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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

TODD HENNIS,)
Plaintiff,)
vs.) Case No. 21-1654L
UNITED STATES OF AMERICA,)
Defendant.)

United States Court of Federal Claims
717 Madison Place, N.W.
Washington, D.C.
Tuesday, August 30, 2022
10:00 a.m.
Oral Argument

BEFORE THE HONORABLE ARMANDO O. BONILLA

Susanne Bergling, RMR-CRR-CLR, Court Reporter

1 APPEARANCES:

2

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1 P R O C E E D I N G S

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3 (Proceeding called to order, 10:00 a.m.)

4 THE COURT: Please be seated. Good morning.

5 ALL COUNSEL: Good morning.

6 THE COURT: We are here this morning for oral
7 argument in Hennis vs. the United States, Case Number
8 21-1654L, regarding the Government's motion to dismiss
9 Plaintiff's complaint for failure to state a claim upon
10 which relief can be granted pursuant to rule 12(b)(6) of
11 the rules of the Court of Federal Claims.

12 Counsel for the Plaintiff, please introduce
13 yourselves.

14 MS. HAGEMAN: Harriet Hageman, and I have with me
15 today Greg Dolin, and I also have Plaintiff, Todd
16 Hennis. And in the room we also have our paralegal,
17 Michaela.

18 THE COURT: Mr. Hennis, welcome to the courtroom.
19 For the United States?

20 MS. TARDIFF: Yes, good morning, Your Honor.
21 Kristine Tardiff from the Department of Justice on
22 behalf of the United States. I have with me Chris
23 Chellis, also from the Department of Justice, on behalf
24 of the Government who will be arguing today, and
25 Andrea Madigan from -- who's our agency counsel from

1 EPA, Region 8.

2 THE COURT: Great. Thank you, Counsel.

3 Before hearing argument from counsel, I'd like to
4 share my preliminary thoughts about this case and my
5 observations to date, including my understanding of the
6 material facts alleged and those in dispute in hopes
7 that they might inform counsel's arguments and highlight
8 our areas of focus today.

9 As for your presentations today, both sides will
10 be given ample opportunity to make their respective
11 cases based upon the facts and the legal issues pending
12 before the Court. Counsel are welcome to argue from the
13 lectern or from counsel table, however you are most
14 comfortable.

15 Counsel are also welcome to divide your time
16 however you see fit. You can tag in and out with your
17 co-counsel or you can defer issues to your co-counsel.
18 Please note you are welcome to use your time at the
19 lectern or at counsel's table as you see fit.

20 Both parties should have every confidence that I
21 have read and digested all of the filings in this case
22 to date and reviewed the limited number of documents
23 attached to the Government's motion. I do note that
24 Plaintiff's complaint at page 11, paragraph 52, cites
25 Exhibits A and B as documenting the Defendant's

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1 admission of responsibility, but nothing was, in fact,
2 attached.

3 I will also note for the record, given the
4 posture of this case, no answer to the complaint has
5 been filed yet, and as I stated at the outset, we're
6 here to discuss the Defendant's motion to dismiss.
7 Therefore, the facts are drawn primarily from the
8 Plaintiff's complaint and all inferences are drawn in
9 favor of the Plaintiff as the nonmoving party.

10 If I deny the Government's dispositive motion in
11 whole or in part, the parties' discovery will further
12 develop the record and the facts in this case. My
13 current plan is to issue a Bench ruling at the
14 conclusion of oral argument today after a short recess,
15 and for that reason, I will provide a more thorough and
16 detailed recitation of the facts as I find them to be
17 material in connection with the pending motion.

18 After I share my current understanding of the
19 material facts, I will ask counsel for both parties,
20 starting with counsel for Mr. Hennis and then the
21 Government, to explain what, if anything, I have wrong,
22 what I'm missing, or to fill in any gaps. We will then
23 turn to the legal issues presented that I must rule upon
24 in deciding the Defendant's motion to dismiss, and I
25 will hear argument from both counsel.

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1 Since the Government is the moving party, when we
2 get to the legal issues, counsel for the United States
3 will argue first, followed by counsel for Mr. Hennis,
4 and we will circle back to the Government for reply. At
5 that point we will assess whether additional argument is
6 needed or warranted.

7 Any questions preliminarily before I address the
8 facts?

9 Counsel for Mr. Hennis?

10 MS. HAGEMAN: No, Your Honor.

11 THE COURT: Counsel for the United States?

12 MR. CHELLIS: No, Your Honor.

13 THE COURT: Plaintiff, Todd Hennis, acquired the
14 Gold King Mine located in Colorado's Bonita Peak Mining
15 District along the Animas River Basin in San Juan County
16 and the adjacent Gladstone property located in
17 Silverton, Colorado, in 2005.

18 The Gold King Mine is one of over 400 inactive or
19 abandoned mines in the area. The historic mining
20 operations of these mines contaminated the surrounding
21 soil and groundwater, and the mines contribute to the
22 release of hazardous substances into the environment;
23 particularly, acid mine drainage.

24 The Gladstone property, which is approximately
25 33.4 acres of uninhabited and remote land, includes

1 three mining claims: Herbert Placer, Anglo Saxon, and
2 Harrison Millsite. Between 1988 and 2005, Sunnyside
3 Gold Corporation upgraded and operated the Gladstone
4 Water Treatment Facility on the Gladstone property to
5 capture and treat acid mine drainage emanating from what
6 is known as the American Tunnel, the lowest
7 transportation point and ore hauling level of the Gold
8 King Mine and the adjacent Sunnyside Mine.

9 In 2008, the United States Environmental
10 Protection Agency -- or the EPA -- and Mr. Hennis
11 personally and through at least one of his companies,
12 the San Juan Corporation, entered into an agreement --
13 which is not included in the record -- granting the EPA
14 access to the Gold King Mine. The agreement permitted
15 the EPA, the U.S. Bureau of Land Management -- or BLM --
16 and the Colorado Division of Reclamation, Mining, and
17 Safety -- DRMS -- to enter the mine and areas of the
18 Gladstone property to monitor and investigate the
19 integrity of the Gold King and surrounding mines.

20 In late 2010, Mr. Hennis revoked his permission
21 for the federal and state environmental agencies to
22 access his property. In May of 2011, the EPA served
23 Mr. Hennis with an administrative order directing
24 compliance with request for access -- also not included
25 in the record -- purportedly subjecting Mr. Hennis to

1 civil penalties up to \$37,500 a day if he continued to
2 refuse access to the Gold King Mine and Gladstone
3 property.

4 After serving Mr. Hennis with the 2011
5 administrative order and continuing through 2015,
6 federal and state environmental agencies accessed
7 Mr. Hennis' property. The record presented is not clear
8 whether this nearly four-year access and extension from
9 2008 was granted through verbal or silent acquiescence
10 in response to the 2011 administrative order, documented
11 through written confirmation, or memorialized in
12 separate agreement or agreements.

13 The parties dispute whether Mr. Hennis' consent
14 was secured voluntarily or through coercion. Mr. Hennis
15 maintains that in allowing the Government access to his
16 property through 2015, he did not authorize the
17 construction or operation of a water treatment facility.

18 On August 4th through the 5th of 2015, the EPA,
19 through its contractor, Environmental Restoration, LLC,
20 performed excavation work to remove the backfill sealing
21 the portal of the Gold King Mine in an effort to drain
22 the mine. The record presented does not specify how
23 long the government contractor was onsite, when the
24 excavation work began, or what other excavation work was
25 being performed at that time.

1 On August 5th, 2015, with EPA and DRMS personnel
2 onsite, Environmental Restoration continued the
3 excavation operation. Specifically, the contractor
4 removed the remaining DRMS-installed draining pipes and
5 backfill area; dug a channel and positioned planks to
6 direct mine water flow and leakage to a previously
7 installed DRMS drainage channel; and, most critical
8 here, caused a catastrophic and sudden breach of the
9 Gold King Mine portal.

10 The blowout, as it is known, of the Gold King
11 Mine resulted in the release of over 3 million gallons
12 of acid mine drainage and sludge and an estimated
13 880,000 pounds of heavy metal and toxins, including
14 aluminum, arsenic, cadmium, copper, manganese, and zinc.

15 The hazardous materials released from the Gold
16 King Mine flooded Mr. Hennis' property, overwhelmed
17 Cement Creek, and flowed into the Animas River through
18 Colorado and into New Mexico until it reached the San
19 Juan River. From there, the pollutants and toxins
20 continued to flow through New Mexico, the Navajo Nation,
21 and into Utah, ultimately reaching Lake Powell.

22 The parties raise many questions regarding
23 Stephen Way's official position and authority to make
24 decisions on behalf of the Government. He is described
25 in the complaint simply as the EPA onsite coordinator.

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1 Hayes Griswold's official position and authority
2 to make decisions on behalf of the Government,
3 particularly in Mr. Way's absence, and the specific
4 facts and circumstances surrounding the August 4th
5 through 5th 2015 excavation decisions, communications,
6 operations, and execution, and whether those are aligned
7 or not and whether they led to the eventual blowout of
8 the mine portal when Mr. Way was on vacation. I'm
9 particularly curious as to why that happened the day
10 after Mr. Way went on vacation.

11 In the hours, days, weeks, and months and now
12 years following the blowout, the EPA undertook various
13 actions to initially stabilize the area around the
14 breached mine portal and subsequently address the
15 environmental disaster and hazardous cleanup, including
16 securing the area with a locked gate; constructing a
17 series of settling pools on Mr. Hennis' property to
18 capture and treat continuing mine drainage and toxic
19 flow; constructing an interim water treatment plant on
20 the Gladstone property using the same concrete pad that
21 supported the Gladstone Water Treatment Facility
22 operated by the Sunnyside Gold Corporation between 1988
23 and 2005; and spreading solid waste captured from the
24 wastewater treatment plant across Mr. Hennis' property
25 in unspecified areas or volume to dry it out for

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1 eventual transport and disposal.

2 Issues of consent and allegations of coercion and
3 duress following the blowout and throughout the past
4 seven years are disputed by the parties. Immediately
5 following the breach, Mr. Hennis concedes that he
6 verbally authorized the Government to temporarily use a
7 portion of the Gladstone property for an emergency
8 staging area for equipment and supplies, recognizing
9 that time was of the essence in addressing the
10 environmental catastrophe caused by the EPA -- and I am
11 quoting the complaint at paragraph 55 -- but Mr. Hennis
12 maintains that he did not grant the EPA permission to
13 construct a water treatment facility on his property --
14 complaint paragraph 55.

15 Mr. Hennis also refutes any representation that
16 he authorized the EPA or other federal or state agencies
17 indefinite access to his property. Mr. Hennis further
18 maintains that he specifically told EPA personnel,
19 although unidentified, that he was not authorizing their
20 use of the Herbert Placer portion of the Goldstone
21 property -- sorry, the Gladstone property -- where the
22 water treatment plant was constructed between August and
23 November of 2015 and remains today.

24 By November of 2015, the EPA completed
25 construction and began operation of the interim water

1 treatment plant on the Herbert Placer portion of the
2 Gladstone property, again on the same concrete pad that
3 previously supported the Gladstone Water Treatment
4 Facility. On November 2nd, 2015, Mr. Hennis and his
5 attorney at the time, David Cook, met with the EPA to
6 discuss the situation.

7 The fact that Mr. Hennis was represented by
8 counsel calls into question but does not conclusively
9 resolve, as the Government suggests, the issue of
10 consent versus alleged coercion. Indeed, Mr. Hennis
11 asserts that the EPA officials or that EPA officials
12 made a series of misrepresentations and threats to
13 secure his alleged consent.

14 Between November 2015 and November of 2020,
15 Mr. Hennis, again represented by counsel at least some
16 of this time -- the record is unclear -- executed a
17 series of documents -- 15, according to the
18 Government -- titled "Consent for Access to Property."
19 Only the first two are in the record the Court has. The
20 two copies attached to the Government's brief include
21 language specifically authorizing, among other things,
22 constructing, operating, and maintaining treatment
23 settling ponds and an interim water treatment facility.

24 In November of 2020, Mr. Hennis refused the EPA's
25 request that he execute another consent form with a

1 proposed extension through 2028, instead agreeing only
2 to their access through February of 2021. In January of
3 2021, the EPA served Mr. Hennis with another
4 administrative order directing compliance appended to
5 the Government's filing, subjecting Mr. Hennis to civil
6 penalties of up to \$59,017 a day -- an amount up from
7 \$37,500 a day from the 2011 administrative order -- if
8 he refused access to the Gold King Mine and the
9 Gladstone property.

10 On January 27th, 2021, the EPA issued a modified
11 administrative order directing compliance with request
12 for access, also not in the record, instead purportedly
13 quoted in the complaint at page 21, paragraph 102. The
14 2021 modified administrative order purportedly removed
15 the requirement that Mr. Hennis affirmatively state his
16 intent to comply with the administrative order, and it
17 also included the following statement:

18 "Nothing in this order constitutes a waiver, bar,
19 release, or satisfaction of or a defense to any cause of
20 action which Mr. Hennis has now or may have in the
21 future against the EPA, the United States, or any entity
22 which is not a party to this order."

23 And the administrative order purportedly included
24 the same civil penalties for noncompliance.

25 The 2021 modified administrative order expires by

1 its own terms upon the earliest of the following three
2 contingencies: Mr. Hennis signs a five-year consent
3 form; Mr. Hennis enters into a lease agreement with the
4 EPA for the Gladstone property; or December 31st, 2025.
5 The Court will assume, unless told otherwise, that
6 neither of the first two triggering events has occurred
7 and will take judicial notice of the fact that December
8 31st, 2025, is still over three years away.

9 Since at least on or about March 1st, 2021, or
10 perhaps as early as January 2021 with the issuance of
11 the modified administrative order, the EPA has continued
12 to access and occupy Mr. Hennis' property pursuant to
13 the 2021 modified administrative order, as opposed to a
14 consent for access to property document that was
15 purportedly agreed to and executed by Mr. Hennis, or
16 some verbal or other written agreement.

17 Throughout the last seven years, Mr. Hennis has
18 requested that the Government lease or otherwise pay for
19 their continuing access and use of the Gold King Mine
20 and the Gladstone property. No such agreement has been
21 reached. Mr. Hennis maintains that the Government has
22 paid him nothing to date for his continued access and
23 occupation of his property.

24 I note, however, that there is an acknowledgment
25 in the complaint that the Government reimbursed

1 Mr. Hennis a modest amount of money for unspecified
2 mining tools that were either destroyed or discarded in
3 the blowout of the mine and its aftermath. That is not
4 a material issue I believe that's in dispute or
5 otherwise will matter for purposes of moving on this --
6 in deciding the Government's motion.

7 On August 3rd, 2021, Mr. Hennis filed this action
8 in this Court alleging a temporary physical taking of
9 his property, the Gladstone property, without just
10 compensation in violation of the Fifth Amendment to the
11 United States Constitution or, in the alternative, a
12 permanent physical taking of that same property. The
13 facts supporting both allegations and counts are the
14 same.

15 I know that that was a lot, but I will now ask
16 counsel, starting with counsel for Mr. Hennis, to offer
17 any corrections, any additions, or any other facts that
18 are critical to deciding the Government's pending
19 motion.

20 Ms. Hageman, Mr. Dolin, if you would like a
21 moment to confer with your client or with each other, we
22 could take a short recess.

23 MS. HAGEMAN: That would be wonderful, Your
24 Honor. Thank you very much.

25 THE COURT: We will stand in recess for ten

1 minutes.

2 (A brief recess was taken.)

3 THE COURT: Please be seated.

4 Ms. Hageman, have you had an opportunity to
5 consult with your client and co-counsel?

6 MS. HAGEMAN: Yes, I have, and thank you, Your
7 Honor. That was an excellent recitation of the facts in
8 this matter, and I appreciate the work that has
9 obviously gone into this.

