

**IN THE UNITED STATES
COURT OF FEDERAL CLAIMS**

STATE OF OHIO,	:	
Plaintiff,	:	No. 20-288 C
v.	:	Hon. Carolyn N. Lerner
UNITED STATES,	:	
Defendant.	:	

STATE OF OHIO’S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

In accordance with Rule 56(a) of the Rules of the Court of Federal Claims (“RCFC”) and the Court’s April 25, 2022 Order (ECF No. 64), Plaintiff State of Ohio asks this Court to grant summary judgment on the issue of Defendant’s liability for Ohio’s claims for breach of contract and breach of the implied covenant of good faith and fair dealing. A memorandum and exhibits in support are attached and incorporated herein.

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MEMORANDUM IN SUPPORT

I. Introduction

Liability in this breach-of-contract case hinges on the answer to a single question: has the United States Army Corps of Engineers (“the Corps”) charged Ohio for expenses that do not constitute “joint-use operation and maintenance costs of the Project,” under the parties’ 1970 Contract (“the Contract”). Or, as clarified by this Court’s prior ruling in this case: has the Corps charged Ohio for costs that are not “necessary to maintain [the Caesar Creek Project] as an efficient going concern, . . . to operate [it] effectively for water storage, water availability, and flood control, . . . and to remedy injurious effects resulting from the [P]roject’s subsequent operation.” ECF No. 40 at 2 (citations and internal quotation marks omitted). The undisputed evidence confirms the answer to this question is yes.

As explained below, the documents and testimony reveal beyond dispute that the Corps has breached the Contract’s operation and maintenance provision, as defined by the Court, in several distinct ways. *First*, the Corps has charged Ohio for expenses that are not necessary for water supply, water storage, or flood control, and thus are not properly passed on to Ohio. Documents and testimony reveal that many of the expenses the Corps billed to Ohio under the “operation and maintenance” provision of the Contract are not necessary to water supply, water storage or flood control and thus are not authorized under the Contract as interpreted by this Court. Examples of those charges include the costs of supplying birdseed; solar panels at the Visitor Center; repairing or replacing Visitor Center bathroom fixtures and heating and cooling units; maintaining recreational amenities like playgrounds and campgrounds; attending the Cincinnati Boat, Sport and Travel Show; and unspecified travel and labor expenses that are not necessary to water supply, water storage, or flood control.

These facially improper charges are not isolated billing mistakes, but rather reflect systemic and categorical overbilling. Indeed, the Corps admits it has not limited its billing to costs for water storage, water supply, or flood control. Instead, it charges Ohio for expenses related to four categories created for the Corps' budgetary convenience: water supply, flood risk management, recreation, and environmental stewardship. But the Contract simply does not authorize the Corps to pass on to Ohio any expenses relating to recreation and environmental stewardship. The net effect of the Corps extra-contractual billing practices is that Ohio taxpayers are subsidizing portions of the Corps' budget.

Second, the Corps has breached the Contract by charging for costs that do not pertain to Caesar Creek. Ohio has learned the Corps has been charging Ohio for expenses incurred by non-Caesar Creek projects and by the Corps' regional office, which is located at Caesar Creek, but encompasses far more than the Caesar Creek project. Costs attributable to the Corps regional office functions are not authorized under the Contract because the Corps "cannot charge Ohio for costs that are not joint use, not for operation and maintenance, or not related to the Caesar Creek Project." ECF No. 40 at 6.

Third, the Corps has breached the Contract by charging for interest on the operation and maintenance charges. The Contract allows the Corps to assess interest charges on Project Investment Costs only. It sets forth an interest schedule and details Ohio's options for paying Project Investment Costs and interest. Ex. 1 at Article 5, Section (a) ("Contract Between the United States of America and the State of Ohio for Water Storage Space in the Caesar Creek Reservoir, Ohio"). In contrast to the Project Investment Costs set forth in the Contract, the Operation and Maintenance provisions do not authorize the Corps to assess interest and late fees. *Id.*, Article 5, Section (c). Yet the Corps admits it has repeatedly done so.

And finally, the Corps breached the Contract when it charged Ohio a retroactive lump-sum charge attempting to recoup a purported 10-year shortfall resulting from the Corps' accounting confusion.

Because the evidence establishes these breaches as a matter of law, Ohio asks this Court to grant summary judgment on Ohio's breach of contract claims (ECF No. 23-1, First, Second, and Third Causes of Action). The undisputed evidence further establishes the Corps' repeated and pervasive failure to provide sufficient detail for the charges it passes on to the State of Ohio, and its arbitrary and inconsistent methodology. These too constitute an independent basis for liability, as they violate not only the Contract but also the breach of the implied covenant of good faith. (*Id.*, Fourth Cause of Action). Summary judgment on the Corps' liability is appropriate at this stage.

II. Historical and Statutory Background

A. The Flood Control Act of 1938

In the wake of the disastrous Ohio River Flood of 1937 and in response to a resolution from the House Committee on Flood Control, the Army Corp of Engineers submitted a "comprehensive flood-control plan for the Ohio and the lower Mississippi rivers." H. Rep. No. 75-2353 (1938). The flood control report identified Caesar Creek, on the Little Miami River in Ohio, as a future site of one of several dozen "[f]lood-control reservoirs for the Ohio River Basin[.]" *Id.* at 11. With the approval of this report, Congress authorized the creation of the Caesar Creek Reservoir under the Flood Control Act of 1938. 75 Pub. L. 761, 52 Stat. 1215 (1938). However, actual work on the project did not commence until years later.

B. The Water Supply Act of 1958 and 1963 Amendments

In the Water Supply Act of 1958, Congress authorized the Corps to include water storage for municipal and industrial water supply in any reservoir project by the Corps. Pub. L. 85-500,

72 Stat. 297, Title III, Sec. 301(b), (1958), codified at 43 U.S.C. § 390b(b). The Act stated that “the federal Government should participate and cooperate with States . . . in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation or multiple purpose projects.” Pub. L. 85-500, Title III, Sec. 301(a), codified at 43 U.S.C. § 390b(a). Congress also recognized that the States retained primary responsibility for “developing water supplies for domestic, municipal, industrial, and other purposes.” *Id.*

An amendment enacted in 1963 allows local partners to obtain a permanent right to water storage space so long as they meet obligations such as “continued payment of annual operation and maintenance costs allocated to water supply.” Pub.L. 88-140, Sec. 3 (1963) (codified at 43 U.S.C. § 390e).

