Court should thus conclude that the United States is not liable to Plaintiff for a taking.

3. Consent to Entry Precludes Takings Liability

Plaintiff's taking claim fails for an additional reason – Plaintiff authorized access to his land to address the emergency caused by the alleged breach of the Mine. It is undisputed that Plaintiff, while represented by counsel, repeatedly signed written access agreements that authorized EPA to construct, operate, and maintain an interim water treatment facility and take any other actions necessary to address releases from the Mine. EPA reasonably relied on the access granted by Plaintiff and abided by its terms.[5] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). No taking has therefore occurred.

The Consent to Access agreements at issue here permitted officers, employees, authorized representatives and contractors of the EPA, Bureau of Land Management (BLM), Forest Service, and State of Colorado to enter and have continued access to Plaintiff's property for the purpose of, among other things, "constructing, operating, and maintaining the mine water management system, including but not limited to pipelines, treatment/settling ponds and interim water treatment facility . . . and [a]ny other actions the EPA determines are necessary to address releases from the Gold King Mine." This very same consent was executed by Plaintiff, who was represented by counsel, no fewer than fifteen times. In fact, Plaintiff expanded the scope of EPA's permitted activities beginning on November 7, 2016, when he consented to the EPA allowing visitors to "access the Property for tours as long as an EPA officer, employee,

[5] Even if EPA's activities on the site exceeded the scope of the access agreements with Plaintiff, that would constitute, at most, a breach of contract, not a taking, and the Complaint does not include a cause of action for breach of contract.

authorized representative or contractor are at the Property and accompany the visitors on the tour." *See* Ex. 4 at 2.

The Consent for Access forms provided by Plaintiff constitute valid contracts in which Plaintiff expressly granted EPA access to his property. Plaintiff's claim that "[t]he Government paid no consideration" is unsound. *See* Compl. ¶ 61. EPA's response work (*i.e.*, treatment of acid mine drainage of the Gold King Mine, a property controlled by Plaintiff (*See* Comp. ¶ 25)), was itself valuable consideration because it would benefit Plaintiff. In addition, EPA promised to leave certain improvements and remedy features on the property at Plaintiff's request.

Plaintiff misses the point in any event. Whether or not an enforceable contract existed, and it most certainly did under black letter contract principles, the undisputed fact remains that Plaintiff consented to EPA's access. That bare fact is fatal to a physical taking claim.

This Court has long drawn a distinction between the government's use of property pursuant to an agreement and the government's taking of property. For example, in *Nat'l Bd. of the YMCA v. United States,* 396 F.2d 467 (Ct. Cl. 1968) *aff'd,* 395 U.S. 85, 89 (1969), the plaintiffs sought compensation for the loss of use of parts of their buildings in the Panama Canal Zone. However, following rioting and looting, the plaintiffs had allowed the Army to fortify their buildings to protect against future damage. The court denied relief under the Takings Clause because "the structural changes . . . were made with the consent of the owner." 396 F.2d at 474.

Similarly, in *J.J. Henry Co. v. United States,* 411 F.2d 1246 (Ct. Cl. 1969), a subcontractor performing design work on a Navy ship alleged that plans it prepared had been taken by the Navy for use on other ships. The court observed that:

> Where the government possesses property under color of legal right, as by an express contract, there is seldom a taking in violation of the Fifth Amendment. The

> Amendment has limited application to the relative rights in property of parties litigant which have been voluntarily created by contract.

188 Cl. Ct. at 46, 411 F.2d 1246. A clause in the parties' contract provided that all contractor-prepared plans became the property of the Navy. The court thus held that the subcontractor had consented to the alleged "taking." *See also Stearns Co. v. United States,* 396 F.3d 1354, 1357 (Fed. Cir. 2005) (taking occurs when the government "occupies the property or *requires* the landowner to submit to a physical occupation of its land.") (emphasis added).

As the United States Supreme Court explained in *Yee v. City of Escondido,* 503 U.S. 519, 527 (1992) (internal citations omitted):

> The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.' Thus whether the government floods a landowner's property or does no more than require the landowner to suffer the installation of a cable, the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

Thus, for example, in *FCC v. Fla. Power Corp.,* 480 U.S. 245, 251-52 (1987), the Court held that a New York statute which required landlords to permit permanent occupation of their property by cable companies constituted a *per se* physical taking. "This element of required acquiescence is at the heart of the concept of occupation." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). By contrast, regulations that "do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, . . . will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *FCC*, 480 U.S. at 252 (quoting *Loretto*, 458 U.S. at 440). *See also Scogin v. United States,* 33 Fed. Cl. 285, 291 (1995) (Although the right to exclude others from one's property is a compensable Fifth Amendment property interest, "a property owner relinquishes the right to exclude when the owner consents to the entry, use, and occupation of the subject property.").