10 To the extent that it may help for further
11 discussions today -- and I have already discussed this
12 with the opposing counsel -- I have some photographs of
13 the area that might help you to actually identify what
14 is out there on the ground. If it would be okay, I
15 would like to submit these to the Court today, and I
16 believe that there will be no objection from the
17 Defendants in that regard.

18 THE COURT: Thank you, Counsel.

19 Anything from the Government on this?

20 MR. CHELLIS: The United States has no objection.
21 We would just like to state the date of the photos for
22 the record.

23 MS. HAGEMAN: They were taken in May of 2022,
24 Your Honor, just a couple months ago, and I have labeled
25 that on here.

1 THE COURT: Great. Thank you, Counsel.

2 MS. HAGEMAN: Thank you.

3 The second thing is that was a mistake on my part
4 about the exhibits. I have the exhibits here, and I
5 will file them separately with the Court, related to the
6 admission by the EPA that they were responsible for the
7 activities that took place out on the site on August 4th
8 and 5th, 2015. I will make sure that these are filed
9 with the record just as soon as we get back to the
10 office today.

11 THE COURT: And has the Government seen those
12 documents?

13 MS. TARDIFF: Counsel described them for us, but
14 we haven't otherwise seen them.

15 THE COURT: I would ask that you show them to
16 government counsel after today's hearing, and I will
17 enter an order subject to objection -- perhaps I will do
18 that before -- sorry. If you could show them to
19 government counsel before we adjourn today --

20 MS. HAGEMAN: I can do that.

21 THE COURT: -- get their consent, and that way I
22 can enter an order so that they can be filed with leave
23 of the Court.

24 MS. HAGEMAN: All right. Thank you very much.

25 There are only a couple of clarifications that I

1 want to address related to the facts that you have laid
2 out as based upon the complaint that we've filed.

3 First of all, in terms of the historical uses out
4 on the ground, I believe that paragraph 19 of our
5 complaint does describe the type of activities that have
6 taken place on the Gladstone property prior to August
7 4th and 5th, including water treatment, light and heavy
8 industrial, storage of industrial equipment, staging
9 area, high density town site, and other large-scale
10 activities. I just wanted to make sure that that was
11 noted for the record.

12 THE COURT: And, Counsel, is that in response to
13 my note that it was uninhabitable?

14 MS. HAGEMAN: Yes.

15 THE COURT: I thought you might take issue with
16 that. I meant -- so, for clarification, I meant that no
17 one was living there.

18 MS. HAGEMAN: Okay.

19 THE COURT: Obviously it was a use and tourist
20 area, but that was not -- and my understanding is there
21 was no electricity on the property or at least there
22 wasn't before the EPA installed electricity and that no
23 permanent dwellings existed on the property.

24 Oh, I'm sorry, your client wants to say
25 something, and I would ask him to speak through you and

1 not directly.

2 MS. HAGEMAN: Actually, Your Honor, there was a
3 high-energy power line that did go through the property,
4 and then, as you noted, there was a concrete pad and
5 there was a Quonset hut out there, so a few buildings,
6 but the purpose of paragraph 19 is just to show what the
7 historical use of the area had been. I don't think we
8 need to belabor the point at all. I just wanted to
9 clarify that.

10 One other clarification is that the 2011
11 administrative order did cover the Harrison Millsite and
12 the Anglo-Saxon, but it did not cover the Herbert Placer
13 portion of the property, and it's in large part the
14 Herbert Placer portion of the property that's at issue
15 here.

16 And then one final clarification is that it is
17 clear that the EPA was in charge of the operations on
18 August 4th and 5th, 2015, and solely responsible for all
19 the decisions made related to the work done with the
20 Gold King Mine.

21 Other than that, as I have indicated, I thought
22 it was an excellent recitation of the facts. We
23 appreciate the work that went into it. I look forward
24 to additional argument in this case, and thank you so
25 much.

1 THE COURT: Great. Thank you, Counsel.
2 Counsel for the United States?

3 MS. TARDIFF: Thank you, Your Honor. We will
4 take advantage of your offer to let us tag team, and on
5 this matter, certainly the Court's recitation of the
6 facts here this morning does accurately draw from the
7 complaint, and since we are here on a motion to dismiss,
8 obviously we are not contesting those facts for the
9 purposes of the motion. And I should say drawing from
10 the complaint and then a few documents that have also
11 been attached.

12 Just a couple things for the record. I mean --
13 and, again, we're not contesting any of those facts. We
14 accept those as true for the purposes of our motion to
15 dismiss. There is, as we've referenced, a separate
16 multidistrict litigation going on that involves this
17 matter, so we're very cautious about factual admissions
18 that may contest with what or conflict with what is
19 going on in that case.

20 There is a dispute over the precise cause of the
21 breach of the mine portal and then the subsequent
22 release, so I just want to flag that for the record,
23 but, again, for our purposes here, we accept the
24 allegations in the complaint for our motion.

25 The Court also had in the recitation some factual

1 discussion of the 2011 administrative order, and there
2 is definitely a gap in the factual allegations between
3 2011 and the breach of the portal in 2015. Plaintiffs
4 haven't actually made a takings claim here -- or that's
5 our understanding based on the complaint -- for that
6 time period, and, in fact, there would be statute of
7 limitations issues I think had they made that
8 allegation.

9 So we haven't kind of developed or relied on any
10 facts for that time period up until kind of 2014 and
11 then '15 when that breach of the portal occurred, but --
12 there certainly are other facts related to access and
13 consent during that time period, but, again, I don't
14 think it's relevant to the motion here today.

15 THE COURT: Okay, great.

16 MS. TARDIFF: Thank you, Your Honor.

17 THE COURT: Thank you, Counsel.

18 Nothing further? Counsel, I assume nothing
19 further?

20 MS. TARDIFF: Oh, I'm sorry. Nothing further.

21 THE COURT: And this next bit might actually go
22 to what you were just talking about. Turning to the
23 legal issues presented, I would like to again begin by
24 sharing my preliminary understanding of Mr. Hennis'
25 legal claims and the Government's responses and current

1 defenses, as well as a few specific areas I would like
2 counsel to address, and then I will invite argument,
3 again, starting with the United States.

4 Again, you are free to use your time as you wish.
5 I share these preliminary thoughts to let you know where
6 I currently am on these legal issues and where I have
7 questions and concerns.

8 Mr. Hennis is asserting two takings claims
9 stemming from the EPA's breach of the Gold King Portal
10 Mine or alleged breach of the mine. The first is the
11 toxic and hazardous flooding and damage to his property.
12 The second is the EPA's continuing occupation of his
13 property, including the construction and operation of
14 the interim water treatment plant, the creation of
15 settling pools, and the storage and drying out of solid
16 waste captured by the water treatment plant until it can
17 be removed and disposed of.

18 I would like Plaintiffs' counsel to confirm or
19 correct my understanding of the takings claims that
20 Mr. Hennis is pursuing to make sure that, as government
21 counsel just argued, Mr. Hennis is not also asserting a
22 pre-breach takings claim.

23 God bless you.

24 MS. HAGEMAN: Excuse me.

25 Your Honor, that's absolutely correct. We are

1 focused on what occurred on August 4th and 5th, and
2 thereafter, 2015.

3 THE COURT: Great. Thank you, Counsel.

4 MS. HAGEMAN: And those are the two takings
5 claims, both the flooding as well as the -- what I
6 believe is now considered a permanent takings of the
7 property related to the construction and operation of
8 the water treatment facility and related infrastructure.

9 THE COURT: Great. Thank you, Counsel.

10 With regard to the tort versus taking allegation
11 or claim, the Government argues that Plaintiff's alleged
12 takings claims, to the extent they involve the breach of
13 the Gold King Mine Portal, sound in tort, either
14 accident or negligence, and, therefore, are outside this
15 Court's limited jurisdiction. I note for the record
16 that the motion filed by the Government was under Rule
17 12(b)(6) as opposed to Rule 12(b)(1), which is a lack of
18 jurisdiction, but nevertheless, jurisdiction can be
19 raised at any time by the party or the Court sua sponte.

20 In arguing that Plaintiff's claims are torts and
21 not takings, the Government further suggests that the
22 EPA did not authorize the alleged rogue actions by
23 Environmental Restoration, the government contractor, in
24 breaching the Gold King Mine Portal. I would like the
25 Government to clarify whether the jurisdictional

1 argument is limited to the actual breach of the Gold
2 King Mine Portal or extends to the flooding of the
3 Gladstone property and/or the now seven-year occupation
4 of Mr. Hennis' property, and, if so, to what extent.
5 And I am happy to outline these issues and then have you
6 present, as you would, your argument.

7 On the issue of necessity, the Government argues
8 that the breach of the Gold King Mine Portal created an
9 environmental emergency, and under the doctrine of
10 necessity, the Government's exercise of its federal
11 police power in protecting the public shields it from
12 liability in this case. I would like the Government to
13 similarly clarify whether this argument is limited to
14 the immediate aftermath of the breach of the Gold King
15 Mine Portal or extends to the now seven-year-plus
16 occupation of Mr. Hennis' property.

17 Now, I understand, Counsel, you are all new to
18 this case and did not write the briefs, but having stood
19 in your shoes for the better part of two decades, I
20 understand that you must defend what the Government has
21 written, and so I will ask you from henceforth to make
22 sure the Government is arguing the defenses that they
23 apply to the specific time periods and the specific
24 takings. I found the briefs written in this case to be
25 very broad stroked, that this is a tort, they lose; this

1 is a necessity, they lose.

2 There is an initial breach of the mine, there is
3 the immediate aftermath and the hazardous cleanup, and
4 then there is the permanent occupation. The defenses
5 need to be alleged and proven with respect to each of
6 those pieces whether you are arguing tort, necessity, or
7 some other defense. It should not be the Court's job to
8 figure it out and apply it accordingly.

9 On this issue Plaintiff argues that the EPA could
10 have installed the water treatment plant on nearby
11 federal land but chose not to and to use a preexisting
12 cement pad for convenience. I would like Plaintiff's
13 counsel to address what difference that would have made
14 to your client's taking claim.

15 The Government still had to clean up the
16 Gladstone property, and the question is why not have the
17 treatment plant closest to the breach of the original
18 toxic flow. At a minimum, even if the Government used
19 the adjacent federal property to install and operate the
20 water treatment facility plant, EPA would have had to
21 install pipes or some other conduit to connect the Gold
22 King Mine Portal to the water treatment plant or the
23 continuing polluting of the Gladstone property and
24 perhaps occupy a larger portion of the Gladstone
25 property.

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1 In other words, if the Government had to put
2 pipes connecting the -- across the entire Gladstone
3 property, isn't that also an occupation? And is that
4 better or worse for your client than having the water
5 treatment facility plant at some point closer to the
6 mine and having the rest of this property free of the
7 government occupation?

8 With regard to the consent versus alleged
9 coercion allegations, the Government argues that prior
10 to August 5th, 2015, and the breach of the Gold King
11 Mine Portal, and continuing through at least February 28
12 of 2021, Mr. Hennis gave the EPA and other state
13 agencies and officials verbal and written permission to
14 access and occupy the Gold King Mine and the Gladstone
15 property and to construct and operate the interim water
16 treatment plant on that property.

17 Mr. Hennis counters that nearly all of his verbal
18 and written consents were secured by the Government
19 through misrepresentation and threat of fines, legal
20 actions, through coercion, and while he was under
21 duress. I would like both parties to address this issue
22 and, in particular, the Government to clarify whether
23 the Government maintains that Mr. Hennis' alleged
24 consent continued beyond the EPA's issuance of the
25 January 2021 modified administrative order or beyond

1 Mr. Hennis' purported November 2020 agreement to extend
2 consent until February 28th of 2021. There's that delta
3 of two months.

4 But I am unaware of and there is nothing that I
5 have seen in the record where the Government is even
6 alleging that Mr. Hennis gave consent beyond the last
7 possible date of February 28th, 2021. So from March --
8 so from March 1st, 2021, to date, and continuing on
9 beyond today, I don't see anything in the record that
10 shows Mr. Hennis' consent to the Government's use of his
11 property.

12 For the Plaintiff, coercion requires a high
13 standard of proof. One of the three elements of
14 coercion requires a showing that Mr. Hennis had no
15 alternative. The facts presented suggest that
16 Mr. Hennis did have alternatives. They weren't ideal.
17 He could risk -- could have risked being assessed and
18 contested the civil penalties. He could have filed suit
19 in District Court seeking a temporary restraining order
20 or a preliminary injunction or otherwise enjoining the
21 Government from continuing to access, occupy, or operate
22 on his property, or he could have sat back and defended
23 against the Government's threats of legal action.

24 I would also like Plaintiff's counsel to explain
25 why Mr. Hennis' legal representation, Attorney Cook,

1 does not undermine the allegation of coercion. Again,
2 the record is unclear as to what -- how involved
3 Mr. Cook was in negotiations with the EPA and whether or
4 not he was involved with all 15 or 16 alleged consent
5 agreements.

6 And, finally, on the issue of damages, in his
7 complaint Mr. Hennis seeks specified sum certain
8 monetary damages in the following amounts: \$792,000
9 between August 2015 and August 2021 calculated at the
10 rate of \$11,000 a month for 72 months, and an additional
11 \$11,000 a month from September 2021 through some future
12 date when and if the EPA ever vacates the Gladstone
13 property.

14 The \$11,000 monthly rate is purportedly based
15 upon Mr. Hennis' representation that he retained a real
16 estate appraiser, Robert Stevens, who appraised the
17 Gladstone property, valued as of August 2015, on May
18 28th, 2020 and June 19th, 2021. The expert report is
19 not in the record, nor has Mr. Stevens' appraisal been
20 subject to scrutiny by the Government as far as the
21 Court knows.

22 Mr. Hennis also seeks \$3 million for the
23 unspecified damage to the Gladstone property as a direct
24 result of the Gold King Mine breach. I will note that
25 Mr. Stevens' alleged appraisal of the fair market value

1 for the entire property is valued at \$2.2 million, which
2 is below the amount of the claimed damages.

3 Mr. Hennis also seeks consequential damages and
4 the loss of business opportunities in unspecified
5 amounts. On this, the law in this Circuit is clear.
6 Monetary damages for proven Fifth Amendment temporary
7 takings claims are generally limited to the fair rental
8 value of the property during the alleged taking.
9 Consequential damages and lost business opportunities
10 are not recoverable.

11 Now, I welcome for both parties to address the
12 issue of damages as well as the potential offset
13 relating to the possible increase in value to the
14 Gladstone property attributable to the Government's
15 cleanup of the Gold King Mine and other property
16 enhancements, such as the installation or upgrading of
17 electricity.

18 And with that, I will invite counsel for the
19 United States to present the Government's case, and if
20 you would like a brief recess, we can take it, or if
21 you're ready to go, we can go.

22 MR. CHELLIS: A brief recess would be great.

23 THE COURT: We will stand in recess for ten
24 minutes.

25 (A brief recess was taken.)

1 THE COURT: I'll hear first from counsel for the
2 United States.

3 MR. CHELLIS: May it please the Court.

4 This morning I'd like to address the three
5 independent reasons why dismissal is appropriate, and
6 I'd like to address those three grounds for dismissal
7 according to the chronology of Plaintiff's two distinct
8 claims based on what I've heard from the Court this
9 morning.

10 Mr. Hennis' first claim, as the Court has said,
11 relates to that initial breach of the portal to the Gold
12 King Mine, which he owns, and the resulting rapid
13 release of the 3 million gallons of acid mine drainage
14 on that property. That's Mr. Hennis' flooding claim.

15 And then the second claim relates to EPA's use
16 and occupancy of his property with a particular focus on
17 the construction and operation of the interim water
18 treatment facility on the Gladstone property, which is
19 treating that acid mine drainage from the Gold King
20 Mine. That continues to this day.

21 In his complaint, Mr. Hennis -- and this
22 addresses the allegations that sound in tort -- you
23 know, Plaintiff's language alleges that the EPA should
24 have done one thing instead of another, and because EPA
25 didn't do these other things, the breach on one of my

1 properties occurred, and these allegations sound in tort
2 and require the dismissal of his first claim. So with
3 tort, we're really talking about that initial breach for
4 the purposes of this motion to dismiss.