III. Statement of the Facts

A. The Caesar Creek Project and the 1970 Water Supply Contract

Against this backdrop, the Corps entered into a Contract with the Ohio Department of Natural Resources (“ODNR”) on January 15, 1970. Ex. 1, Contract. The Contract’s recitals define the “Project” as “the Caesar Creek Reservoir on Caesar Creek. . . authorized by the Flood Control Act approved on 28 June 1938.” *Id.* at 1. The recitals also note that the Contract’s purpose was for Ohio to obtain “storage for municipal and industrial water supply. . . in accordance with the provisions of the Water Supply Act of 1958” and as amended in 1963. *Id.*

Under the Contract, Ohio acquired “the right . . . to utilize an undivided 48.7 percent of the storage space in the Project between elevations 800.0 and 846.0 feet above mean sea level as deemed necessary by the State to impound water for municipal and industrial use and to make withdrawals therefrom at any time. . . .” *Id.* at 1, Article 1. In addition to some construction and

investment costs, the State agreed to pay “12.7 percent of the annual experienced joint-use operation and maintenance costs of the Project.” *Id.* at Article 5, Section (c)(1). The first payment for these costs was due within 30 days from the date the State first uses the storage space for water supply purposes. *Id.* at Article 5, Section (c)(2). After that, “[a]nnual payments will be due and payable in advance on the 1st day of July thereafter.” *Id.* Those annual payments may be adjusted “to reflect the difference between the prior payment for operation and maintenance and the actual experienced joint-use costs of operation and maintenance for the prior years.” *Id.* The Corps has charged joint-use operation and maintenance costs to Ohio annually beginning in 1994, when the Caesar Creek Project began to supply water. ECF No. 25 at ¶ 22.

B. Caesar Creek Lake and Dam

The water level in the Caesar Creek lake is controlled by the main dam, four auxiliary dams, and a control tower on the main dam which contains a series of hydraulic gates that control the flow of water. Ex. 2, James O’Boyle Dep. 19. As of May 2021, nine individuals at Caesar Creek reported to the Park Manager, James O’Boyle: four maintenance staff members, four permanent (i.e., non-seasonal) park rangers, and one administrative staff member. *Id.* at 23-24. Only specially trained and licensed dam operators are authorized to tend or handle the dam gates. *Id.* at 20. O’Boyle, all of the maintenance staff, and the permanent rangers are licensed dam operators. *Id.* at 20-21; Ex. 3, Kimberly Baker Dep. 31. The maintenance staff are mainly responsible for operating the dam, with rangers providing backup assistance about once or twice a year. Baker Dep. 32-33.

C. The facilities at Caesar Creek

1. The Visitor Center complex

The original Visitor Center at Caesar Creek was built in the 1980s. Baker Dep. 38. Around 2008, with funds from the American Recovery and Reinvestment Act, the Corps added an

extension to the Visitor Center that added a Learning Center and an office for the Miami River Area office. O'Boyle Dep. 35, 38; Baker Dep. 38; Ex. 4, Amy Babey 30(b)(6) Dep. 185. The Miami River Area office is under the Louisville District Office and oversees five Corps projects in the Little Miami River watershed, including Caesar Creek. O'Boyle Dep. 36; Baker Dep. 46. The Learning Center is a classroom where the Corps conducts educational programs for the public. Baker Dep. 42. The Learning Center is also used by other non-Caesar Creek projects and Corps staff from other locations for training programs and activities, like visitor assistance training and ranger safety training. *Id.* at 42-43. The term "Visitor Center," as used and understood by Caesar Creek Project employees, refers to the entire complex, which includes the Visitor Center, the Learning Center and the Miami River Area office. O'Boyle Dep. 40; 146-147; Baker Dep. 72-73; Ex. 5 (Google aerial image of Visitor Center, Ex. A of O'Boyle Dep.).

The Visitor Center at Caesar Creek is a Class A facility. Baker Dep. 59. Class A is the Corps' designation for regional visitor centers that showcase the Corps' national and regional history. O'Boyle Dep. 25; Baker Dep. 58. There are approximately eight or nine Class A visitor centers in the United States. O'Boyle Dep. 47. Class B visitor centers, by contrast, focus on the Corps' local mission at a specific project and local history. Baker Dep. 58. Class C visitor centers are comparable to information desks. O'Boyle Dep. 48. As a Class A facility, the Caesar Creek Visitor Center has exhibits that explain the history of the Corps, the Corps' regional flood control mission, and the natural and archeological history of the region. Ex. 6, Photo of Exhibit in the Regional Visitor Center at Caesar Creek Lake, from U.S. Army Corps of Engineers Louisville District, Caesar Creek Lake Master Plan (2020) 5-69, available at <https://www.lrl.usace.army.mil/Portals/64/CaesarCreekMasterPlanUpdate.pdf>.

Park rangers are stationed at the Visitor Center to interact with the public, to help visitors

find what they need, to give directions, and to talk about the attractions and activities on site. Baker Dep. 25. The Visitor Center is open every day to the public except winter holidays and receives about 400 to 500 visitors on weekends. *Id.* Fossil hunting is a popular activity at Caesar Creek, attracting about 3,000 visitors per month during the summer. *Id.* at 26. The park rangers also have natural resource management responsibilities, which include prairie and trail maintenance and the removal of invasive species. *Id.* at 33-35.

2. The Miami River Area Office

Within the Corps' Louisville District is the Miami River Area, which encompasses five lakes in the Little Miami River watershed. Four of those lakes are in southwest Ohio: Caesar Creek, C.J. Brown Lake, West Fork Lake, and William Harsha Lake. The fifth is Brookville Lake in southeast Indiana. Baker Dep. 47. The Miami River Area Office runs operations for all five lakes from its office in the Caesar Creek Visitor Center. *Id.*; O'Boyle Dep. 36. The Corps considers the Miami River Area office to be a "field office for the Louisville District." Ex. 7, Amy Babey Dep. 21.