Because Plaintiff relinquished his right to exclude the EPA from his property in successive access agreements, there was no taking. Rather, for the time periods covered by the access agreements, Plaintiff voluntarily relinquished the right to exclude.

In an effort to avoid the legal effect of his repeated agreements permitting EPA's access to his property, Plaintiff claims that those agreements were coerced. First, Plaintiff alleges that he "did not freely" consent to the EPA's access of his property "but was instead forced to accede to EPA's coercive demands" after it "threatened to impose soul-crushing civil penalties." *See* Compl. ¶¶ 90, 102. Second, Plaintiff alleges that "[t]he Government's misrepresentations . . . regarding the nature and scope of its authority to construct and operate a water treatment facility on his property . . . were designed to coerce Plaintiff into granting access to his property." *Id.* at ¶ 92. Third, Plaintiff alleges that "[t]he Government . . . threatened Plaintiff that if he did not allow access to and the use and occupation of his property that EPA would bring a lawsuit against him." *Id.* ¶ 93. Fourth, Plaintiff alleges that he had no choice but to consent to access because "the Government's breach of the Gold King Mine . . . necessitated the Government's use and physical occupation of his property[.]" *Id.* at ¶ 95. Yet coercion sufficient to negate Plaintiff's consent to EPA's entry onto his property requires far more.

"To render an agreement unenforceable for coercion or duress, a party 'must establish that (1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts." *Waverly View Investors, LLC v. United States*, 135 Fed. Cl. 750, 793 (2018) (quoting *Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000). In addition, "duress is measured by an objective, not subjective, standard." *Robinson v. United States*, 95 Fed. Cl. 480, 485 (2011).

First, "the 'threat of considerable financial loss' is not sufficient to establish duress." *Waverly View Investors*, 135 Fed. Cl. at 793 (quoting *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed. Cir. 2003)). "In order 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, and even threatened financial disaster is not sufficient." *Fruhauf Sw. Garment Co. v. United States*, 126 Ct. Cl. 51, 62 (1953). However, Plaintiff's complaint alleges no such thing. In fact, he alleges that he signed a November 2015 Consent for Access form only after the EPA "threatened to impose soul-crushing civil penalties should [he] attempt to exercise his constitutional rights to exclude the Government from his property." Compl. ¶ 90. Clearly, however, Plaintiff could have continued to refuse to sign the consent form. *See Waverly View Inv's*, 135 Fed. Cl. at 793 (holding that while "such refusal may have subjected [plaintiff] to liability for 'investigation and cleanup costs' under CERCLA . . . the 'threat of considerable financial loss' is not sufficient to establish duress") (citation omitted). Here, as well, the alleged threat of substantial statutorily-authorized penalties is insufficient to establish duress.

Second, a misrepresentation of law cannot form the basis of duress when the plaintiff is represented by counsel prior to and at the time of the agreement. *See Collins v. United States*, 209 Ct. Cl. 413, 421-22 (1976). Plaintiff alleges that "[i]n November 2015, the Government misled [him] regarding the nature and scope of its authority to construct and operate a water treatment facility on his property, claiming that a previous document signed by Plaintiff provided for such authority." Compl. ¶ 92. But Dave Cook, an attorney based in Colorado Springs, Colorado, represented Plaintiff's interests in his negotiations with the EPA over consent to access the property. "Ordinarily one having need of legal advice will retain counsel and not take it from the other side of the negotiating table." *Mills v. United States*, 187 Ct. Cl. 696, 700

(1969). If Plaintiff believed that, contrary to what the EPA expressed in its November 10, 2015 letter to Mr. Cook, the prior Consent for Access form did not permit the installation of a water treatment facility, he was represented by counsel that could have expressed that belief on his behalf.

Likewise, the allegation that the EPA threatened to "bring a lawsuit" if Plaintiff failed to consent to its access of his property is insufficient to establish duress. *See* Compl. ¶ 93. "[C]oercion requires a showing that the Government's action was wrongful, *i.e.*, (1) illegal, (2) a breach of an express provision of the [agreement] without a good-faith belief that the action was permissible under the [agreement], or (3) a breach of the implied covenant of good faith and fair dealing." *N. Star Steel Co. v. United States*, 477 F.3d 1324, 1334 (Fed. Cir. 2007) (citations omitted). Even assuming that, in negotiating consent for access, the EPA informed Plaintiff and his counsel of its legal authority to access the property, such Government action is neither illegal, a breach of an express provision of the agreement, nor a breach of the implied covenant of good faith and fair dealing. In fact, in its November 10, 2015 letter to Mr. Cook, the EPA wrote that it constructed an interim water treatment facility on the property "under the current consent for access." *See* Def. Ex. 1 at 1. If Plaintiff disagreed with that characterization of the scope of the existing Consent for Access form, he could have refused the EPA access prior to the construction of the treatment facility.