5 THE COURT: But if you separate out the first --
6 you call it the flooding claim -- the actual breach of
7 the mine could have been a tort, or the record, as I see
8 it, isn't clear yet as to whether or not the -- Mr. Way,
9 the second government official --

10 MS. HAGEMAN: Griswold.

11 THE COURT: I'm sorry?

12 MS. HAGEMAN: Griswold.

13 THE COURT: -- Griswold, whether he, in the
14 absence of the first government official, said, no, no,
15 no, keep digging, and was authorized -- and that's why I
16 raised the issues of authority and the actions and
17 whether or not the directives from the Government were
18 orders that were followed or orders that were not
19 followed, because if the Government said to go ahead and
20 dig and breach, then it is an intentional act, and
21 there's -- there might be legal debate as to whether or
22 not that intentional act is a tort and whether or not
23 the Government was authorized, but I don't, based on the
24 record before me today, know what happened there.

25 There seems to be a lot of allegations, and I

1 think discovery would be helpful in that regard, but go
2 ahead -- and so the other thing I want to say is you
3 talk about the breach of the mine, but it's also the
4 flooding. So if the -- you know, the Fire Service or
5 the Army Corps of Engineers releases a valve and it
6 floods people's property, intentional or not, that act
7 that caused the flooding may be a tort, but the actual
8 flooding of the property is a taking or can be a taking.
9 And I believe -- Mr. Hennis, his counsel can speak for
10 him -- I believe the allegation is not so much the
11 breach of the mine. It is the flooding and destruction
12 of the Goldstone property.

13 MR. CHELLIS: And I think that's where the
14 necessity doctrine comes in in terms of what the
15 Government is offering with this motion to dismiss, and
16 I'll get into that as well.

17 THE COURT: Okay.

18 MR. CHELLIS: The second ground for dismissal is
19 that EPA acted out of a necessity to address that
20 emergency caused by that tortious breach. EPA's
21 emergency response included, among other things,
22 addressing the 3 million gallons of contaminated water
23 with settling ponds. It also included -- well, it
24 included -- it includes that period, and it also
25 includes the construction and operation of the interim

1 water treatment facility on Gladstone to address an
2 ongoing emergency. So there's 3 million gallons of acid
3 mine drainage, but it doesn't simply end there. There
4 is also an ongoing release from the portal that needs to
5 be dealt with.

6 THE COURT: But my understanding is that the EPA
7 itself is not calling it an emergency today.

8 MR. CHELLIS: No. You're correct.

9 THE COURT: It's over. And that's why I want the
10 Government to be very precise when it talks about
11 necessity and public emergency. It's been over seven
12 years.

13 MR. CHELLIS: Correct. Right.

14 THE COURT: At some point the 800 million pounds
15 of sludge made its way through and now there's a drip.
16 It's like an exploding balloon, a water balloon. The
17 water comes out and all of a sudden there is just a mess
18 that's left. And where does necessity -- when does the
19 necessity defense end is my question.

20 MR. CHELLIS: The necessity defense ends when the
21 EPA declared it and was funding it as a non-time
22 critical removal action, and that occurred on January
23 12th, 2017, and I will get into that for the Court.

24 THE COURT: Okay.

25 MR. CHELLIS: So you can put that pin in it,

1 January 12th, 2017, because at that point it was funded
2 as a non-time critical emergency -- removal action as
3 opposed to an emergency removal action.

4 THE COURT: And that's one of the memos, the few
5 things that is in the record.

6 MR. CHELLIS: Ah, yeah.

7 And that brings me to the third ground for
8 dismissal of Plaintiff's claim, and this -- in regards
9 to the EPA's use and occupation of the property, and
10 they received his -- you know, they received his consent
11 from at least -- and it's in the record -- from at
12 least -- it's the -- I believe the second exhibit in ECF
13 Number 7, the motion to dismiss, is his consent from
14 November 2015, and the final point on that, the United
15 States does not dispute for purposes of this motion to
16 dismiss that he refused consent past February 28th,
17 2021.

18 THE COURT: Okay. So what is the Government's
19 defense to this cause of action starting on March the
20 1st of 2021, because the EPA is still there.

21 MR. CHELLIS: Correct. For purposes of this
22 motion to dismiss, the United -- the EPA is there
23 against Mr. Hennis' consent. He has no longer consented
24 for --

25 THE COURT: Right. But the Government has moved

1 to dismiss this entire cause of action, and now you're
2 conceding --

3 MR. CHELLIS: We are conceding that there may be
4 liability past -- you know, starting with March 1st,
5 2021, correct.

6 THE COURT: Thank you.

7 MR. CHELLIS: And Plaintiffs, per the complaint,
8 as far as the language in the complaint, don't seem to
9 be suggesting that he didn't sign these agreements from
10 November 2015 to February -- that would cover that
11 period from November 2015 to February 28, 2021. What
12 they're arguing is, you know, legal defenses -- you
13 know, coercion, duress, there should have been a
14 signature, that sort of thing -- which, you know, the
15 parties have fully briefed, but I'll also discuss those
16 because I know that the Court has noted those as issues
17 of concern.

18 THE COURT: But Mr. Hennis is also alleging that
19 misrepresentations were made to both he and his counsel
20 at the time that he signed those documents. So there's
21 no dispute -- well, so, the record has two signed copies
22 of the agreements, and apparently there were 15 or 16 of
23 them, and Mr. Hennis doesn't argue -- I agree with
24 you -- that he never signed them. What he's arguing is
25 the Government made misrepresentations to him to entice

1 him to sign them and coerced him to sign them under
2 threat of, you know, sanctions of over \$50,000 a day.

3 MR. CHELLIS: Right, and we can get to that, Your
4 Honor, but in the Government's brief, we do address that
5 issue of coercion as far as the specific fine defense.
6 You know, this Court decided just four years ago that,
7 you know, the simple fact that the EPA is citing to some
8 statutory fine doesn't amount to coercion or duress. It
9 would have to be something more than that.

10 THE COURT: Well, so, as I said earlier, it's a
11 high hill to climb, for Plaintiff to prove.

12 MR. CHELLIS: Correct.

13 THE COURT: But shouldn't Plaintiff be given the
14 opportunity to prove it? He has made an allegation that
15 he was coerced and placed under duress. There has been
16 no deposition. The Government hasn't tested it, and the
17 Government has to accept the allegations as true for
18 purposes of this motion.

19 So isn't the issue of coercion and duress -- I'll
20 give you it's a legal issue and it is a difficult burden
21 that Plaintiff will reach, which is why I highlighted
22 it, but isn't that a -- better dealt with on a motion
23 for summary judgment and/or a trial than a motion to
24 dismiss for failure to state a claim?

25 MR. CHELLIS: Well, I think Plaintiffs have

1 presented their legal defense as far as coercion or
2 duress, and what they presented to the Court and us is
3 that there was some amount of coercion via this
4 regulatory -- this statutory fine, the threat of a
5 statutory fine, and that's something that this Court has
6 dealt with in the past in terms of the Waverley case.
7 So there's law on this, addressing this issue of a fine
8 being some form of coercion or duress, and as this Court
9 has said, that it does not rise to that level.

10 THE COURT: But what about the allegation that
11 Plaintiff, Mr. Hennis, was asking for a rental payment
12 to be on the property? The Government, perhaps, was
13 holding that over his head of just sign these, we can
14 get this work done, we will work out some agreement in
15 the future, but we need to be on your property because
16 we need to solve this problem, and if those facts are
17 true, then there is an allegation of a
18 misrepresentation, and I think there is enough there,
19 especially because one of the contingencies in the most
20 recent request for consent says this will expire when
21 the Government and Mr. Hennis agree to a rental on the
22 property.

23 So it's not clear, but we're also at a motion to
24 dismiss and not summary judgment. Now, granted,
25 Plaintiff bears the burden, and I don't know whether

1 Plaintiff will be able to carry the day, but I am not
2 convinced yet that he can't carry the day.

3 MR. CHELLIS: Okay. We'll try to address that as
4 best we can today then, Your Honor.

5 THE COURT: Thank you.

6 MR. CHELLIS: And I was going to go over some key
7 facts that I think are relevant to our grounds for
8 dismissal, but the Court did an excellent job of
9 reciting the facts, so I am just going to skip over that
10 and address this issue of a tort versus a taking and
11 just jump right into that.

12 I think the focus here on tort versus taking as
13 it relates to the breach and what occurred on August
14 4th, the focus here is on the plain language of the
15 allegations. Have they met the burden of alleging
16 intent -- a reckless level of intent, I should say --
17 and beyond bare assertions? You know, how does the
18 complaint describe actions -- and in this case,
19 inactions -- it alleges caused the breach of the Gold
20 King Mine Portal? And the plain language here doesn't
21 come close to pleading the requisite level of intent.

22 Rather, the complaint alleges -- and I'll draw
23 the Court's attention to the complaint specifically and
24 certain paragraphs. In paragraph 28, the complaint
25 alleges that "the hydraulic pressure test would have

1 left no doubt that it was unsafe to remove the backfill
2 sealing the portal and that EPA needed to take
3 additional precautions to prevent its excavation-induced
4 failure." So, in essence, a negligent failure to take
5 some action, and that's paragraph 28.

6 Taken from the same paragraph, 28, "Had EPA
7 simply followed this common practice and its own
8 precedent, it would have discovered that the Gold King
9 Mine contained a vast quantity of highly pressurized
10 water." So had EPA exercised a certain level of care,
11 it would have taken this other action, but it
12 negligently failed to take that action.

13 THE COURT: And doesn't that get to the point
14 that I was making earlier with regard to Mr. Way versus
15 Mr. Griswold and what their instructions were? And my
16 understanding, based on what I have, is that Mr. Way
17 said don't do any more, don't -- until I get the Army
18 Corps of Engineers to look at this, stand down, and he
19 goes on vacation. Mr. Griswold comes in, and all of a
20 sudden, within a day or -- 48 -- within 24 to 48 hours,
21 the mine is breached.

22 Isn't -- aren't there facts that needed to be
23 developed on -- and Mr. Hennis wouldn't know this,
24 because these are government officials -- as to what
25 directives the government officials gave the contractor

1 and what the contractor -- the government contractor did
2 with those directives?

3 And if the Government -- if Mr. Griswold comes in
4 and says, "I don't care what Mr. Way said, I want to
5 take care of this problem today," and the contractor
6 breached the mine, and Mr. Griswold had the authority to
7 make that directive, how is that a tort?

8 MR. CHELLIS: As far as my understanding in
9 reading the pleadings of -- in reading the allegations
10 in the pleadings, Mr. Way had -- as the on-site
11 coordinator, as alleged in the complaint, had that
12 authority to do certain things. Assessment work, which
13 is different from what was done on August 4th, I think
14 we can conclude, based on the allegations in the
15 complaint.

16 So he has the ultimate authority, and as
17 Plaintiffs alleged specifically in this pleading, they
18 acted contrary to all instructions. That is a direct --

19 THE COURT: Well, my understanding is that they
20 acted contrary to Mr. Way's instructions, who was not
21 there, and it's unclear as to whether they were
22 following Mr. Griswold's instructions, and there -- that
23 is what I'm focused on right now, because it's -- you
24 know, and I also want to make sure that we are
25 addressing the right legal standard upon which you are

1 holding the Plaintiff in their complaint.

2 You are asking Mr. Hennis to figure out what
3 authorities were properly invested in government
4 officials, what directives those government officials
5 gave to their government contractor, and whether or not
6 those government contractors executed them.

7 The purpose of the complaint is to put the
8 Government on notice of the allegations. The allegation
9 in this case is EPA came onto my property. EPA blasted
10 open this mine. There is no allegation, as far as I
11 could tell, that Mr. Hennis wants to be reimbursed for
12 the cover or closure of the mine. It's the Gladstone
13 property that was destroyed by the breach of the mine.

14 So I think the tort allegation or the tort
15 contention is the breach of the portal, and Mr. Hennis'
16 claim, as I understand it, is the subsequent flooding of
17 his property. Now, those are interconnected, but he is
18 not claiming damage to the front wall of the Gladstone
19 mine. It is the Gladstone -- I'm sorry, the Gold King
20 Mine. It is the Gladstone property, and those are two
21 different things.

22 And I agree with you, at least today, that the
23 breach of the mine covering that caused this
24 catastrophic environmental disaster was more likely than
25 not a tort. Now, I can't find that based upon what we

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1 have today, but the allegation isn't or the complaint
2 does not allege that. The complaint is you flooded my
3 property. I don't care how you did it, but you flooded
4 my property. And so when you're arguing tort, I want to
5 know what the Government's position is with regard to
6 the flooding, not the breach.

7 MR. CHELLIS: But for the breach, which was
8 committed, there would be no flooding, and that's --

9 THE COURT: But this Court hears all the time
10 controlled fires, controlled -- when the Army Corps of
11 Engineers does flooding and they -- you know, there can
12 be a allegation made at any time that when a Fire
13 Service employee lights a controlled fire, they did it
14 wrong. The Court doesn't throw it out on tort if they
15 torched somebody's house. There is a difference -- you
16 have to separate out those two, the breach from the
17 flooding, and the breach itself may and probably is a
18 tort. The flooding, I'm not sure.

19 MR. CHELLIS: Yeah, and in terms of addressing
20 the interconnectedness between the breach and the
21 flooding, I think what the -- I think what controls is
22 this -- you know, this question of intent, and they have
23 to plead sufficient -- you know, a requisite level of
24 intent, and in doing that, you know, it's two-pronged.
25 They either have to show that the United States intended

1 to invade his property -- and I don't think that this --
2 I don't think that this pleading alleges that there was
3 an intent, that EPA intended to cause this catastrophic,
4 you know, environmental catastrophe.

5 So you turn to the second prong, which is whether
6 the invasion was the result -- the probable, you know,
7 natural or direct result of an authorized government
8 activity.

9 THE COURT: And doesn't that get to what
10 Mr. Griswold ordered or directed on the day in question,
11 what the contractors understood on the day in question,
12 and what actually happened? And until we know those
13 three facts, we can't answer whether this was the direct
14 and probable consequence of the Government's directive.

15 MR. CHELLIS: And as far as I see it, I do make
16 that distinction between authorized activity and what
17 occurred on August 4th. Mr. Way said don't excavate the
18 earthen debris blocking the portal; don't drain the mine
19 without setting up the equipment first that can handle
20 that discharge. As pled in the complaint, they acted
21 contrary to all those instructions. Whether it comes
22 from Mr. Way or Mr. Griswold, they acted contrary to
23 those instructions.

24 THE COURT: Right. But a few minutes ago you
25 said for purposes of this argument Mr. Griswold was

1 authorized, the authorized official to make the
2 decisions on the ground that day because Mr. Way was not
3 around, and when I was going through the facts, I
4 specifically noted that Mr. Way gave some instructions,
5 went on vacation.

6 Mr. Griswold comes in, gives instructions, and
7 all of a sudden, there's a breach, and the allegations
8 in the complaint, as I read them, is that Mr. Griswold
9 effectively ordered them to breach this mine.

10 Now, did he want all of these contaminants and
11 sludge to pollute all of these neighboring waters? I
12 can't imagine that that's the case, but we don't know
13 what he said. We don't know if he said just dig another
14 two feet or leave it alone, and the contractor was like,
15 well, we'll just dig another two feet, and clearly
16 Mr. Hennis would not be in a position to know.

17 So I'm looking solely at his complaint, and his
18 complaint says Mr. Way is there, says don't do this. He
19 goes on vacation. A new onsite manager comes in,
20 Mr. Griswold. Mr. Griswold talks to the contractors.
21 The contractors keep digging, and all of a sudden,
22 there's a breach. That puts the Government on notice
23 that Mr. Hennis is arguing or alleging that Mr. Griswold
24 directed the activity, that if he, in fact, disregarded
25 Mr. Way and thought he knew better that day and that

1 this was his chance to shine and prove that he could
2 clear out this mine and not wait for the Army Corps of
3 Engineers and made this directive, I don't know what the
4 facts are, and that's the issue.