Three employees for the Miami River Area work from the Caesar Creek Visitor Center: the operations manager, a facility operations specialist who oversees regional maintenance, and an administrative assistant. O'Boyle Dep. 35. These employees work under a completely different chain of command from the Project staff and do not report to the Caesar Creek Park Manager, Jim O'Boyle. *Id.* The operations manager for the Miami River Area reports to the Corps' Louisville District office. Baker Dep. at 47. Employees for the Miami River Area travel out to the five lakes. O'Boyle Dep. at 37.

3. The Caesar Creek Project Office

The Caesar Creek Project Office, which the Project staff also refer to as the maintenance

building, is not located in the Visitor Center complex. Baker Dep. 72-73; O'Boyle Dep. 44. The term "Project Office," as used and understood by Caesar Creek staff, refers to a separate building located down the road from the Visitor Center. Baker Dep. 72-73; O'Boyle Dep. 44, 134-135; Ex. 8 (Google aerial image of Caesar Creek Project Office, Ex. B of O'Boyle Dep.). While O'Boyle and the rangers maintain offices in the Visitor Center, the remaining Caesar Creek project staff work in this Project Office. O'Boyle Dep. 44.

D. Congressional inquiries into the Corps' billing practices

In 1990, Ohio contracted with the City of Wilmington, Ohio, to supply the City with raw water from the Caesar Creek Project. Ex. 9 (Agreement between the State of Ohio and City of Wilmington and 2004 Amendment). As part of the payment for raw water, the City agreed to reimburse Ohio for all operation and maintenance costs charged to the State by the Corps under the water supply Contract. *Id.* at OH00224.

In 2017, the City expressed concern about unexplained increases in the operations and maintenance costs that the Corps charged Ohio. The City wrote to U.S. Representative Steve Stivers requesting his assistance investigating the Corps' "unconscionable" escalating charges. Ex. 10 (City of Wilmington letter to Rep. Stivers, May 9, 2017). On behalf of the City, Rep. Stivers and U.S. Senator Sherrod Brown both inquired about the increases. Ex. 11 (Rep. Stivers letter to Corps, July 24, 2017); Ex. 12 (Sen. Brown letter to Corps, June 6, 2017). Initially, the Corps responded to Rep. Stivers with a one-page summary and pie chart. Ex. 11. Rep. Stivers responded that the Corps' summary was "not sufficient" and requested a "detailed, itemized list of the joint-cost expenditures" of the over \$2 million in expenses. *Id.*

In response to Rep. Stivers' letter, the Corps provided an itemized list of charges for the operation and maintenance charges for 2015 to 2016. Ex. 13 (Corps' response to Rep. Stivers,

Sept. 15, 2017). The Corps also provided a breakdown of labor costs by position title, number of hours, and the total cost of those hours. The labor costs included hours billed by archeologists, natural resource management specialists, park rangers, and student trainees. *Id.* at USA003975 to 3977. The labor breakdown did not specify the tasks performed by any individuals, the purpose of their labor hours, or the relationship of the labor costs to Caesar Creek. *Id.* In response, Rep. Stivers identified items that he deemed to be recreational expenses. Ex. 14 (Rhiannon Ryan email, “Call with Congressman Stivers RE: Caesar Creek Water Supply,” Sept. 22, 2017). Specifically, he considered rangers’ salaries to be “100% recreation and therefore not part of the joint costs.” *Id.*

E. The Corps’ audit results in over \$187,000 of additional charges to Ohio.

As a result of the inquiries from Ohio’s congressional delegation in 2017, the Corps’ Louisville District office conducted an internal 10-year audit of its billings for Caesar Creek. Ex. 15, Alicia Graham Dep. 78-79, 81-82. After conducting the audit, the Corps acknowledged that it had made mistakes in its billing from 2007 to 2017. But according to the Corps, those mistakes resulted in a net *underbilling* in the amount of \$187,150.07. Ex. 16 (Adjusted bill for underpayment, Jan. 24, 2018); Ex. 19 (Corps response to ODNR with audit summary, June 26, 2018). The Corps accountant who conducted the audit determined that the underbilling resulted from the Corps having “calculated the O&M amounts different in some years than others.” Ex. 17 at USA013208 (Alicia Graham email re billing error). For some years, the Corps used only labor costs to calculate Ohio’s share of operation and maintenance costs, which resulted in underbilling. *Id.*; Graham Dep. 94, 97. For other years, the Corps used the wrong subtotal, which resulted in overbillings in the amounts of \$28.89 in 2008, \$1.97 in 2009, \$28,795.72 in 2013, and \$68,779.13 in 2017. Graham Dep. 92-95; Ex. 19 at USA004212 (Corps audit summary). This “systemic

error,” the Corps concluded, “resulted in multiple years of incorrect joint cost billing for this lake.” *Id.*

The Louisville District office discussed whether the Corps had the ability to forgive the underbilled amounts. Babey 30(b)(6) Dep. 62. The Corps decided to assess the retroactive charges without considering whether the Contract allowed those charges. Babey Dep. 34. The Corps sent an adjusted bill dated January 24, 2018 charging Ohio with a retroactive assessment of \$187,150.07. Ex. 16. In response to Ohio’s request for an explanation, the Corps provided an overview of its audit findings and an explanation of its billing process, as well as itemized summaries for charges billed from 2007-2017. Exs. 18-20

1. Work category codes and the Corps’ four budgetary purposes

The Corps’ audit overview explained that each expense for the Caesar Creek project is billed to one or more of four budgetary purposes. Ex. 19 at USA004212; Ex. 21, Erin Teives Dep. 48-49. For Caesar Creek, those purposes are flood risk management, environmental stewardship (or natural resource management), water storage, and recreation. *Id.* Caesar Creek staff complete a purchase request and commitment for every expense and enter a budgetary code, which the Corps calls a “work category code.” Ex. 19 at USA004212; Ex. 22 (Purchase request and commitment forms, Graham Dep. Ex 3). Every purchase request is assigned a work category code, which ties each individual cost to a specific budgetary purpose. Ex 4, Babey 30(b)(6) Dep. 40, 46; Ex. 21, Teives Dep. 48-49, 64. The Corps uses these work category codes to identify the purpose of each cost and to identify the charges that the Corps passes on to Ohio. Babey 30(b)(6) Dep. 46.