Finally, the mere fact that the alleged breach created an emergency event does not render the consent agreement "involuntary." *See* Compl. ¶ 95. Contrary to his assertion, the circumstances were not "such that Plaintiff had no alternative." *Id.* Plaintiff's alternative to consent was to refuse to consent to access, at which point the EPA could, as it informed Plaintiff,

issue an Access Order requiring that he provide it access to the property. That Plaintiff, represented by counsel, did not exercise that option does not render the agreement involuntary.

In sum, binding precedent establishes that, as a matter of law, the Complaint fails to adequately allege that the access agreements were coerced. That Plaintiff is unhappy about entering into those agreements after the fact does not negate his consent to the entry. And that consent vitiates his *per se* permanent physical taking claim.

4. Plaintiff is Not Entitled to Compensation for Consequential Losses, Including Alleged Lost Business Opportunities

Plaintiff claims that he lost two business opportunities as a result of the alleged taking, neither of which is compensable under takings jurisprudence. First, Plaintiff claims that he has suffered a taking because "EPA's operation of its water treatment facility on his property has prevented and is currently preventing [him] from moving forward with . . . developing his Gladstone property into a resort area with condominiums and other accommodations to serve the Silverton Mountain Ski Area." Compl. ¶ 73. Second, Plaintiff claims that "[s]o long as Defendant intends to continue to operate the water treatment facility . . . Plaintiff is immobilized from taking any substantial steps toward the development of his mineral rights." *Id.* at ¶ 77.

Even if the Complaint adequately alleged a taking – and it does not – Plaintiff is not entitled to recovery for lost speculative, future business opportunities to develop his property and mineral rights as a result of the United States' actions. Supreme Court precedent squarely forecloses any such result. For example, in *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266 (1943), the Court explained that because "[f]rustration and appropriation are essentially different things," "settled rules of law preclude[ ] a consideration of consequential damages for losses of a business or its destruction" as a result of a taking. *Id*. at 282-83 (quotations and citations omitted). "In absence of a statutory mandate the sovereign must pay

only for what it takes, not for opportunities which the owner may lose." *Id*. at 281-82 (citation omitted). Under the Fifth Amendment, a claimant is "not guarantee[d] a return of his investment," including profits "attributable to [an] enterprise which [claimant] hoped to launch," and business opportunities that are "too remote and slim to have any legitimate effect upon the valuation." *Id*. at 285 (quotation and citations omitted).

Similarly, in *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960), the Court of Claims found that when the United States condemned land upstream from plaintiff, the United States had to compensate the plaintiff for the taking of its water power rights and "its franchise to develop electric power and energy at [its] site" downstream. *Id*. at 231 (footnote omitted). The Supreme Court held that because the plaintiff "has done no more than prove that a prospective business opportunity was lost," "[t]he Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise." *Id*. at 236.

As in *Powelson* and *Grand River Dam Authority*, Plaintiff here has alleged, at best, that the alleged taking "obstructed" (*i.e.*, frustrated) a prospective plan to develop condominiums and "blocked" (*i.e.*, frustrated) an even more indefinite plan to explore, mine, or otherwise develop his mineral assets. Compl. ¶¶ 75, 87. Settled rule of law precludes the consideration of such alleged consequential damages. *See Schultz v. United States*, 5 Cl. Ct. 412, 418-19 (Cl. Ct. 1984) (granting the United States' motion for judgment on the pleadings because "plaintiff has plead no facts, nor urged any inferences therefrom, which support a finding of governmental interference with the *present* use and enjoyment of his land. Plaintiff's allegation concerning frustration of future and speculative uses does not support a *present* taking claim" (emphasis original)); *see also White Oak Realty, L.L.C. v. U.S. Army Corps of Eng'rs*, 746 F. App'x 294, 302 (5th Cir. 2018) (per curiam) ("Indeed, White Oak's owner could not identify any damage to White Oak

outside a lost business opportunity. This is insufficient to establish a 'taking' under the Fifth Amendment."); *Allain-Lebreton Co. v. Dep't of the Army*, 670 F.2d 43, 45 (5th Cir. 1982) ("The sovereign must only pay for what it takes, not an opportunity the owner loses." (citing *Johnson v. United States*, 479 F.2d 1383, 1392-93 (Ct. Cl. 1973)).

CONCLUSION

For these reasons, the United States respectfully requests that the Court grant the United States' Motion to Dismiss and dismiss the Complaint in this action.

Respectfully submitted,

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