5 But if, in fact, that happens, something along
6 those lines, you have an authorized government official,
7 according to what information we have today, directing
8 the contractor to take some actions that the Government
9 is saying were in direct contravention of what Mr. Way
10 had directed the day before or in the weeks before. How
11 is that not the direct and probable cause of what
12 Mr. Griswold allegedly ordered?

13 MR. CHELLIS: Well, it's not a direct or probable
14 or natural result of what Mr. Way had ordered, this --
15 you know, whether it's a contractor or whether it's some
16 government bad actor directly affiliated with EPA, it is
17 contrary -- you know, as the complaint pleads, it's
18 contrary to all instructions, and Mr. Way provided those
19 instructions.

20 And what the Plaintiff is alleging in the
21 complaint is that the failure -- the failure to do these
22 things that Mr. Way instructed people to do on August
23 4th was ultimately this recipe for disaster and that
24 failure to take these steps led to this breach.

25 The language in the complaint clearly lays that

1 out in terms of here are inactions and here are actions
2 that were contrary to all instructions, and that's the
3 distinction I guess I'm trying to make here.

4 THE COURT: Yeah, and I'm following you. What
5 I'm not getting from you is Mr. Way wasn't there, and he
6 may have said under no circumstances are you to do any
7 more digging while I'm on vacation, and he leaves.
8 Mr. Griswold comes in, and the allegation is
9 Mr. Griswold is in charge, and so if he's in charge on
10 that day and he says, "Dig, I don't care what Mr. Way
11 said, I am in charge, and I am the authorized government
12 official," how is that not the Government's -- the
13 natural consequences of the Government's authorized
14 action?

15 MR. CHELLIS: I understand where you're going
16 with this, Your Honor, and maybe I'll confer with
17 counsel and we can address that this morning at some
18 later point. Point taken.

19 THE COURT: Okay.

20 MR. CHELLIS: Turning to the necessity doctrine,
21 which covers everything post breach to January 11th,
22 2017, when EPA declared its response non-time critical,
23 notwithstanding what we believe Plaintiff's failure to
24 plead the requisite level of intent was -- and the
25 associated document provides the second sort of

1 independent ground for dismissal of Plaintiff's claim
2 through January 11th, 2017 in terms of occupation --
3 it's not addressing the breach, per se.

4 The necessity doctrine provides that there's no
5 compensable taking for government acts that avert an
6 imminent threat to public health, safety, or welfare.
7 It's undisputed that the alleged breach of the Gold King
8 Mine released 3 million gallons of acid mine drainage
9 into the Animas River. The complaint alleges in
10 paragraph 51 that the then Governor of Colorado declared
11 the affected area a disaster zone.

12 The complaint alleges in paragraph 55 that Mr.
13 Hennis' sub recognized the breach of the Gold King Mine
14 as an environmental catastrophe and that, in recognizing
15 that, he verbally authorized EPA to use a portion of the
16 Gladstone property for an alleged emergency staging
17 area.

18 EPA's initial step toward addressing this
19 emergency was for the on-scene coordinator to initiate
20 an emergency removal action pursuant to his delegated
21 authority under CERCLA. This is documented in a January
22 11, 2016, action memorandum documenting that decision
23 and approving funding for it for an additional 12 months
24 as a continued emergency removal action. This document
25 is referenced on page 14 in the Government's reply in

1 support of its motion to dismiss and is a matter of
2 public record that the Court may take judicial notice
3 of.

4 May I approach the Bench and offer the Court a
5 copy of that?

6 THE COURT: Show Plaintiff's counsel, please.

7 MS. HAGEMAN: I haven't seen that, Your Honor.

8 THE COURT: I've asked him to show it to you.

9 MS. HAGEMAN: Okay.

10 MR. CHELLIS: May I approach the Bench?

11 THE COURT: I'll wait for Plaintiff's counsel.

12 MS. HAGEMAN: (Document review.)

13 (Pause in the proceedings.)

14 THE COURT: Ms. Hageman, do you have a position
15 on the document?

16 MS. HAGEMAN: Yes. I would object to the
17 admission. This isn't part of the record. This is a
18 motion to dismiss. This is a document that was signed
19 in January, five months after the breach of the Gold
20 King Mine. I haven't had an opportunity to review this.
21 I don't understand its relevance when we're talking
22 about a motion to dismiss based upon the issues that
23 they raised in their briefing.

24 Whether they thought that this was an emergency,
25 I don't tend to necessarily disagree with that. The

1 question was whether they effectuated a takings of my
2 client's property in the two ways that we've discussed
3 repeatedly, which is the flooding, which I think we've
4 already established that that is actionable, and we have
5 got some other issues that we can address when I get up
6 there, and I think they have conceded that there is a
7 permanent or that there has been a takings of the
8 property with the construction and operation of the
9 water treatment facility.

10 So I don't know what this adds to the discussion
11 at all. I would object to it. We haven't had a chance
12 to even respond to it, and, again, I think it's entirely
13 irrelevant to the issue before the Court today.

14 THE COURT: Counsel, can you specify exactly why
15 you are offering this?

16 MR. CHELLIS: I am offering it because it's not
17 only a matter of public record, but it also directly
18 addresses this -- the emergency necessity doctrine
19 defense that the United States is offering as part of
20 its motion to dismiss. It's directly relevant in terms
21 of the EPA has funded this emergency response through a
22 certain date, and the Court is asking, you know, at what
23 point in time did the emergency cease, and this document
24 speaks directly to that.

25 THE COURT: And so in the record I currently have

1 the memoranda, which the EPA internally called this a
2 nonemergency cleanup as of that January 2017 date, and I
3 believe that that is Docket Entry 7-3 at page 5. And I
4 also understand the Governor of Colorado declared a
5 state of emergency in the immediate aftermath -- I think
6 that's in Plaintiff's complaint --

7 MR. CHELLIS: Correct.

8 THE COURT: -- and I don't know what added
9 benefit this document you're trying to admit -- how much
10 further do we need to go on this?

11 MR. CHELLIS: Because ultimately the United
12 States needs to show that there was an actual emergency.
13 That's part of our burden of proof in terms of the
14 necessity doctrine and our defense, and this document
15 speaks directly to that because in issuing and finding
16 and improving this emergency removal action, EPA needs
17 to look at certain factors, and those factors directly
18 deal with, you know, immediate threats to public health
19 and the environment.

20 THE COURT: But as I read the complaint,
21 Mr. Hennis calls the immediate aftermath of the blowout
22 an emergency. The Governor of Colorado calls it an
23 emergency. My issue was the Government's saying it's an
24 emergency, exercise of police power, we get to do this
25 with no end date? And now I understand with the

1 Government's concession that there is an end date, and
2 that was one of the questions that I had, was that the
3 Government's emergency ends at least as of 20 -- January
4 2017.

5 Now, whether or not that delta of August 5th,
6 2015, through January 12th, 2017, was an emergency is
7 the sole issue, I don't know that the Court needs to
8 resolve that today. One of the other questions I have
9 for you is if the Government causes the emergency, how
10 can the Government then turn around and say that we're
11 exercising our police power because this is a public
12 emergency that we caused? Because there's a case issued
13 by this Court which says the Court must examine whether
14 or not the Court can self-immunize -- whether the
15 Government can immunize itself when it causes the
16 emergency.

17 MR. CHELLIS: Well, the United States' position
18 would be that a bad actor acted out of what was, you
19 know, contrary to all instructions, as the complaint
20 pleads, and so there's that intervening act, because in
21 those cases that you're talking about that this Court
22 has looked at, what they often look to is some
23 intervening act, and the intervening act here would be
24 that bad actor or bad actors on August 4th, who,
25 contrary to all instructions, created this tortious

1 breach and caused the flooding and the emergency
2 situation in the first place.

3 THE COURT: That's the Government's position that
4 you are welcome to present in a summary judgment
5 argument, but in a motion to dismiss, I have to look at
6 what Mr. Hennis is arguing, and he's arguing that the
7 Government did this, that the government official who --
8 and I don't want to go back to Mr. Way versus
9 Mr. Griswold -- but the Government ordered this. It
10 happened. Now the Government has to pay for it. That's
11 Mr. Hennis' argument.

12 I get that the Government said -- is alleging,
13 and I'm sure in the multijurisdictional and with its
14 contractor -- that this is your fault, not ours. We
15 told you not to do this -- "we" being the government
16 official -- told the government contractor not to do
17 this, and you went ahead and did it anyway, and you
18 caused this catastrophic breach, and that's all well and
19 good from the Government's perspective, but that is a
20 summary judgment issue, not a motion to dismiss issue.

21 I'm not going to allow that document to come in
22 at this time, and I think to the point you're making,
23 that between August 5th, 2015, and January 12th of 2017,
24 I think the record is pretty clear that an emergency did
25 exist. My bigger issue is -- was whether or not the

1 Government was arguing a continuing emergency after that
2 January 2017 date, and I understand that you are not.

3 MR. CHELLIS: Correct.

4 THE COURT: Okay.

5 MR. CHELLIS: Correct, Your Honor.

6 And I know that the Court was interested in
7 certain issues regarding consent, so I'll talk about
8 that as well, and I save consent for last, the third
9 ground for dismissal, and this addresses just the second
10 claim, use and occupation of Plaintiff's property,
11 because unlike those first two grounds, this relates
12 just specifically to the second claim, and I'll put it
13 simply because the alleged facts here I think are even
14 clearer in their support for dismissal.

15 As the Court has noted, Plaintiff was represented
16 by counsel when he signed these documents, and he's not
17 disputing that in the complaint. In fact, the January
18 2021 access order, which is in the record, the complaint
19 first refers to in paragraph 99, states that since
20 August 2015, EPA had requested and negotiated the terms
21 of access with Mr. Hennis at least 16 times, and as far
22 as I understand it, Mr. Hennis is not alleging that he
23 didn't sign these documents. He's just alleging that
24 there was some amount of coercion or duress that made it
25 impossible for him to not voluntarily sign these

1 documents.

2 THE COURT: But doesn't that get him to the same
3 place of my consent was not actual consent?

4 MR. CHELLIS: Right, but this is a legal issue
5 that I believe the Court can decide today based on what
6 has been pled, and, you know, the language in these
7 consent agreements couldn't be clearer. Mr. Hennis
8 consented to EPA "constructing, operating, and
9 maintaining the mine water management system, including
10 but not limited to pipelines, treatment, settling ponds,
11 and the interim water treatment facility."

12 Even more broadly, it allowed for any other
13 actions the EPA determines are necessary to address
14 releases from the Gold King Mine. No one forced
15 Mr. Hennis' hand here. He could have refused EPA access
16 at any point in time. The Court touched on this
17 briefly. He did ultimately refuse after that access
18 order in January 2021. He did, and we're not
19 disputing -- you know, we're not disputing that the EPA
20 is there, you know, with his -- he no longer consents to
21 that occupation post, you know, beginning of March 1st,
22 2021.

23 I do want to clarify, though, that the United
24 States, you know, does have defenses to the claim, that
25 claim, including a special benefits defense and offset,

1 but that is not part of the Government's motion to
2 dismiss, and we can brief that separately should we get
3 to that point. It's just not -- we're not conceding
4 that there are those defenses.

5 THE COURT: And those would go to the issue of
6 damages?

7 MR. CHELLIS: Correct. That defense obviously
8 was not included in our motion to dismiss, which is why
9 we're not talking about it or discussing it today or
10 offering it to the Court. It's not within the scope of
11 the motion to dismiss.

12 THE COURT: Well, your motion does discuss
13 improvements to the property.

14 MR. CHELLIS: Right.

15 THE COURT: And it also discusses consequential
16 damages.

17 MR. CHELLIS: Correct, and we do brief
18 consequential damages, and we do still take that
19 standpoint, that those are not proper in a takings
20 claim. And I think, as you said, the Court of Federal
21 Claims does not bring those claims in. It's not
22 appropriate. The Court lacks jurisdiction in that
23 realm. So we're not disputing fair market value today.
24 We're just disputing those consequential damages.

25 His ultimate refusal to extend the parties'

1 consent agreement past February 28, 2021, is proof of
2 his voluntariness in signing these consent agreements
3 from at least November of 2015, taking us through
4 February 28, 2021.

5 THE COURT: Or enough is enough. You have been
6 here seven years. Enough is enough. That could be
7 Mr. Hennis' position.

8 MR. CHELLIS: Correct.

9 THE COURT: Okay.

10 MR. CHELLIS: That Mr. Hennis might regret
11 signing these agreements I think is one thing, but, you
12 know, legal support to nullify them is another, and what
13 Plaintiff pleads here doesn't rise to that level. You
14 know, a mere recitation of the statutory penalty -- one
15 arrived at by Congress, no less -- doesn't amount to
16 coercion or duress.

17 Waverley View Investors, a decision made by this
18 Court just four years ago, confirmed that. There, the
19 Court found that even though Plaintiff's refusal to sign
20 a right of entry form may have subjected the company to
21 liability for investigation and cleanup costs under
22 CERCLA, the threat of considerable financial loss isn't
23 sufficient to establish duress.

24 THE COURT: And what about the allegation that it
25 was the misrepresentations that caused him to sign these

1 things and the example I threw out earlier of just sign
2 this, we have to clean this mess up -- that being the
3 EPA -- and we'll negotiate something going forward? So
4 we have got you covered. We'll take care of this. We
5 are going to take care of your land. We'll take care of
6 you. We have to get the requisite authorities to sign
7 off on a lease. Just keep signing these, signing these.

8 And his lawyer may well have said to go along to
9 get along, because if you obstruct their ability to
10 clean this up, they are never going to agree to, A,
11 clean this up, or B, lease the property. So the
12 Government could have been -- and this is my
13 understanding of the allegations -- holding these
14 negotiations over his head to get him to consent to sign
15 all these things, and at some point he realized, like,
16 this is never going to happen. I'm done. And how is
17 that not -- that misrepresentation not enough to void
18 these consent signings?

19 MR. CHELLIS: We don't believe that the ongoing
20 negotiations between the parties necessarily negates the
21 defense, and we feel that it falls outside of the scope
22 of this -- of consent, of this argument, and so that
23 would be something that can be addressed at some later
24 point, but we don't believe that the Court needs to go
25 there to reach the conclusion that there was consent.

1 So we believe that the ongoing negotiation -- you
2 know, I can speak to that at some later point. It's not
3 part of the record, but just for the Court's interest in
4 this issue, there were good faith negotiations between
5 the parties. There were appraisals exchanged, not just
6 Plaintiff's appraisal, but two appraisals by EPA, done
7 at EPA's expense.

8 So the negotiations that did occur, that were
9 ongoing while these consent agreements were validly
10 signed, not coerced, that good faith negotiation
11 occurred, but, you know, the EPA was fully invested
12 in reaching some sort of settlement at that point, and
13 it simply didn't occur because Plaintiff wasn't happy
14 with the numbers that those appraisals were offered at.

15 THE COURT: Well, that's what I'm struggling
16 with, is -- and I don't want to start going down the
17 road or tainting me with regard to what numbers were
18 negotiated, but we're at the motion to dismiss phase.

19 MR. CHELLIS: Um-hum.

20 THE COURT: Plaintiff is arguing that I signed
21 these documents because misrepresentations were made to
22 me about a leasing agreement that was going to be
23 executed. If I accept that as true, as I must, how does
24 the Government say that consent is not voided, because
25 consent was derived, according to Plaintiff, based upon

1 misrepresentations. He may have signed the documents,
2 but there were all these other conversations that were
3 happening, and the problem that I'm struggling with is
4 the Government is asking me to throw this claim out
5 based upon the smallest and thinnest of records
6 possible. You talk about negotiations and, you know, we
7 could flush this out, like, why aren't we flushing this
8 out before you ask the Court to rule on it and dismiss
9 claims?