The Corps’ itemized list of costs does not contain any work category codes or provide any information that identifies the purpose of each operation and maintenance cost. Ex. 15, Graham Dep. 118; Ex. 4, Babey 30(b)(6) Dep. 113, 119. The work category codes also do not appear on

the purchase and request commitment forms completed by Project staff when they make a work item request. Graham Dep. 107-108; Ex. 22 (Purchase request and commitment forms); Teives Dep. 32. Because the Corps has not provided them, the Court has ordered the Corps to provide the work category codes for each cost billed to Ohio by June 14, 2022. ECF No. 55.

2. Labor hours billed to Ohio as operation and maintenance costs

The Corps' response to ODNR's 2018 request for information also provides an annual summary of the labor hours charged to Ohio as operation and maintenance costs from 2007 to 2017. Ex. 20, *see e.g.*, USA001590. The summary shows labor charges by position title, pay plan, number of hours and the total cost of those labor hours for that year. *Id.* Employees can designate their time in 15-minute intervals to a code that corresponds to a project purpose. Ex. 15, Graham Dep. 138-139. But the labor summaries provided to Ohio do not identify the project purpose for those hours, nor do they describe the tasks being performed. *Id.* at 135.

3. The Corps' internal confusion about its own billing practices

Ohio's inquiry revealed the Corps' own internal confusion about its billing practices. In preparing its response to Ohio's 2018 request for information, the Louisville District did not know how the Corps defined joint-use costs or specific costs, what the work category codes mean, where to find the work category codes, whether the codes change yearly, and whether the Corps' billing practices for the Caesar Creek Project were consistent with the Corps' suggested methodology set out in a Water Supply Agreements Billing Working Paper issued by the Corps. Ex. 23 (Corps email re "ODNR Request to Corps – Caesar Creek," June 2018). Against this backdrop of confusion, one Corps employee asked, "are we billing for the wrong things?" *Id.* at USA009863.

F. The U.S. Government Accountability Office report on Corps water storage agreements

Around the same time as the Louisville District's audit of Caesar Creek billings, the U.S.

Government Accountability Office (“GAO”) issued a report summarizing its review of the Corps’ data for municipal and industrial water storage agreements and the Corps’ process for setting water storage agreement prices. Ex. 24 (GAO Report to Congressional Requesters, “Army Corps of Engineers: Better Data Needed on Water Storage Pricing.” GAO-17-500, August 2017). The GAO found inconsistencies in how the Corps recorded its data and concluded that the Corps did not systematically review or trace data back to the originating agreement to ensure accuracy, as called for by federal standards for internal control. *Id.* at 21-23.

The GAO also reported many of the interviewed water users and stakeholders cited the same concerns raised by Rep. Stivers and the State of Ohio—namely, the lack of detail in billing invoices and the variation in annual operation and maintenance charges. *Id.* at 32. This lack of detail, the GAO noted, made the identification of billing errors difficult. *Id.* As an example, one water user said that the Corps incorrectly included in the water supply bill a portion of operation and maintenance costs for constructing a new playground at a Corps project. *Id.* at 32-33. The water user was only able to determine the error after requesting that the Corps provide an itemized operation and maintenance bill for that year. *Id.* at 33.

G. Ohio’s partial payment and second request for information

In August 2018, Ohio passed along to the Corps a partial payment made by the City of Wilmington in the amount of \$147,209.63. Ex. 25 (Graham email confirming ODNR payment, Aug. 17, 2018). That same month, Ohio sent a second letter requesting more information in response to the Corps’ June 28, 2018 letter. Ex. 26 (Ohio’s 2nd request for information, Aug. 3, 2018). Ohio invoked Article 5, Section 3 of the Contract and asked for additional records, including “any documents explaining the policies and procedures the Contracting Officer uses to determine what costs are included as joint-costs under the Contract.” *Id.* at USA004363. Ohio’s

letter also proposed a meeting with ODNR, Wilmington, and Corps representatives to address ongoing questions and concerns about the charges. *Id.* at USA004362.

The Corps responded with a letter dated September 20, 2018. Ex. 27 (Corp's response to Ohio's 2nd request, Sept. 20, 2018). The Corps did not provide any documents responding to Ohio's request for documents explaining the policies and procedures used to determine joint use costs; instead it simply stated that the procedure to determine joint use costs for all Louisville District multiuse reservoirs "has been vetted" by several divisions within the Corps. *Id.* at USA005019.

In response, ODNR's Deputy Legal Counsel repeated Ohio's request for a copy of written policies or procedures that the Corps uses to determine what costs are included as joint-costs under the Contract. Ex. 28 at USA011159 (Cynthia Frazzini email, Oct. 18, 2018). The parties also agreed to meet on October 22, 2018 at Caesar Creek. *Id.* at USA011163. In preparation for that meeting, ODNR also asked the Corps to be prepared to explain the process used to determine joint use costs and to address questions about specific changes. *Id.*

H. Limited credits for recreation and Visitor Center charges

Sometime in 2019, Major General Mark Toy, the Commanding General of the Great Lakes and Ohio River Division (the division above the Louisville District) met with Rep. Stivers and discussed the possibility of crediting Ohio for any charge that included the term "recreation." Ex. 7, Babey Dep. 39; Ex. 29 at USA007950 (Corps email addressing crediting of recreation charges, June 17, 2019). Major General Toy agreed with Rep. Stivers that if "'recreation' is in the billing, it should be removed." *Id.* at USA007949.

Major General Toy assigned Amy Babey, the Chief of Civil Works for the Louisville District, the task of reviewing the Corps' itemized charges for potential credits. Babey Dep. 16,

32. Babey reviewed the Corps' spreadsheets of itemized charges for 2006 to 2019 and identified any items that contained the express terms "Visitor Center" or "VC" or "Recreation" or "Rec" in the item description and highlighted those items. *Id.* at 41-42; Ex. 30 (Amy Babey color-coded spreadsheets). Items that did not contain those specific designations were not included in her review. Babey Dep. at 42. Babey also did not review any labor charges or ranger salaries in response to Rep. Stivers' 2017 inquiry. Ex. 4, Babey 30(b)(6) Dep. 117.

Babey did not consult the Contract during her analysis of the itemized costs. Babey Dep. 71. She also did not consider whether each itemized cost was necessary to maintain or operate the Project effectively for flood control or water supply. *Id.* at 71-72. Babey's inquiry revealed improperly charged costs for recreation and the Visitor Center, resulting in a credit of \$7,906.99 to Ohio.

1. Credits for recreational charges

Babey acknowledged that costs for recreation were not properly chargeable to Ohio and should be credited back. Ex. 7, Babey Dep. 43; Ex. 4, Babey 30(b)(6) Dep. 91. But she only credited items that she deemed to be for the *sole* purpose of recreation. If, in her view, a recreation item related in any way to any other budgetary purpose (water supply, flood risk management, or environmental stewardship), she determined it was not eligible for a credit. Babey 30(b)(6) Dep. 94. Applying this standard, Babey determined that only four items from 2006 to 2019 were eligible for credits as solely recreational expenses: three charges for mowing and maintenance of "rec sites" or "rec items," and one charge for "electric service operations and rec areas." Ex. 30 at USA 120009 (highlighted in yellow and orange); Babey 30(b)(6) Dep. 112-114; Ex 31 (Babey summary of 2019 billing credits). The total amount of those recreational costs was \$54,385.71. Ex 31 (Summary of 2019 billing credits); Ex. 32 (Babey email to ODNR re "Caesar Creek Water Supply

Billings,” July 2, 2019). The Corps applied a credit of 12.7% of that amount, or \$6,906.99, to Ohio’s 2019 water supply bill. *Id.*

2. Credits for Visitor Center charges

Babey also reviewed the highlighted charges that contained “Visitor Center” or “VC” in the item description. She decided not to credit the majority of Visitor Center charges because, in her view, they involved the “overall operation” of the Visitor Center and therefore advanced the Corps’ environmental stewardship and flood risk management purposes. Ex. 7, Babey Dep at 45-46. Babey was not aware of any Corps policy or procedure supporting her conclusion. *Id.* at 51. She identified five Visitor Center charges for potential credits: a replacement microwave for the Visitor Center kitchen; letters for the Visitor Center classroom, screens for the Visitor Center, a replacement screen, and “VC hours window clings.” Ex 31 (Babey summary of 2019 billing credits). Babey credited these Visitor Center items because they “could be construed as visitor focused rather than operations focused.” Ex. 32 (Babey email to ODNR re “Caesar Creek Water Supply Billings,” July 2, 2019). But Babey did not credit other Visitor Center charges that similarly involved public use. When asked to clarify why the Corps chose to credit some items (like the microwave and classroom supplies) and not others (like restroom repairs) that also involve both public and employee use of the Visitor Center, Babey responded, “That was not our determination.” Ex. 7, Babey Dep. at 69.

The Corps credited Ohio the amount of \$1,000 for Visitor Centers charges, and it applied those credits to the 2019 water supply bill. Ex. 32 (Babey email to ODNR re “Caesar Creek Water Supply Billings,” July 2, 2019). After applying the recreational and Visitor Center credits, the Corps concluded that Ohio owed \$458,553.84, which included the \$187,150.07 retroactive assessment, interest and penalties on the unpaid balance on the 2018 and 2019 bills. *Id.*

I. The Corps' interest charges and threatened referral to the Treasury Offset Program

But while Ohio was meeting with the Corps in 2018 and 2019 to gather more information and to discuss the crediting of contested charges, the Corps had been preparing to refer Ohio's remaining unpaid balance to the Treasury Offset Program. The Treasury Offset Program, operated by the Department of the Treasury's Bureau of the Fiscal Service, is a "fully-automated, centralized program that intercepts federal and state payments to collect delinquent debts owed to federal and state agencies." Treasury Offset Program Fact Sheet, available at <https://fiscal.treasury.gov/files/top/TOP-rules-reqs-fact-sheet.pdf>. Once referred, the Program withholds federal funding from the debtor—in this case, the State of Ohio—until the unpaid balance is paid off. *Id.* Importantly, a referral would authorize the Treasury Offset Program to withhold funds from *any* Ohio department or agency, not just the Department of Natural Resources.

In November 2019, the Corps sent to Ohio two notices of delinquency for \$321,357.34 and \$43,607.74, which also threatened to refer the unpaid balance to the Treasury Offset Program. Ex. 33 (Notices of Delinquency and Statements of Account, Nov. 8, 2019). Attached to the notices are Statements of Account that list the unpaid balance and accrued interest and penalties. *Id.* To avoid referral to the Treasury Offset Program, Ohio made a payment of \$364,965.08, under protest, reserving all rights, claims, or defenses arising from the Contract. Ex. 34 (Ohio letter with payment under protest, Dec. 6, 2019). Given the parties' ongoing efforts at negotiating a resolution while Ohio disputed the charges, Ohio noted its surprise at the Corps' threatened referral to the Treasury Offset Program. *Id.* at OH011794. The Corps had held collection in abeyance and had not provided any notice that referral to the Treasury Offset Program was imminent. *Id.*

Unwilling to risk a referral that could potentially impact an unrelated agency, Ohio paid

the remaining balance under protest on February 21, 2020. Ex. 35 (Ohio’s email and letter with payment under protest, Feb. 21, 2020).