10 MR. CHELLIS: We can only take, you know, the
11 four corners of the document, and we do have that in the
12 record and it does show consent for this particular
13 activity. It's explicitly clear, and Plaintiff isn't
14 disputing that. What Plaintiff is disputing is that
15 there was some form of coercion, and to meet that --

16 THE COURT: And misrepresentation.

17 MR. CHELLIS: -- but to meet that -- you know,
18 right, but the Plaintiff has to make a showing that
19 there was some sort of coercion and misrepresentation,
20 and Plaintiff has not pled that sufficiently, but there
21 is no -- there is nothing alleged in terms of
22 misrepresentation. The bare assertion that there was
23 misrepresentation, sure, but it does not sufficiently
24 plead misrepresentation.

25 THE COURT: But doesn't that go to the four

1 corners of the complaint and what the pleading
2 requirements are to put the Government on notice as to
3 what the claims are? And here Plaintiff is claiming you
4 secured my consent through misrepresentation. The
5 Government is now on notice.

6 I'm struggling because you're asking the Court to
7 hold Plaintiff to a standard in a pleading that I don't
8 think is required, and so my question is whether or not
9 misrepresentation, in and of itself, is not enough to
10 establish duress or coercion.

11 MR. CHELLIS: I guess I'm struggling with this
12 because I'm not seeing where Plaintiffs are pleading
13 misrepresentation sufficiently enough to get through
14 this initial stage. Even consent vitiates takings
15 liability, that's our position, and they have not shown
16 a sufficient and requisite level of misrepresentation or
17 coercion or duress under the standards of this Court,
18 and that would be our position as far as consent goes.

19 THE COURT: Okay. Thank you, Counsel.

20 MR. CHELLIS: And I believe we briefed the issue
21 of signatures, so I'm not going to touch on that unless
22 it comes up later, but I believe that covers it as far
23 as -- as far as the questions that the Court had in
24 terms of consent.

25 THE COURT: Okay.

1 MR. CHELLIS: Thank you.

2 THE COURT: Anything else?

3 MR. CHELLIS: That's it.

4 THE COURT: Thank you, Counsel.

5 MS. HAGEMAN: Your Honor, thank you.

6 Mine is going to be a bit of a scattershot to try
7 to address the issues that have been raised today by
8 both you as well as opposing counsel. A couple of
9 things that I just want to throw out there that I have
10 taken notes of that I think are very important, just to
11 make sure that I clarify the record.

12 We're not talking about rogue actions.
13 Mr. Griswold, who worked for the EPA, was onsite on the
14 4th and the 5th of August as EPA's representative. All
15 of the actions that took place on those two days at the
16 Gold King Mine were at the behest of, pursuant to the
17 instructions of Mr. Griswold, who was employed by EPA to
18 do the very thing that he was doing.

19 Whether there was a Mr. Way who was in the office
20 and said don't do this that day, wait until I get back
21 because I want to watch it happen, too, or whatever it
22 may be, is entirely irrelevant to where we are today.
23 This entire project was run by the EPA.

24 We can look at Environmental Restoration as
25 nothing more than a backhoe -- and I don't mean to

1 insult anybody and call them a piece of equipment -- but
2 that's what they were. They were there at the behest of
3 the EPA to do the project that they did, which was to
4 breach the portal of the Gold King Mine.

5 Now, one of the things that has been raised by
6 the Government is the claim that we have not -- let me
7 find the information here -- that they claim that we
8 have not adequately -- that this is a tort and that we
9 have not adequately pled or asserted that the
10 invasion -- the flooding is what we're talking about
11 now -- is the direct, natural, or probable result of an
12 authorized activity and not the incidental or
13 consequential misery inflicted by the action.

14 All of the things that we have laid out is
15 exactly that. What we have laid out, Your Honor, is all
16 of the reasons as to why this was the direct and natural
17 result of the decisions that they made that day.
18 Everything they did was wrong, but they made them
19 anyway. They intended to do what they did. They
20 intended to breach the Gold King Mine.

21 Yeah, did they create a catastrophe? Well,
22 that's why we're here seven years later. No question it
23 created a catastrophe, but they intended to do what they
24 did, and by "they," I mean the EPA. So when opposing
25 counsel talks about "they," he wants you to believe that

1 Mr. Griswold and Environmental Restoration really have
2 nothing to do with the EPA, but that's not the facts of
3 what we were dealing with.

4 The reason we put the detail into our complaint
5 that we did is to make it clear that they knew or should
6 have known that what they were doing was going to be
7 really bad, and it was. That doesn't turn it into a
8 tort. What it does is they knew that what they were
9 doing was going to create the catastrophe for Mr. Hennis
10 that, in fact, occurred.

11 So I want to make very clear that, in fact,
12 that's why we pled that information, why we included it
13 in the complaint. It was the EPA that made those
14 decisions, and, again, that's specific to the flooding
15 issue itself.

16 THE COURT: And I understood Mr. Hennis'
17 allegations to be Mr. Way may have said don't do this,
18 but Mr. Griswold said go ahead and do this. The
19 contractor did, in fact, do this, and, therefore,
20 according to the complaint, that was the natural and
21 probable consequence.

22 MS. HAGEMAN: That's exactly right.

23 THE COURT: So -- and that's why I was asking
24 government counsel about authority issues, you know, and
25 if I am unclear as to what these gentlemen's actual

1 positions were or their authorities, but that is not for
2 a decision to be made today. It might be a motion for
3 summary judgment down the road of Mr. Griswold and/or
4 Mr. Way possessed or lacked the requisite government
5 authority to authorize a specific act.

6 MS. HAGEMAN: That's correct, and we will be
7 presenting evidence on that, Your Honor, but it doesn't
8 go into the complaint, as you just noted a moment ago.

9 There was another question that was raised during
10 the course of your questioning or when you were laying
11 out some of the legal issues, and that included we have
12 an allegation in there that they could have -- "they"
13 being the EPA, the United States -- could have
14 constructed this water treatment facility on BLM land,
15 and I think that the Court had a question about, well,
16 would that make any sense? That would make it further
17 away from the mine. That might create a different issue
18 with the pipeline and those sorts of things.

19 Again, this goes back to the intentional taking
20 of our client's property, and it also goes ultimately to
21 the value of this property, so that's part of the reason
22 that we put that information in there. And then also
23 you'll notice that the United States continues to come
24 back at Mr. Hennis and say, well, they didn't say that
25 our actions were unreasonable. It wasn't unreasonable

1 to build this water treatment facility on Mr. Hennis'
2 property. And, again, when we go to trial in this case,
3 Your Honor, I think we will show that it was
4 unreasonable, and there's a couple of reasons why.

5 If you look at the photographs that we presented
6 to you today --

7 THE COURT: And for the record, they will be
8 admitted without objection from the Government. I meant
9 to do that earlier.

10 MS. HAGEMAN: Thank you.

11 The very first photograph that's there, if you
12 look on the right-hand side, you will see a county road.
13 The BLM land is near the end of that photograph towards
14 the -- what you're looking at is essentially towards the
15 west on that photograph. The BLM is on the other side
16 of Mr. Hennis' property. What you're seeing in that
17 photograph is the nature of part of the United States
18 footprint that is now on Mr. Hennis' property. This
19 doesn't show the entire footprint related to that water
20 treatment facility. This is only part of it, and it
21 demonstrates the magnitude of the taking that we're
22 talking about.

23 Pipeline number one would have been buried, could
24 have gone right down along that county road, and
25 Mr. Hennis' property would have been able to stay intact

1 rather than to have this kind of a situation put on it.
2 So when we come to the reasonableness and the question
3 being, well, maybe it could have -- there wouldn't have
4 been a reason to put it on BLM land, again, these are
5 questions of fact for trial. They don't have relevance
6 here.

7 I just wanted to clarify that because it was a
8 question that was raised earlier in the proceedings
9 today as to what relevance at all does the BLM land
10 have, and that's one of them right there.

11 THE COURT: So can I ask, I see in this
12 photograph there is a tanker truck and a -- I'm calling
13 it a metal shed, but I'm sure that it's a lot bigger
14 than a shed -- and then some sort of an arced-shaped
15 building, and you said this is a partial footprint. So
16 are there other buildings?

17 MS. HAGEMAN: Back behind me where I'm standing
18 is -- are other areas where they have been drying some
19 of the stuff that continues to be -- that they're
20 treating. So this is just part of the area. This is
21 part of Mr. Hennis' property. This is the water
22 treatment facility here. You've got the Quonset hut,
23 and then this is the equipment from the EPA.

24 THE COURT: Okay. So the structures, the actual
25 physical buildings that I see are the facility in its

1 entirety, but I understand that there are those settling
2 pools, and those are the -- are surrounding other areas
3 of the property, because the record is unclear, too, how
4 many settling pools are there, how much of the property
5 does it cover, obviously all questions of fact, but I'm
6 trying to get a sense of the overall footprint, and my
7 question is, are these -- is this the nature and extent
8 of the buildings and the structures that are on the
9 Gladstone property?

10 MS. HAGEMAN: For the most part. There might be
11 some fencing behind me, but for the most part, that's
12 exactly what that is.

13 THE COURT: Okay.

14 MS. HAGEMAN: But it continues to grow, so --
15 over time, and, again, that's just to give you an idea
16 of the situation out there on the ground.

17 THE COURT: And where is the mine?

18 MS. HAGEMAN: Behind me. So if I'm looking west
19 as I take this photograph, it's up on the -- it's up on
20 the mountain behind me.

21 THE COURT: Okay.

22 MS. HAGEMAN: You take a road up to the other
23 side of Bonita Peak, and it is right up there
24 (indicating) if you're looking. So it's -- it's back
25 behind the person taking the photograph there.

1 So some other things that I think are very
2 important, we've talked quite a bit about consent, and
3 here was the situation that Mr. Hennis was confronted
4 with, a couple of things, and if you read the letter
5 from November of 2015, I think it's very clear. It's
6 bolded on the last page, and it -- Mr. Hennis had two
7 options, and from the United States' standpoint, it was
8 very simple. Heads, we win. Tails, you lose.

9 You either agree to allow us to continue to
10 operate a water treatment facility that we built on your
11 property without your knowledge or consent, or we'll do
12 it anyway, and in that event, we're going to charge you
13 \$59,000 a day. So either way we're going to be
14 operating this water treatment facility here.

15 THE COURT: Right. And to my point, Mr. Hennis
16 could have marched into Federal District Court in
17 Colorado and said, "I want a TRO, I want a preliminary
18 injunction, stop the Government from invading my
19 property."

20 MS. HAGEMAN: And from a -- from the standpoint
21 of what he could have done, I don't necessarily disagree
22 except for this: Mr. Hennis, from the beginning,
23 attempted to work with the EPA to find a resolution to
24 all of this, and that's why it goes to a question of
25 fact, and I'm not bringing that in because I think it's

1 inappropriate at the time of a motion to dismiss to go
2 into all of that detail.

3 Mr. Hennis was not trying to fight with the EPA.
4 All he was trying to do was be compensated. He
5 recognized that there was an emergency situation. When
6 he heard about this, he wasn't even onsite. He heard
7 about this, and it's like, "Oh, my goodness, gracious,
8 what have they done to the Gold King Mine?" He rushes
9 up there and he's, like, "Oh, yeah, you can use my
10 property for an emergency purpose. Stay away from the
11 Herbert Placer," which is what you're seeing in this
12 photograph right here, "stay away from that."

13 THE COURT: What was that? I'm curious.

14 MS. HAGEMAN: Because he wanted to keep it intact
15 and use it for the other purposes that we talked about.
16 He was concerned that the EPA was going to create an
17 environmental disaster. We have included that in the
18 complaint, and for goodness sakes, they ultimately did.
19 But he said, "Yeah, whatever we need to do, we'll help.
20 You can temporarily use my property. Let's see what we
21 need to do to address the emergency that they're talking
22 about."

23 There is no question that for a period of time
24 there was that consent, and he continued to try to work
25 with the EPA, and he signed the consent documents, but

1 as you've indicated, we have also made allegations about
2 misrepresentation. Now, not only was the
3 misrepresentation in relation to the scope of the 2011
4 agreement that -- or administrative order that had been
5 imposed against him -- and as we clarified earlier, that
6 administrative order did not include the Herbert
7 Placer -- but even in their letter from November of
8 2015, they implied that it did.

9 Did he have counsel? Yes, he did. There is no
10 question. We are not objecting to that. But also, as
11 counsel, I know that I work with clients all the time
12 and say, "Let's work with the other side and see if we
13 can find some way to reach a resolution. You don't want
14 to run off to court." There's a lot of reasons we don't
15 want to do that.

16 But here we are seven years later, and the EPA
17 went out there, they not only blew out my client's Gold
18 King Mine -- that's not part of this case -- but they
19 flooded his property, came in and constructed a water
20 treatment --- a \$2.3 million water treatment facility on
21 his property, and they never paid one dime in rent.
22 They never paid him one dime to use his property in
23 7 1/2 years.

24 Now, I read the Fifth Amendment to the United
25 States Constitution, and to me there is absolutely no

1 question whatsoever do we have an unconstitutional
2 taking, and I believe that today that was admitted. I
3 believe that one of the things that we have is that the
4 Defendants have now conceded that Mr. Hennis did not --
5 they do not claim that he gave consent past 3/1/21. I
6 would argue it's December 31st, 2020, and we can argue
7 that, and if we need to argue that today, I'm prepared
8 to do it --

9 THE COURT: Well, is that argument based on the
10 fact that in November of 2020 the Government alleges
11 that Mr. Hennis gave them consent until the end of
12 February 2021, and Mr. Hennis is saying that that is
13 part of the misrepresentation and coercion campaign?

14 MS. HAGEMAN: Not part of the misrepresentation
15 and coercion necessarily, but as of January 6th, they
16 said we're done working with you anymore, and they filed
17 the administrative action, and at that point in time,
18 they took his property.

19 At that point in time, there's no question
20 whatsoever that they took his property for purposes of
21 the -- of the operation -- continued operation of the
22 water treatment plant. So what I'm saying is although
23 they have filed a very broad and all-encompassing motion
24 to dismiss, I believe that even they have conceded today
25 that there is no way that this Court could dismiss Todd

1 Hennis' claim about the taking associated with the water
2 treatment facility, its construction and operation.

3 What we're battling over a little bit may be
4 dates, and that's where the question of consent comes
5 in, but I still believe that that's a question of fact
6 that has to be decided after we've had the opportunity
7 to do discovery and ask the very questions and establish
8 the very facts that we've talked about today.

9 So I think that -- I don't believe that this is a
10 terribly complicated situation that we're in. What has
11 complicated things is that for some odd reason the
12 United States Government, after taking my client's
13 property, squatting on his property for seven years, and
14 finally saying enough is enough, even they have admitted
15 that's what he should have done from the beginning.

16 He should have run to court. He should have come
17 to you. He should have come to the Court of Claims and
18 said, "You are taking my property," and yet when he does
19 that, what do they do? They file a motion to dismiss
20 and say, "You know, sorry. It was an emergency."

21 And so here we are in August of 2022 arguing over
22 something that they said, "Well, we could have argued
23 over this seven years ago." That isn't where we were.
24 The fact is we have got an unconstitutional taking
25 related to the flooding. We could argue that that's

1 temporary, but we've got now what I believe is a
2 permanent taking of his property with the water
3 treatment facility that they have out there, and I
4 believe that today the United States Government has
5 conceded that they have taken his property as of, again,
6 I would argue no later than December 31st, 2020.

7 THE COURT: Let me stop you there because you
8 were very careful with your words the last time you
9 talked about the Government's concession. What I
10 understand the Government's concession is, after March
11 1st of -- starting on March 1st, 2021, that the consent
12 issue is no longer, and also of that date -- as of that
13 date or earlier, 2017, the necessity doctrine is off the
14 table.

15 The Government said that it does have an
16 alternative and other defenses, some on the issues of
17 damages, but they have conceded that the issues of
18 consent and necessity all are gone as of March 1st,
19 2021.