J. The Corps’ post-audit response to Ohio and Congressional inquiries

As a result of the Corps’ 2017 audit, the Corps assured Ohio’s congressional delegation that it had “revised the billing process to dramatically reduce the opportunity for miscalculations, prevent future errors, and to be more transparent.” Ex. 19 at USA004210 (Corps letter to Sen. Brown, Aug. 2, 2017). Contrary to that representation, however, the Corps has not, to date, made any changes in its billing practices to address the concerns raised by members of Congress and ODNR – that Ohio was being charged improperly for costs not related to water supply or storage or flood control. Babey 30(b)(6) Dep. 118. Rather, the Corps’ “revised” billing practices focused on the accounting methods that led to the purported underbilling—i.e., the Corps’ use of the wrong numbers to calculate the operational and maintenance costs. Graham Dep.174-175; Babey 30(b)(6) Dep. 67-68. The Corps also acknowledges that it has not made any changes to provide greater transparency or more detail in its invoices. Ex. 4, Babey 30(b)(6) Dep. 55-58, 68.

IV. Procedural History

A. Ohio sues the Corps for breaching the Contract.

After years of failed attempts to negotiate an amicable resolution to these ongoing issues with the Corps, Ohio filed its complaint on March 13, 2020, asserting seven causes of action. (ECF No. 1). The first three causes of action asserted claims for breach of contract resulting from (1) the Corps charging operation and maintenance costs not authorized by the Contract, (2) the Corps retroactively assessing \$187,150.07, and (3) the Corps charging interest on disputed invoices that the Corps asserts are past due. *Id.* at ¶¶ 37-44. Ohio’s fourth cause of action asserted breach of the implied covenant of good faith and fair dealing. *Id.* at ¶¶ 45-47.

The Corps moved to dismiss the action. ECF No. 9. The Court denied the motion with respect to all but Ohio's takings claim. The Court found that it had jurisdiction over Ohio's breach of contract claims and that Ohio's claims fell within the six-year statute of limitations in 28 U.S.C. § 2501. *Id.* at 5-6. The Court concluded that it has jurisdiction over Ohio's illegal exaction claim and deferred ruling on the Corps' motion to dismiss Ohio's claim for breach of the implied covenant of good faith and fair dealing. *Id.* at 7-8. The only claim the Court dismissed was Ohio's takings claim. *Id.* at 8.

Following the Court's ruling on the Corps' Motion to Dismiss, Ohio filed an amended complaint to comport with the Court's ruling and to clarify, in response to the Corps' challenge, that the Complaint encompasses new bills and interest charges assessed during the pendency of this litigation. (ECF No. 23-1 at ¶ 42; *see also* Ex. 36).

B. The Court's partial summary judgment decision

In February 2021, Ohio filed a Motion for Partial Summary Judgment requesting that the Court define the Contract's term "joint-use operation and maintenance costs of the Project," based on U.S. Supreme Court, Federal Circuit, and Court of Federal Claims precedent. ECF No. 26. The Court granted Ohio's motion, holding that the Contract places three limits on what the Corps may charge: the Corps "cannot charge Ohio for costs that are not joint use, not for operation and maintenance, or not related to the Caesar Creek Project." ECF No. 40 at 6.

Starting with the meaning and scope of "the Project," the Court noted that the contract states that the Project is "the Caesar Creek Reservoir on Caesar Creek, a tributary of the Little Miami River," construction of which "was authorized by the Flood Control Act" of 1938 and would include "storage for municipal and industrial water supply." *Id.* The Project was designated as a "multi-purpose project" with the goals of "flood control," "water quality control," and "water

supply.” *Id.*

Next, the Court turned to the “core” of its analysis—the meaning of “operation of maintenance.” *Id.* at 7. Under controlling precedent, costs are considered “maintenance and operating expenses” when those “expenditures [are] made to maintain it as an efficient going concern and to operate it effectively to the end for which it was designed,” *Nampa*, 268 U.S. at 53, as well as “costs . . . incurred after the project was completed to remedy injurious effects resulting from the project’s subsequent operation.” *Casitas*, 543 F.3d at 1284.

Finally, turning to the meaning of “joint use,” the Court determined that “the Contract defines ‘joint-use’ as pertaining to more than one *contractually specified use*.” ECF No. 40 at 6 (emphasis added). Joint-use costs, as used in the contract, refer to expenses which serve multiple purposes, while specific use costs refer to expenses for recreational purposes only. *Id.*

Based on the plain language of the Contract, the statutory purposes of the Contract, and controlling precedent, the Court concluded that expenses charged to Ohio as “joint-use operation and maintenance costs” under the Contract are those “necessary ‘to maintain [the Project] as an efficient going concern,’ *Nampa* at 53, ‘to operate [the Project] effectively’ for water storage, water availability, and flood control, *id.*, or ‘to remedy injurious effects resulting from the [P]roject’s subsequent operation,’ *Casitas*, 543 F.3d at 1284, that pertain to more than one purpose of the Project.” ECF No. 40 at 9.

V. Legal Argument

A. Ohio is entitled to summary judgment on its breach of contract claim.

Summary judgment for Ohio is appropriate here because there is no genuine issue of material fact as to the Corps’ breach of contract claims, and Ohio is entitled to judgment as a matter of law. RCFC 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears

the initial burden of establishing that there is no genuine issue of fact as to an essential element of the non-moving party's case. *Celotex*, 477 U.S. at 322. The responding party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). As the party opposing the motion, the Corps must point to an evidentiary conflict created on the record. *San Carlos Irrigation & Drainage Dist. v. United States*, 84 Fed.Cl. 786, 802 (2008). Mere denials or conclusory statements are insufficient to defeat a motion for summary judgment. *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

To recover for a breach of contract, a party must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach. *San Carlos Irrigation*, 877 F.2d at 959. The first two elements are not in dispute here. Neither party challenges the validity the 1970 Contract. Nor do the parties dispute the existence of an obligation or duty under the Contract. This Court has already defined the scope of those duties as relevant to this case: Expenses charged to Ohio as "joint-use operation and maintenance costs" under the Contract are those (1) operation and maintenance charges; (2) pertaining to the Caesar Creek Project; (3) that are "necessary 'to maintain [the Project] as an efficient going concern,' 'to operate [the Project] effectively' for water storage, water availability, and flood control," or "to remedy injurious effects resulting from the [P]roject's subsequent operation,' that pertain to more than one purpose of the Project." ECF No. 40 at 9 (internal citations omitted). And while the precise *amount* of damages is yet to be calculated, there can be no serious dispute that if the Corps has been categorically overcharging Ohio (and it has), then Ohio has suffered damages.