20 MS. HAGEMAN: According to them. I would argue
21 that it was earlier than that.

22 THE COURT: Yes, and I get that, but I just want
23 to make sure that I'm capturing any concessions by the
24 Government, because the first time you were
25 extraordinarily accurate -- you were accurate in

1 describing it. This time you said that they conceded a
2 taking, and they are not conceding a taking. They are
3 conceding certain defenses don't apply after certain
4 dates.

5 MS. HAGEMAN: Okay, and I think that that is
6 absolutely a fair clarification, and as far as going to
7 the emergency, I think something else that's extremely
8 important to clarify is that this is another area where
9 I believe that the United States has been intentionally
10 vague, and that is to try to argue that the 3 million
11 gallons and 800,000 pounds of heavy metals, that is what
12 created the emergency, which provides them a defense to
13 the takings claim. That happened before they did
14 anything.

15 That's what happened when they blew out the Gold
16 King Mine, and one of the things that we will be
17 presenting when we go to trial on this case are videos
18 that show what the EPA did when they took out the portal
19 to the Gold King Mine. So even in their emergency
20 defense, I want to make it very, very clear -- and I
21 think it's extremely important -- that, again, on a
22 motion to dismiss it would be inappropriate to dismiss
23 this case based upon the fact that they may have a
24 defense of an emergency.

25 The case law is very, very clear. That is

1 fact-specific, and it can only be resolved either
2 through a trial or on a motion for summary judgment as
3 you have -- as you have so obviously raised and pointed
4 out, but I do want you to understand that it was --
5 their construction of this water treatment facility and
6 their operation was this was not to remediate the
7 disaster that they created on August 4th and 5th, 2015,
8 in relation to the 3 million gallons and the 800,000
9 pounds.

10 They had the opportunity over a three-month
11 period to decide where to site it, where to locate it,
12 what kind of amenities were there that were -- that
13 would be necessary to operate it, and that's another
14 reason why we raised the issue of the BLM lands being in
15 the vicinity, because it wasn't necessary. It was not
16 necessary to take my client's property to construct this
17 water treatment facility. While they needed to build a
18 water treatment facility, there was no emergency that
19 required them to take my client's property to do it.

20 THE COURT: Right, but you get my point earlier
21 of if they built the water treatment plant on your
22 client's property or a neighboring property and put
23 pipes in on your client's property, your client would
24 still have a takings claim.

25 MS. HAGEMAN: Absolutely.

1 THE COURT: The Government installs cable wires
2 and there's a takings claim there.

3 MS. HAGEMAN: And I don't disagree with that at
4 all and I appreciate that clarification. No matter how
5 small, it's still a takings, and I agree with that, but
6 it wouldn't have been nearly as destructive to my
7 client's property as it has been.

8 THE COURT: I want to touch on the emergency for
9 the moment. You talked about the cleanup, and this was
10 an environmental catastrophe by all accounts, and so
11 when the Government has to come in and do HAZMAT
12 cleanup, I understand that the initial blowout -- it's
13 almost as if, you know, a fire comes in and destroys a
14 house or part of a house or just a little bit of a
15 house, but then when the firemen come in and spray water
16 everywhere, it's the water damage, and then correcting
17 and fixing and cleaning up that water damage takes
18 weeks, months, if not years.

19 It's not the initial blowout of all of this
20 sludge. The sludge seeps into the land, and that's got
21 to be cleaned up, so -- and it seeps into the water, and
22 clearly this overwhelmed the Cement Creek and into the
23 San Juan River, and so that wasn't going to be cleaned
24 up in a matter of days, weeks, or months. That's going
25 to take years.

1 So I don't want to get lost in the -- this 800
2 million pounds of minerals came rushing out and it moved
3 on and that's over, and why was the Department -- why
4 was the EPA even there cleaning up because the stuff was
5 gone? It wasn't. It had seeped into the land.

6 MS. HAGEMAN: So -- and I get -- I will agree to
7 the extent that those are all questions of fact, and
8 that's why it would be inappropriate to dismiss this
9 case based upon the concept of necessity or emergency,
10 and, again, it's another reason as to why we point out
11 that there were other avenues available.

12 So if you're dealing with a fire and that fire is
13 barreling down towards a town and you've got a strip of
14 land between the town and the fire, that's going to be
15 the only strip of land you're going to be able to do
16 your back-burning or whatever it may be, covering it
17 with foam, retardant, whatever it might be. That isn't
18 necessarily the situation we were dealing with, and that
19 becomes a question of fact.

20 THE COURT: So is it fair to say that the
21 doctrine of necessity came into play at some point?
22 There is a dispute between the parties as to when it
23 ended, because everyone agrees that on November -- I'm
24 sorry, August 4th or 5th -- the 5th, I believe, was the
25 breach -- of 2015, that initial breach triggered

1 necessity of the EPA to come in and clean this thing up.
2 Now, whether or not the EPA can legally invoke the
3 necessity doctrine because they caused the emergency --

4 MS. HAGEMAN: That's right.

5 THE COURT: -- is one question. The second is if
6 they can, in fact, invoke it, how long did that
7 necessity last, much like if your client consented --
8 and I understand that he did consent at some point to
9 some things -- so defining the nature and scope of his
10 consent is a factual issue that needs to be explored,
11 but the issue of consent is out there, the issue of
12 necessity is out there, and the issue of emergency is
13 out there.

14 And so -- and obviously the issue of tort is out
15 there, but I think that that's now at least in part off
16 the table because we have clarified that your client is
17 not alleging a taking for the breach --

18 MS. HAGEMAN: No.

19 THE COURT: -- but it is the fallout, what we are
20 calling the flooding, and then the occupation.

21 MS. HAGEMAN: That's exactly correct, and
22 everything that you have stated there is 100 percent
23 accurate, but what I -- that's where -- that's why we
24 get to do discovery. That's why we need to do
25 discovery, because the extent of the emergency, whether

1 the response was reasonable, whether there were
2 alternatives available to the EPA, but they really liked
3 my client's land and thought, "You know, that looks
4 awfully good over there, I think we'll take that one
5 instead of going in and using the BLM land" --

6 THE COURT: Well, I see the allure of the cement
7 pad was already there, and we know that workers were
8 already working in that particular area, so why not
9 build it there from the EPA's perspective?

10 MS. HAGEMAN: And I do, but that's also why they
11 owe my client money, because then they took that,
12 admittedly so, for purposes of responding to the
13 emergency or the catastrophe that they created and the
14 ongoing situation out there on the ground. So that is
15 the classic example of an unconstitutional takings if
16 they refused to compensate my client for the use of that
17 property or for the taking of that property.

18 And then again, I think that we -- we are both
19 landing on the same issue, which is the long-term
20 cleanup. It's not an emergency. It's clear that,
21 again, as of January 2017 -- and I haven't seen that
22 document or had an opportunity to study it yet -- even
23 the EPA is saying it was not an emergency situation out
24 there. So, again, there's no defense to the takings
25 claim even by -- from their standpoint even if the

1 emergency or necessity doctrine applied, which I'm not
2 saying that it does, but even by their analysis.

3 And then also I would argue that the EPA can't
4 lower its costs and efforts by transferring those costs
5 to the Plaintiff. So, again, looking at that concrete
6 pad, looking at the land, looking at the amenities that
7 it had, they don't -- the United States doesn't get to
8 say, well, we can go ahead and take that because it's an
9 emergency, because that's going to make our costs lower
10 than if we went and built on our own property, but,
11 again, these are all questions of fact.

12 So the last thing that I want to come down to
13 is -- there are just a couple of other points that I
14 think are really important to make. My client did
15 say -- he finally said enough is enough after attempting
16 to work with the EPA for seven years. He finally said
17 enough is enough, and he's filed this lawsuit.

18 And as I have made very clear and that we have
19 pled in our briefs, I think that the briefs lay this
20 out, and I think the complaint lays this out. You know,
21 one of the things that I did in drafting this complaint
22 was I didn't want to fight over a lot of the things of
23 whether we had adequately pled a complaint against the
24 EPA. We all know what the standard of pleadings is. I
25 believe that our complaint was 40 pages, laying out in

1 great detail what happened and what Mr. Hennis has
2 suffered as a result.

3 And instead of working and coming in and saying,
4 well, okay, let's go through discovery and see if you
5 can meet your burden of proving all of this, we are just
6 going to come in and we are going to file a motion to
7 dismiss, and the reality is is that this is the way that
8 the EPA and the Federal Government have treated
9 Mr. Hennis from the beginning.

10 They blew out his mine. They flooded his
11 property. They took his property. They built an
12 enormous water treatment facility. They have been
13 operating it for seven years. At no time have they ever
14 treated him with the respect that he deserves or
15 addressed the problems that they themselves created, and
16 this is just another example of that, having to come
17 in and -- and we're happy to go do discovery. We're
18 happy to go take depositions and find out what authority
19 Mr. Griswold had and Mr. Way had.

20 We have gotten some of that information. We know
21 what they did out there, and none of what they did was
22 good, and yet here we are trying to go forward with a
23 case where Mr. Hennis could finally get some relief for
24 the taking of his property, and here we are fighting
25 over things that they've even had to admit today weren't

1 exactly correct in the briefs that they filed.

2 So you can probably tell I'm a little bit
3 frustrated because I don't think that this is the way
4 that the Government ought to treat people, and so I
5 would request, with all respect, Your Honor, that their
6 motion to dismiss be denied, that we be allowed to go
7 forward with discovery and prove our case, and that we
8 finally get some relief for Mr. Hennis for what he has
9 suffered over the last seven years.

10 THE COURT: And to that point, I'd like you to
11 touch on damages for a moment, and, in particular, the
12 consequential damages, and I understand that Mr. Hennis
13 would like to build up the property for use by the local
14 ski resort -- and maybe even sell it to the ski resort,
15 I don't know -- but this Court cannot grant such relief.

16 MS. HAGEMAN: And maybe that was a mistake on my
17 part of not clarifying that better. We are not seeking
18 consequential damages. We have included that
19 information so that when we get to the issues of
20 appraisals and the value and the use of this property,
21 we have documented and put a marker in the sand as to
22 how this property has been historically used and how it
23 was intended to be used if they hadn't created the
24 disaster that they created.

25 We're not seeking a compensation that is separate

1 and specific for consequential damages. We're seeking
2 that Mr. Hennis be paid the value of the property, and
3 all we're looking at is all of the bundle of the sticks,
4 the water rights, the development rights, the mineral
5 rights. All of that goes into the value of what this
6 property is, and, again, that's what we'll prove at
7 trial, is what the value of this property is. We're not
8 asking for anything other than the opportunity to do
9 that, and that's the kind of information that we would
10 be presenting.

11 THE COURT: Okay. Thank you, Counsel.

12 MS. HAGEMAN: Thank you.

13 THE COURT: Before you -- I want to ask the court
14 reporter if she's okay.

15 THE REPORTER: Yes, I'm fine.

16 THE COURT: I will ask counsel for the United
17 States to come back up.

18 MR. CHELLIS: And I don't want to take up too
19 much of the Court's time, but I did want to touch on a
20 few things that were brought up in response by opposing
21 counsel. I want to clarify the activity that occurred
22 on August 4th in terms of the scope of the project. The
23 project was not to breach the Gold King Mine and release
24 3 million gallons of untreated acid mine drainage. You
25 know, the project was an assessment project. That was

1 the point of the project as it was dictated and
2 instructed by Mr. Way. What was carried out on August
3 5th is quite different from what was instructed and what
4 the point of the project was. So I just want to clarify
5 that.

6 There was no intent to breach the mine portal,
7 obviously. You know, the direct natural and probable
8 result of that work is not the release of millions of
9 dollars of untreated acid mine drainage. That was not
10 the purpose of the project as instructed. It might have
11 been carried out differently on August 5th, but that's
12 not what was instructed by Mr. Way.

13 THE COURT: Right, and I don't think Mr. Hennis
14 is arguing that Mr. Way directed the contractor to blow
15 up the mine or that he told them not to do it and
16 Mr. Griswold came in the next day and said to blow up
17 the mine. I mean, a kind of simple analogy would be
18 holding a giant water balloon and Mr. Way saying, "Don't
19 touch it," and Mr. Griswold saying, "Just put a little
20 pin in it and see if you can not get more than a drop of
21 water out," and the thing just exploded.

22 Putting a pin in a balloon and having it pop is a
23 natural consequence of that action, and I -- my
24 understanding of the complaint in its most simplistic
25 form is that, that Mr. Griswold came in and gave

1 different instructions than Mr. Way had given -- right
2 or wrong, and clearly, at the end of the day, they were
3 wrong -- and the instructions -- and we don't know what
4 those instructions were -- caused this catastrophe.

5 MR. CHELLIS: Well, we do know what those
6 instructions were as alleged in the complaint in the
7 sense that it says that Mr. Way said to do X, Y, and Z,
8 and it alleges that instead of doing those things, they
9 did these other things, so the failure --

10 THE COURT: Right, but Mr. Way was away on
11 vacation. It was Mr. Griswold who was in charge on the
12 scene that day, and we don't know what Mr. Griswold told
13 everyone. And as I said earlier, Mr. Griswold could
14 have said, "Disregard what Mr. Way told you. I am in
15 charge, and I am telling you to dig," and that's what
16 happened, but -- well, I'm sorry, we don't know exactly
17 what happened, but according to the complaint, that play
18 out of the facts is possible.

19 Mr. Hennis was not there. All Mr. Hennis knows
20 is that on the 4th, he knows by information and belief
21 that Mr. Way said don't dig. The next day Mr. Griswold
22 gave some directives, and it wasn't, as far as we know,
23 "Listen to what Mr. Way said." It was do something, and
24 the contractors breached the mine, and the factual issue
25 is what instructions Mr. Griswold gave, whether or not

1 those instructions were followed, and whether or not
2 what was followed was a natural or -- caused the breach
3 of the mine.

4 I don't have anything in front of me that answers
5 any of those questions. I have allegations that I must
6 accept as true.

7 MR. CHELLIS: Correct. And I guess the point
8 that I'm trying to make is that, yes, the allegations in
9 the pleading identify Mr. Way as the lead -- it says
10 "lead" -- and then there's -- he has a certain set of
11 instructions that he gives prior to his taking leave,
12 and those instructions are explicit, and yet contrary to
13 those instructions, Mr. Griswold, per the complaint, and
14 those who were present that day referred -- yeah, those
15 who were present that day acted contrary to those
16 instructions.

17 THE COURT: Yes, exactly, and the questions are,
18 was -- and I pointed these out earlier -- was
19 Mr. Griswold -- what was the level of his authority in
20 Mr. Way's absence? I don't know based upon the
21 complaint and the description, which I am asked to
22 accept as true, that he was the foreman or the person in
23 charge, and that means that -- the person in charge
24 means authority.

25 Now, the Government may come back and say that he

1 was -- that Griswold was Way's assistant and had no
2 independent authority and his sole responsibility was to
3 carry out Mr. Way's orders. That may all well be true,
4 but it is not in the record today, and that is why I
5 keep pressing this issue over and over again.

6 And I understand that the Government's position
7 is probably going to be at the end of the day that
8 neither Mr. Way nor Mr. Griswold were authorized to
9 direct anyone to breach this mine, especially given the
10 fact -- and I think this is in the complaint -- that
11 Mr. Way already scheduled the Army Corps of Engineers to
12 come examine the mine.

13 So the complaint is clear that Mr. Way did not
14 want this mine to be breached. We don't know what
15 Mr. Griswold did. We just know that he didn't follow
16 Mr. Way's instructions. And we also don't know what
17 level of authority or what actual position Mr. Griswold
18 had, which is why I keep pressing this issue of how is
19 this not better left for summary judgment than a motion
20 to dismiss, because for me to dismiss now would require
21 me to adopt the Government's facts that are not in
22 evidence.