Liability thus hinges on the third element of Ohio's breach of contract claim: Has the

Corps breached its duties and obligations under the Contract? Answering that question does not turn on any material issue of disputed fact. Rather, this case turns on applying the undisputed facts to the meaning of “joint-use operation and maintenance costs of the Project,” as already determined by this Court. *See* ECF No. 40 at 9. *See also Richardson v. United States*, 157 Fed.Cl. 342 (2021) (a case that “involves essentially undisputed facts and turns on the legal consequences that attach to those facts” is appropriate for summary judgment). Ohio is therefore entitled to summary judgment on liability.

B. The Corps has breached the 1970 Contract.

The Corps has breached the 1970 Contract by persistently billing Ohio for a wide swath of expenses that fall outside the definition of “joint-use operation and maintenance costs of the Project.” Ex. 1, Contract, Article 5, Section (c)(1). Specifically, the undisputed factual evidence reveals, as a matter of law, that the Corps breached and continues to breach the Contract in at least four distinct ways: (1) the Corps has charged Ohio for expenses that are not necessary for water supply, water storage, or flood control, and thus are not properly passed on to Ohio; (2) the Corps has charged Ohio for costs that do not pertain to the Caesar Creek Project; (3) the Corps has charged for interest on the operation and maintenance charges; and (4) the Corps charged Ohio for a retroactive lump-sum charge. The Corps breached the agreement by charging for expenses that are not necessary for flood control, water supply, or water storage.

The plain terms of the Contract, as this Court has already ruled, limit the Corps to charging Ohio for expenses necessary for water storage, water availability, and flood control. ECF No. 40 at 9. The Corps admits it does not limit its billing in this way. Indeed, it does not try. The Corps breaks its costs down based on what Congress authorizes it to *spend* at Caesar Creek, not based on what the Contract allows it to *bill* Ohio. But the two are not synonymous. Congress

authorizes the Corps to spend money at Caesar Creek for four budgetary purposes: flood risk management, water supply, environmental stewardship, and recreation. The Contract, however, only allows the Corps to charge Ohio for two of those categories: flood risk management and water supply. By also charging Ohio for expenses related to recreation and environmental stewardship, the Corps breached the Contract.

1. Unauthorized recreational charges

The Corps readily concedes that recreational expenses fall outside those contractually authorized Project purposes. Ex. 7, Babey Dep. 43; Ex. 4, Babey 30(b)(6) Dep. 91-92. The Corps nevertheless justifies charging Ohio with recreational expenses in one of two ways. First, it recharacterizes expenses with an obvious recreational purpose as charges related to the Corps' flood control mission. For example, the Corps charges Visitor Center displays as flood control expenses because they teach the public about the Corps' history and flood control mission. O'Boyle Dep. 93. But educating the public about the history and flood control mission of the Corps, while laudable, does not keep the dam running.

Second, the Corps tries to justify passing on recreational expenses to Ohio by characterizing them as "joint use costs" related to both recreation and one of the remaining Project purposes. The Corps considers recreation a non-billable "specific cost" when recreation is the sole purpose of the expense. Ex. 7, Babey Dep. 43. But if the Corps considers an expense as related to recreation and *any* another purpose, it passes on to Ohio 12.7% of that entire expense as a "joint use cost." Ex. 4, Babey 30(b)(6) Dep 94-95. For example, the Corps acknowledged that repairs to the Visitor Center heating and cooling system may be related to recreation. Babey 30(b)(6) Dep. 94. The Visitor Center furnace and air conditioning system is not necessary for water supply or flood control. Yet, the Corps did not credit those expenses because it considered

these repairs a “joint cost” tied to more than one budgetary purpose. *Id.*

The Corps’ “joint use” methodology, however, is completely untethered from the Contract. Recreational costs—whether standalone or joined with another purpose—cannot be charged to Ohio under the Contract. As demonstrated by the Corps’ billing practices, there is no stopping point to the recreational costs the Corps has passed on to Ohio, so long as it can conceive of a possible nexus to another budgetary purpose or recharacterize it as an expense related to flood control. Illustrating the point, the recreational expenses below, which plainly bear no reasonable relation to the permitted purposes of flood control or water storage and supply, nonetheless appeared in Ohio’s bills from the Corps. While this practice may be administratively convenient for the Corps, it is a breach of the contract.

Visitor Center and Learning Center expenses. The Corps’ charging of expenses related to the Visitor Center and Learning Center presents some of the plainest examples of its improper billing practices. The Visitor Center at Caesar Creek is a Class A facility that showcases the Corps’ national and regional history. Ex. 2 (O’Boyle Dep. 25); Ex. 3 (Baker Dep. 58). As a regional Class A facility, the Visitor Center has exhibits that explain the history of the Corps, the Corps’ regional flood control mission, and the natural and archeological history of the region. *Id.* at 67; Ex. 6 (Photo of exhibit from Visitor Center). The Learning Center, which is part of the Visitor Center complex, is used for Corps training programs and activities, like visitor assistance training and ranger safety training. Baker Dep. 42-43. The Corps also conducts educational programs for the public in the Learning Center. *Id.* at 42.

Despite its obvious recreational and educational purposes, the Corps has passed on to Ohio an extensive array of Visitor Center expenses by recharacterizing them as flood risk management expenses or as related to both recreation and flood control. Those expenses include Visitor Center

electric service (Ex. 20 at USA 001615), repairs to the Visitor Center heating and cooling system (*id.* at USA 001665), and repairs to the public restroom urinals (*id.* at USA001616). The Corps has also charged Ohio for various expenses that specifically benefit the Learning Center. *See id.* at USA 001603 (“American Flag set for Learning Center”); *id.* at USA 001616 (“Emergency furnace repairs—Learning Center/MRA Office”). These expenses have nothing to do with operating the Caesar Creek Project for water storage, water supply, or flood control.