23 MR. CHELLIS: I understand the Court's position.
24 I did want to touch on exactly what the
25 Government's position is in terms of liability beginning

1 with March 1st, 2021. We are not conceding all
2 liability beyond that point. We're preserving certain
3 arguments that go to a special benefits defense and
4 offset. So we are not conceding all liability
5 past March -- you know, past February 28, 2021. We're
6 simply saying that our consent argument ends there, and
7 that's it.

8 THE COURT: Right, and necessity ended in 2017.

9 MR. CHELLIS: Correct.

10 THE COURT: Right. And I believe that
11 Ms. Hageman and I had an exchange that we agreed on
12 that, that necessity comes in unless the Government's
13 precluded as a matter of law from raising it because
14 they caused the breach, and consent may or may not come
15 in -- or actually comes in at some points, depending on
16 whether or not coercion, duress, or misrepresentations
17 come in to play -- and emergency and police powers come
18 in at certain points.

19 I think what the parties disagree on is when they
20 end. I think everyone agrees that as soon as the breach
21 happened, you had an immediate consent, you had an
22 immediate emergency and necessity and police power, but
23 at some point they end. The Government concedes that
24 after January of 2017, the emergency ends. After March
25 1st, or on or after March 1st of 2021, consent ends for

1 the Government.

2 Mr. Hennis says that it ended before that, but
3 that's a factual issue or an issue of duress,
4 misrepresentation, and coercion that the Court may or
5 may not be able to decide today based upon the legal
6 arguments advanced.

7 MR. CHELLIS: Correct.

8 THE COURT: And there are also issues of damages
9 and the nature and extent of what is recoverable in this
10 case, but I understand now that Mr. Hennis is
11 effectively conceding that he cannot recover the amount
12 of money he would have sold the property for to an
13 independent developer for the ski resort and/or if he
14 had developed the property himself with condominiums or
15 some other spa, how much money he would have raked in
16 over the years.

17 Mr. Hennis has just -- not just -- but Mr. Hennis
18 is arguing those facts to support the valuation and the
19 fair market value of the property to better assess what
20 he claims the Government took, and once we figure out
21 what the periods were -- or period -- of actual taking,
22 we will assess the amount of damages based upon I guess
23 his heavily litigated valuations and appraisals by
24 experts as to the value of the property.

25 Now, one issue that I would also like to call

1 Plaintiff's counsel up again after you're done to talk
2 about is the rental value versus the damage to the
3 property and whether or not Mr. Hennis is seeking both
4 of those, because it's the \$11,000 a month and the \$3
5 million in damages. That's one issue that we didn't
6 talk about that I would like to talk about, but I will
7 give the floor back to the Government.

8 MR. CHELLIS: Understood. And I won't belabor
9 the point on consent other than to say -- and I think
10 the Court has reiterated this point -- Mr. Hennis had
11 options. He could have gone to court once he got that
12 access order. That option was available to him at any
13 point in time, and he chose not to. It's not EPA's --
14 it's not EPA's responsibility to tell him to do that
15 while -- especially while represented by counsel, and
16 Plaintiff isn't saying that he wasn't represented by
17 counsel at any point in time while these negotiations
18 were ongoing.

19 THE COURT: But you have to at least -- you don't
20 have to accept -- but understand his point of his then
21 lawyer telling him you're never going to get a dime from
22 the EPA unless you cooperate, plus you need your
23 property cleaned up, and if they're not here, they're
24 not cleaning your property, and the argument is that he
25 was strung along believing that a deal was coming that

1 never came.

2 MR. CHELLIS: And I guess I am just not seeing
3 that misrepresentation being shown in his pleadings, and
4 maybe that's something that we address at some later
5 point, but I just want to point out that I don't see
6 that as of today in the pleadings. I don't see that
7 misrepresentation argument being made or fleshed out.

8 And, sure, all they have to do is allege, you
9 know, that to a requisite level. I just don't see that
10 that level is being reached, but fair point. I
11 understand your position, Your Honor.

12 And I do want to touch on what EPA is doing
13 today. This may not be necessarily relevant to our
14 motion to dismiss, but I do want to clarify that there
15 was an ongoing relationship between the parties since
16 2008 for a reason. EPA was doing assessment and cleanup
17 work, and that work prior had been done by Sunnyside, as
18 alleged in the complaint, and EPA may not be there in
19 response to an emergency at this point, but it's still
20 addressing threats to the public health.

21 There is still -- there is seepage and there had
22 been seepage ongoing for years prior to his purchasing
23 the property, as pled in the complaint. So EPA's
24 presence there is a necessary -- you know, they may not
25 be addressing an emergency, but they are still

1 addressing threats to the public health.

2 THE COURT: And I can see from the Government's
3 perspective that this Gold King Mine was a ticking time
4 bomb --

5 MR. CHELLIS: Correct.

6 THE COURT: -- filled with all of this sludge and
7 toxins and chemicals that was going to breach at some
8 point. It could have been breached a thousand years
9 from now or tomorrow. The EPA was there to try to,
10 ironically, avoid the disaster that actually happened
11 and doing its best to take care of it, and I assume that
12 at the end of the day, when and if EPA does vacate the
13 premises -- and I don't know that much about mining, I
14 don't know if there's a continuing formation of this
15 sludge that's going to continue to pour out for all
16 eternity or whether there's an end -- and so if the EPA
17 leaves, Mr. Hennis, despite the years, if not decades,
18 of their presence, at some point his property will be
19 more valuable because the ticking time bomb is gone, and
20 those are all issues of damages.

21 MR. CHELLIS: Right. And, you know, as I said,
22 think we can address the special benefits defense and
23 offset at that later point. It's not really part of the
24 Government's motion to dismiss, but that is something
25 we're prepared to argue, yes. And I think that's it.

1 Thank you.

2 THE COURT: Thank you, Counsel.

3 Ms. Hageman, if I could ask you to address the --
4 I appreciate and understand the \$11,000 a month.
5 Obviously that will be contested by the Government at
6 some point, but the damage to the property, the \$3
7 million and a lump sum payment.

8 MS. HAGEMAN: That's just the permanent takings.
9 If you look at that -- if you look at the photographs
10 that we've provided to you, Your Honor, I think that
11 after seven years, I think that it's completely
12 reasonable to argue that this is a permanent takings of
13 his property, and that is the value that we have put on.
14 We're required to provide a number when we file the
15 complaint. We hired the appraiser to do that.

16 THE COURT: But your valuation is higher than the
17 appraiser's valuation. I thought his was 2 --

18 MS. HAGEMAN: It's two different dates. One is
19 as of August 5th, 2015, and the other one is as of
20 January 6th, 2021, depending on how the Court wanted to
21 evaluate what the date of the takings was.

22 THE COURT: Got it.

23 MS. HAGEMAN: So it comes back kind of to that
24 consent issue. So if the consent is there, then the
25 valuation should be done as of January 1, 2021 --

1 January 6th, 2021 is our argument, and their argument is
2 March 1, 2021, as to when the actual takings took place.
3 And so it's just two different numbers based upon two
4 different times.

5 THE COURT: Got it.

6 MS. HAGEMAN: That's the 2 1/2 million versus the
7 3 million, and then the \$11,000 per month in rent is
8 what we believe that Mr. Hennis is entitled to for the
9 intervening period of time.

10 THE COURT: Okay. Thank you, Counsel.

11 MS. HAGEMAN: Thank you.

12 THE COURT: It is 12:25. I do intend to rule
13 from the Bench today. I would like to take half an hour
14 to collect my thoughts. So we will stand adjourned
15 until 1:00 p.m. if that works for Plaintiff's counsel
16 and for the Government.

17 MS. HAGEMAN: Um-hum.

18 MS. TARDIFF: Yes.

19 THE COURT: We stand adjourned.

20 (A brief recess was taken.)

21 THE COURT: Please be seated.

22 I'd like to begin with one housekeeping matter
23 that I forgot to address before we adjourned, and that
24 was to ask Plaintiff's counsel whether they have had an
25 opportunity to show Government's counsel proposed

1 Exhibits A and B to Plaintiff's complaint, which were
2 cited at page 11, paragraph 52, that were not previously
3 filed.

4 MS. HAGEMAN: Yes, Your Honor, I have, and they
5 have no objection to us filing these.

6 THE COURT: Okay. In the order that I will issue
7 after this hearing, I will direct you to file them by
8 leave of the Court, and that way there will be no issue
9 with the Clerk's Office.

10 MS. HAGEMAN: Okay. Thank you, Your Honor.

11 THE COURT: Counsel, I would like to thank you
12 for indulging me in answering all of my questions this
13 morning and early into the afternoon. I thought both
14 sides were extraordinarily well prepared and were able
15 to answer all of the questions I had, and so I've -- as
16 I indicated earlier today, I wanted to issue a Bench
17 ruling. This case and this matter has gone on for some
18 time, and I didn't want to further delay it by waiting
19 until I had an opportunity to issue a written decision
20 in this matter.

21 As I noted at the outset, I have read the
22 complaint filed in this case, Docket Entry Number 1, as
23 well as the parties' briefs addressing the Government's
24 motion to dismiss for failure to state a claim upon
25 which relief can be granted under Rule 12(b)(6) of the

1 rules of this Court. The briefs were filed at Docket
2 Entry Numbers 7, 10, and 11, and I have considered the
3 arguments of counsel advanced today, and, again, I'm
4 prepared to issue a ruling from the Bench.

5 The order that I issue after this hearing will be
6 very short adopting all of the statements I'm prepared
7 to make at this point. So as to not bury the lead, the
8 Government's motion is denied in its entirety. In
9 support of this ruling, the Court offers the following:

10 Subject to the following two amendments, the
11 Court incorporates the recitation of the material facts
12 shared with the parties in open court at the outset of
13 today's hearing, and those two facts are, first, my
14 reference to the Gladstone property as uninhabited and
15 remote. I have reread paragraph 19 of the complaint in
16 which the Plaintiff states that the Gladstone property
17 comprises approximately 33.4 acres of land that has
18 historically been used for a variety of activities,
19 including water treatment, industrial activities,
20 storage of industrial equipment, staging area
21 facilitating access to and operation of surrounding
22 mines, and as a high-density town site, historical town
23 of Gladstone, Colorado.

24 Plaintiff also represented during oral argument
25 that there is a high energy power line running through

1 the property. So I will be removing the word
2 "uninhabited." I think it is somewhat remote, but I
3 think Plaintiff's complaint, paragraph 19, better
4 identifies what the property is.

5 The second fact regards the 2011 administrative
6 order issued by the EPA, which did not include the
7 Herbert Placer portion of the Gladstone property;
8 however, Plaintiff's takings claims do not concern the
9 nearly four-year access between the issuance of the 2011
10 administrative order and August 2015 when the events of
11 August 4th through 5th, 2015, caused the breach of the
12 Gold King Mine.

13 Plaintiffs' takings claims, as confirmed during
14 oral argument, relate to the flooding of Plaintiff's
15 property after the breach of the mine on August 5th,
16 2015 and subsequent instructions and operations of the
17 water treatment plant that continues to this day, August
18 2015 to present.

19 I will now turn to the legal conclusions
20 supporting my decision. A motion to dismiss for failure
21 to state a claim upon which relief can be granted under
22 Rule 12(b)(6) is appropriate when the facts asserted by
23 the Plaintiffs do not entitle him to a legal remedy,
24 Lindsay vs. United States, 295 F.3d 1252, 1257, Fed.
25 Cir. (2002.)

1 To avoid dismissal, a complaint must allege facts
2 plausibly suggesting, not merely consistent with, a
3 showing of entitlement to relief, Kam Almaz -- that's
4 K-A-M A-L-M-A-Z -- vs. United States, 682 F.3d 1364 at
5 1367, Fed. Cir. (2012).

6 A Plaintiff must plead facts that allow the Court
7 to draw the reasonable inferences that the Defendant is
8 liable for the misconduct alleged. Ashcroft versus
9 Iqbal, I-Q-B-A-L, 556 U.S. 662 at 678, 2009. Here,
10 Mr. Hennis has satisfied the applicable pleadings
11 requirements for this case to move forward to the
12 discovery phase.

13 Turning to the Government's argument that some or
14 all of Mr. Hennis' claims are barred because they sound
15 in tort or relate to tort -- and I understand the
16 Government has clarified that argument, but in the
17 original briefs, it suggested that all of his claims
18 sounded in tort -- by statute, 28 USC Section
19 1491(a)(1), this Court lacks jurisdiction over claims
20 sounding in tort. Consequently, this Court is not
21 authorized to entertain, let alone adjudicate, any
22 claims by Mr. Hennis that the EPA's actions in actually
23 breaching the Gold King Mine, or the actions of their
24 agents or contractors, were negligent or tortious.

25 Nevertheless, based upon the early posture of

1 this case and the scant record presented, as well as the
2 allegations included in the complaint, it is premature
3 to conclude at this time that the breach of the Gold
4 King Mine and the resulting damage to Mr. Hennis'
5 property were solely the result of alleged torts.
6 Temporary government-induced flooding may give rise to a
7 compensable taking claim. Arkansas Game & Fish
8 Commission vs. United States, 568 U.S. 23 at 34, 2012.

9 Moreover, in examining whether a complaint
10 asserts a potential viable takings claim or sounds in
11 tort, I must look at the intended and authorized actions
12 of the Government, as well as the foreseeable and
13 resulting consequences. Ridge Line, Inc. vs. United
14 States, 346 F.3d 1346 at 1355 through 56, Fed. Cir.
15 (2003), and Thune vs. United States, 41 Fed. Cl. 49 at
16 52, (1998). On a takings theory, the Government cannot
17 be liable for failure to act but only for affirmative
18 and authorized acts by the Government and its agents.

19 In the flooding context, in particular, both the
20 Supreme Court and the Federal Circuit have uniformly
21 based potential takings claims on affirmative government
22 authorized acts, St. Bernard Parish Government vs.
23 United States, 887 F.3d 1354 at 1360, Fed. Cir. (2018).

24 As I noted earlier in reciting the material facts
25 in this case and during oral argument, the Court has

1 numerous questions regarding the events of August 4th
2 through the 5th, 2015, and the authority and the
3 intended actions of Mr. Way and Mr. Griswold and the
4 communication and the execution of any directives they
5 may or may not have given leading to the eventual
6 blowout of the Gold King Mine Portal when Mr. Way was on
7 vacation.

8 Put simply, the record presented at this juncture
9 is not clear whether the EPA or Environmental
10 Restoration followed the instructions of Mr. Griswold as
11 argued by the Plaintiff or acted as a rogue or negligent
12 contractor as argued by the Government in breaching the
13 Gold King Mine Portal.

14 For those reasons, I will deny the Government's
15 request at this time to dismiss, in whole or in part,
16 Mr. Hennis' complaint upon the ground that he is
17 alleging a claim that sounds only in tort, either for
18 lack of subject matter jurisdiction or for failure to
19 state a claim upon which relief can be granted under
20 either 12(b)(1) or 12(b)(6) of this Court's rules.

21 I will add, as clarified today, that Mr. Hennis
22 is not asserting a takings claim with regard to the
23 actual breach of the mine. It is the flooding claim, as
24 we are now calling it, and then the occupation in
25 building the water treatment facility or plant. This

1 ground in the Government's motion to dismiss is
2 similarly unavailing as applied to Mr. Hennis' takings
3 claim concerning the continued use of his property to
4 house settling pools and dry captured waste and
5 hazardous and toxic materials and, most notably, to
6 construct and operate the water treatment plant.

7 For example, in *Hendler vs. United States*, 952
8 F.2d 1364, Federal Cir., (1991), the Federal
9 Circuit determined that the EPA's installation of
10 groundwater monitoring wells constituted a taking where
11 years had passed since the first wells were installed
12 and nothing in the Government's activities suggested
13 that their removal was imminent.

14 Although not raised by the parties today with
15 regard to DRMS, the Federal Circuit further held in
16 *Hendler* that the state government actions in furtherance
17 of the cooperation with the Government were attributable
18 to the Federal Government.

19 Similarly, in *McKay vs. United States*, 199 F.3d
20 1376, Fed. Cir. (1999), the Federal Circuit held that
21 the Government's years-long installation and operation
22 of groundwater wells on Plaintiff's property presented
23 issues of material fact that should have precluded
24 summary judgment in the Government's favor regarding the
25 Plaintiff's takings claim. Again, at this stage of the

1 proceedings, I must view the allegations in the light
2 most favorable to Mr. Hennis and draw all reasonable
3 inferences in his favor as the nonmovant.

4 With regard to the Government's defense of
5 necessity, the Government argues that Plaintiff's
6 allegations regarding the Gold King Mine breach describe
7 an environmental emergency such that under the doctrine
8 of necessity and pursuant to the Government's federal
9 police power, the Government is shielded from takings
10 liability for actions it took to protect the public from
11 the toxic and hazardous spill.

12 The doctrine of necessity, also known as the
13 necessity defense, absolves the Government of liability
14 for destruction of real property and personal property
15 in cases of actual necessity to prevent or forestall
16 grave threats to the lives of property and others.
17 *TrinCo Inv. Co. vs. United States*, 722 F.3d 1375 at 1377
18 through 78, Fed. Cir. (2013).

19 The Supreme Court has held in times of imminent
20 peril, such as when fire threatens a whole community,
21 the sovereign could, with immunity, destroy the property
22 of a few so that the property of the many and the lives
23 of many more could be saved. *United States versus*
24 *Caltex -- C-A-L-T-E-X --* 344 U.S. 149 at 154, 1952.
25 Sixty years later, however, the Federal Circuit in

1 TrinCo cautioned this Court against adopting an
2 expansive view of automatic government absolution based
3 on necessity, particularly in the context of a 12(b)(6)
4 motion.

5 To prove necessity, the Government must
6 demonstrate actual emergency and imminent danger met by
7 a targeted and actually necessary response. Here, as
8 time passed and continues to pass from the August 5th,
9 2015, blowout, the actual emergency diminished, as did
10 the imminent danger, such that the Government's response
11 must be continuously assessed to determine whether it is
12 both targeted and actually necessary to the events as
13 they continue to abate.

14 To that end, a complete timeline of events and
15 assessment of the Government's specific actions compared
16 to that timeline in light of the continuously evolving
17 situation on the ground is necessary to resolve these
18 issues. The record presented does not allow for that
19 required assessment.

20 The factual record needs to be developed, and the
21 Government needs to tailor its reliance upon the
22 necessity defense, as we discussed today, to properly
23 assess the extent and duration of the imminent peril
24 phase of the environmental emergency caused by the
25 breach of the Gold King Mine. We have just passed the

1 seven-year anniversary of the blowout, and the
2 Government is still occupying and operating on
3 Mr. Hennis' land.

4 As conceded by the Government today, the EPA's
5 January 2021 administrative order, one of the few
6 documents in the record, notes that in January of 2017,
7 the EPA transitioned from emergency removal action to a
8 non-timeline critical removal associated with the
9 interim water treatment plant -- and I'm citing Docket
10 Entry 7-3 at page 5, paragraph 7 -- thereby indicating
11 that the EPA itself understood that the emergency caused
12 by the blowout had abated at or around that time.

13 The Court must also determine, as I suggested
14 earlier, whether the defense of necessity is properly
15 invoked at all given the fact that the Government caused
16 this emergency, regardless of the critical duration of
17 the emergency itself. In *In Re: Upstream Addicks and
18 Barker (Texas) Flood-Control Reservoirs*, this Court
19 held, "...where, as here, the Government is responsible
20 for creating the emergency, granting the Government
21 immunity from liability under the necessity doctrine
22 would stretch that doctrine too far." 146 Fed. Cl.
23 219, 264, 2019.

24 On the issue of consent versus coercion, the
25 Government argues that Plaintiff fails to state a

1 takings claim because they authorized EPA's access to
2 and occupation of his land to address the emergency
3 caused by the breach of the Gold King Mine Portal,
4 primarily through written access agreements that
5 authorized EPA to construct, operate, and maintain an
6 interim water treatment plant, and take any other
7 actions necessary to address toxic and hazardous
8 releases from the mine.

9 Mr. Hennis maintains that he did not freely sign
10 the EPA consent for access documents, asserting that he
11 was coerced to do so beginning as far back as 2011
12 because the EPA threatened to impose significant fines
13 or take other enforcement actions against him.

14 As to consent, a claim for physical taking may
15 not arise where a property owner voluntarily consents to
16 the Government's entry onto his property and to those
17 government activities giving rise to such a claim, as
18 cited by the Government, *Waverley View Investors LLC vs.*
19 *United States*, 135 Fed. Cl. 750, 792, (2018).

20 A property owner reserves the right to exclude
21 strangers, especially the Government, when that owner
22 does not consent to a physical invasion or intrusion.
23 *Scogin vs. United States*, 33 Fed. Cl. 568 at 577,
24 (1995).

25 On the other hand, a property owner relinquishes

1 the right to exclude when the property owner consents to
2 the entry, use, and occupation of the subject property.
3 As for Mr. Hennis' claims of coercion, to render an
4 agreement unenforceable by coercion or duress, a party
5 must establish three elements.

6 It involuntarily accepted the other party's
7 terms; the circumstances permitted no alternative; and
8 third, such circumstances were the result of the other
9 party's coercive acts. *Dureiko vs. United States*, 209
10 F.3d 1345 at 1358, Fed. Cir. 2000.

11 Notably, in *Waverley View Investors* -- again,
12 cited by the Government -- this Court has held that the
13 threat of considerable financial loss is insufficient to
14 establish duress, 135 Fed. Cl. at 793. Signing under
15 protest is not the same as establishing the elements of
16 coercion or duress.

17 Although it is unclear whether Mr. Hennis will be
18 able to prove the legal elements of coercion,
19 particularly due to the fact that he was represented by
20 counsel, engaged with the APA for many years, and
21 intermittently and finally refused to continue
22 voluntarily allowing the Government to access and occupy
23 his property, I cannot rule it out at this time based
24 upon the limited record presented.

25 The record presented does not detail the nature

1 and extent of the conversations and negotiations between
2 the EPA and Mr. Hennis or his counsel or then counsel,
3 Mr. Cook. For example, it is not certain whether
4 Mr. Hennis initially consented to the August through
5 November 2015 construction of the water treatment plant
6 or its location in the first instance. That said, the
7 Court notes that the November 10th, 2013, letter from
8 the EPA to Mr. Cook states -- and I quote -- "As you and
9 Mr. Hennis are aware, under the current consent for
10 access, the EPA, at substantial cost and effort,
11 constructed a future water treatment facility on the
12 Herbert Placer and subsequently signed consent for
13 access to property documents starting November 20th of
14 2015, similarly state that Mr. Hennis consented to
15 "constructing, operating, and maintaining the Mine Water
16 Management System, including but not limited to
17 pipelines, treatment/settling pools, and interim water
18 treatment facility, once it was built and on his
19 property, through at least December of 2020, if not
20 February of 2021." Mr. Hennis disputes the accuracy of
21 these documents. These are part of his claims of
22 misrepresentation, coercion, and duress.

23 There are also allegations, as we have discussed
24 today, that the EPA strung Mr. Hennis along with
25 promises of a rental agreement or a lease agreement in

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1 order to entice him to continue allowing the EPA's
2 occupation and operation of the water treatment plant,
3 storing pools, and drawing waste for its eventual
4 removal, and to that end, I cite the complaint at
5 paragraph 58 on page 12, where Mr. Hennis says -- and I
6 quote -- "Plaintiff allowed EPA to temporarily use a
7 portion of its property with the understanding that
8 since the EPA admittedly caused the environmental
9 catastrophe and were responsible for all the related
10 damages, the United States Government would negotiate
11 and act in good faith in order to enter into a lease or
12 other rental agreement to pay just compensation for the
13 use of his property."

14 Now, I don't know whether that's going to carry
15 the day as to establishing a misrepresentation
16 sufficient to establish a consent or a duress argument,
17 but at this stage of the proceedings, I must allow it to
18 go forward. Additionally, there is no documentation in
19 the record memorializing the nature, extent, or duration
20 of Mr. Cook's legal representation of Mr. Hennis.

21 Now, I note and I am cognizant that discovery and
22 litigation on the issues involving legal representation
23 of Mr. Hennis may implicate issues of attorney-client
24 privilege and attorney work product. So moving forward
25 I simply remind counsel to be thoughtful as we address

1 those issues, and I am available to adjudicate any of
2 those issues because I don't think that bell can be
3 unrung once discovery commences.

4 But given the posture of this case, no answer has
5 been filed, no discovery has been conducted, and we're
6 dealing only with the Government's motion to dismiss,
7 and I must view all of the facts asserted in the light
8 most favorable to Mr. Hennis as the nonmoving party.

9 To that point, I note that the Government is
10 relying upon documents and representations outside of
11 the complaint -- very few, but nonetheless, there are --
12 and we have cited and discussed those. Given the
13 limited record and the numerous factual disputes, I am
14 not inclined to sua sponte convert the Government's
15 filing to a motion for summary judgment under Rule 56.

16 Factual issues remain regarding whether
17 Mr. Hennis can establish that he was coerced or
18 otherwise acted under duress or was sufficiently misled
19 or duped. If coercion is not established, we must
20 explore what exactly the parties understood and can
21 demonstrate would be the duration of the temporary
22 access and any limits on the Government's operations
23 with regard to footprint or property location, and we
24 must also look into what the parties understood
25 regarding the nature and extent of the Government's

1 access and occupation of Mr. Hennis' land.

2 Additionally, as acknowledged by both parties,
3 however the issue of consent versus coercion issue is
4 ultimately resolved, at least as of March 1st, 2021, if
5 not as of January 2020 -- I'm sorry, January 2021, upon
6 the issuance of the 2021 modified administrative order,
7 and continuing to date, the EPA has continued to access
8 and occupy Mr. Hennis' property solely under the 2021
9 modified administrative order.

10 If I ultimately find Mr. Hennis voluntarily
11 consented to the Government's access to and occupation
12 of its property, in whole or in part, during certain
13 periods of time relevant to his takings claims, those
14 findings would impact the scope of liability and, of
15 course, damages, and based upon the record, I cannot
16 make those findings today. It would also serve no
17 purpose, in my opinion, to try to limit the scope of
18 discovery based upon the thin record presented and, more
19 specifically, the interconnected events that gave rise
20 to the takings claims in this case.

21 With regard to the issue of damages and
22 consequential damages and lost business opportunities,
23 as I stated this morning and counsel for Mr. Hennis
24 acknowledges, the law in this Circuit is clear.
25 Monetary damages for proven Fifth Amendment temporary

1 takings claims and permanent takings claims are limited
2 to the fair market rental value and the fair market
3 value of the property at the time of and for the
4 duration of the takings. Consequential damages and lost
5 business opportunities or lost profits are not
6 recoverable. Yuba Natural Resources, Inc. vs. United
7 States, 904 F.2d 1577 at 1580 to 81, Fed. Cir., (1990).

8 As stated by the Supreme Court in United States
9 ex. rel. and for use of Tennessee Valley Authority vs.
10 Powelson, "In the absence of a statutory mandate, the
11 sovereign must pay for only what it takes, not for
12 opportunities which the owner may lose." If we get to
13 the issue of damages, as Plaintiff's counsel
14 acknowledges, Mr. Hennis will not be entitled to recover
15 the value of the land if it had been developed for or
16 sold to the nearby Silverton Mountain ski area or the
17 value of exploring and mining mineral assets in the Gold
18 King Mine and the Gladstone property. These issues will
19 be disputed and discovery will be had on them, and it
20 will go toward the proper valuation of the Government's
21 taking, whether temporary or permanent.

22 Similarly, Mr. Hennis' recovery may be limited by
23 any value added to his property resulting from the EPA's
24 cleanup actions, the restoration of his mine, making it
25 explorable; whether or not the mine is a threat to the

1 community or to the water; the increase in the property
2 value; as well as any enhancements or improvements to
3 the property, the enhancement of electricity or the
4 extension of it. See generally Hendler vs. United
5 States, 175 F.3d 1374 at 1380 through 83, Fed Cir.
6 (1999), and City of Van Buren, Arkansas vs. United
7 States, 697 F.2d 1059 at 1062, Fed. Cir. (1983). The
8 case law is clear in this Circuit. Mr. Hennis cannot
9 recover the full value of the land, temporarily taken,
10 and retain the increased value of the land attributable
11 to the alleged taking.

12 All that said, I will defer the issue of damages
13 until issues of liability are resolved or at least until
14 the record is more fully developed, perhaps at the
15 summary judgment phase, but I do believe it's a better
16 use of the parties' time to figure out the scope of
17 liability and then address the issue of damages, but
18 that discussion we can have on another day.

19 But we need to resolve, first and foremost, the
20 many factual and legal issues regarding whether there
21 was an authorized government taking of Mr. Hennis'
22 property and, if so, its duration. Assuming a taking
23 occurred, the duration of that taking will dictate the
24 appropriate calculation of damages, and for all those
25 reasons, the Government's motion is denied.

1 And with that, I would like to turn this into a
2 bit of a status conference. In light of the Court's
3 decision to deny the Government's motion to dismiss
4 under rule 12(b)(6), by operation of Rule
5 12(a)(4)(A)(i), the United States must file an answer to
6 the Plaintiff's complaint within 14 days. That
7 calculation is September 13th of 2022.

8 I assume, given we have new counsel for the
9 United States, that additional time will be requested,
10 and I will ask the Government if 30 days, until
11 September 29th, 2022, is sufficient to file an answer,
12 and I don't anticipate another dispositive motion.

13 MS. TARDIFF: Your Honor, I think 30 days will be
14 fine. Thank you.

15 THE COURT: Counsel for Mr. Hennis, are you okay
16 with 30 days?

17 MS. HAGEMAN: Absolutely, Your Honor. Thank you.

18 THE COURT: I will enter an order requiring that
19 the Government file an answer to this complaint on or
20 before September 29th, 2022. Moving forward, as you
21 work together on a joint preliminary status report under
22 Appendix A to this Court's rules, consider whether it
23 makes sense for the Court to conduct a site visit in
24 connection with either cross motions for summary
25 judgment or pretrial. I leave that to the parties to

1 discuss, and I will make myself available if I have
2 mutual agreement. I will not resolve this through a
3 motion. It has to be mutual consent. I think I would
4 benefit. I don't know what the state of the property is
5 and whether there has been such change that it would be
6 meaningless, but I will leave that to the parties to
7 discuss.

8 I understand from public reporting that the
9 Government has settled litigation with the States of New
10 Mexico and Utah and the Navajo Nation and that
11 multijurisdictional litigation continues over this
12 environmental disaster as the Government has alluded to
13 earlier today.

14 Upon the parties' joint request, at any time
15 moving forward, I can and will make myself available to
16 serve as a settlement judge, and I leave that to the
17 parties. I will only do it by mutual agreement. I will
18 not do it by motion. If both parties are not in
19 agreement, I will not participate.

20 And with that, I will ask counsel for Mr. Hennis
21 if there's anything else that the Court needs to address
22 at this time.

23 MS. HAGEMAN: I don't think you -- I don't think
24 so, Your Honor. I think that you have been the most
25 thorough Judge that I have ever been in front of on a

1 motion to dismiss, and I very much appreciate your
2 attention to detail, as does my client. Thank you.

3 THE COURT: Thank you, Counsel.

4 For the United States?

5 MR. CHELLIS: No, nothing further, and I echo
6 Ms. Hageman's statement. I appreciate your
7 thoroughness.

8 THE COURT: Well, thank you, Counsel.

9 In that case, we stand adjourned.

10 (Whereupon, at 1:36 p.m., the proceedings were
11 adjourned.)

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CERTIFICATE OF TRANSCRIBER

I, Susanne Bergling, court-approved transcriber,
certify that the foregoing is a correct transcription
from the official digital sound recording of the
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DATED: 9/14/2022

s/Susanne Bergling
SUSANNE BERGLING, RMR-CRR