Caesar Creek’s Park Manager has given a similar bureaucratically convenient rationale for billing Visitor Center expenses to Ohio. When asked why electric service for the Visitor Center would be billed under flood risk management, he replied, “that’s just historically the way we’ve done it.” O’Boyle Dep. 93. Expenses for the Visitor Center, the Learning Center, and Miami River Area Office “all get lumped in under [flood risk management]” because when visitors come in to look at the exhibits at the Visitor Center, they’re “looking at the exhibits about the history of the Corps of Engineers, which we would charge to [flood risk management].” *Id.* at 94.

Teaching the public about the history and flood control mission of the Corps, however, does not keep the dam running. If the Visitor Center and its various amenities and exhibits no longer existed, what would happen to the water supply, water storage, and flood reduction operations of the Project? Absolutely nothing. Case in point: During the height of the COVID-19 pandemic from March 2020 until April 2021, the Visitor Center was closed to the public. O’Boyle Dep. 28; Baker Dep. at 50-51. Rangers worked remotely and reduced their hours on site. Baker Dep. 50-51. Yet, during that time, the flood reduction and water storage operations of the Project continued. O’Boyle Dep. 28; Baker Dep. 52. The Visitor Center has no nexus to the physical operation or maintenance of the dam itself.

Solar panel installation and repair. The costs of installing and repairing solar panels on

the Visitor Center are also recreation and visitor outreach expenses that should not be billed to Ohio. The Corps has installed solar panels on the Visitor Center as a conservation effort and as an outreach tool to teach the public about solar energy. O'Boyle Dep. 40; Baker Dep. 75. The solar panels are not the sole power source for the Visitor Center; the Corps also pays for electric service. O'Boyle Dep. 40. The solar panels also do not provide any power to the dam facilities. Baker Dep. 49-50. But the Corps bills Ohio for both the solar panels and for Visitor Center electric utility bills. These charges have no relation to the water supply or flood control purposes of the Project and therefore are not authorized by the Contract.

Water safety education and outreach. The Corps has also billed Ohio for water safety education and public outreach as flood risk management expenses. According to the Corps' own materials, Caesar Creek Lake is a popular recreational destination that attracts over a half-million visitors each year for boating, sailing, canoeing/kayaking, paddle boarding, and swimming. U.S. Army Corps of Engineers Louisville District, Caesar Creek Lake Master Plan (2020) 2-39, available at <https://www.lrl.usace.army.mil/Portals/64/CaesarCreekMasterPlanUpdate.pdf>. To promote water safety at all the lakes in the Louisville District, the Corps has sent Caesar Creek employees to attend and set up booths at events like the Cincinnati Travel, Sports, and Boat Show, Cincinnati Reds baseball games, and Fourth of July parades. O'Boyle Dep. 99-101. At these events, the Corps sets up a booth with activities to promote water safety. *Id.* at 119. For example, the Corps uses a game called "Drunk Goggles" to simulate the effects of driving a boat while intoxicated. *Id.* at 119. A Corps employee also dresses up as Bobber the Water Safety Dog, the Corps' mascot, and passes out coloring books to children at these events. *Id.* at 100; Ex. 39 (Photo of Bobber the Water Safety Dog from U.S. Army Corps of Engineers digital visual library, Library of Congress, accessed on April 18, 2022).

Although the self-evident purpose of these events is to teach water safety to recreational users of their lakes, the Corps has billed water safety outreach under flood risk management and has passed on to Ohio the costs of attending these events. Ex. 21, Teives Dep. 41; O’Boyle Dep. 103; Ex. 37 at USA001779 (\$1,977.60 for “Cincinnati boat show” in 2017-2018 costs). The Corps has also charged Ohio for expenses related to the purchase, transport, and cleaning of the Bobber the Water Safety Dog costume. *See, e.g.*, Ex. 38 at USA001822 (\$2,415.00 for “Bobber the Water Safety Dog Outfit” in 2018-2019 costs); Ex. 20 at USA001601 (\$152.28 for “Replacement mascot transport” in 2015-2016 costs). The Corps justifies Bobber the Water Safety Dog as a flood-risk-management expense because Bobber’s job is to educate the public about the multiple purposes of Caesar Creek, which include flood risk management. O’Boyle Dep. 104. Even the Corps’ own accountant, however, could not justify this leap. Alicia Graham acknowledged that she too questioned why the costs of sending employees to a boat show were included as operation and maintenance expenses, testifying: “it didn’t seem like a normal thing.” Graham Dep. 53-54.

The Corps has breached the Contract by charging Ohio for expenses related to recreation and by passing on to Ohio the entirety of a charge that involves both a recreational component and another budgetary purpose. These charges have no relation to the water supply or flood control purposes of the Project and therefore are in breach of the Contract.

2. Unauthorized charges for environmental stewardship

Expenses related to the environmental stewardship mission at Caesar Creek also fall outside the Contract’s authorized Project purposes, as defined by this Court, and therefore breach the Corps’ agreement with Ohio.

The environmental stewardship purpose of Caesar Creek generally relates to the preservation of species habitats, cultural resources or archeology. Teives Dep. 52. The park

rangers' natural resource management responsibilities include prairie and trail maintenance and the removal of invasive species. Baker Dep. 33-35. The Corps has used the environmental stewardship budgetary purpose to justify charging Ohio with expenses such as: birdseed (O'Boyle Dep 67-68; Ex. at USA001601); bird feeders set up under the Visitor Center roof (O'Boyle Dep. 132-133; Ex. 20 at USA001588); flea collars (*id.*); water feature for Visitor Center garden (Babey 30(b)(6) Dep. 159; Ex. 20 at USA001641); invasive species removal in areas unrelated to flood control (Ex. 20 at USA001603); and salaries for natural resource specialists (i.e., rangers), biologists, and archeologists (Babey 30(b)(6) Dep. 159; Ex. 37, USA001783 to 1785). The Corps' program analyst concedes that activities related to environmental stewardship are not necessary to keep the flood wall operating. Teives Dep. 52. Indeed, if any of these features were eliminated from Caesar Creek, their absence would not prevent the dam itself from operating.

Ohio does not dispute that Congress has authorized the Corps to coordinate the flood control and water supply purposes of their projects with wildlife preservation and natural resource conservation. *See, e.g.*, The Fish and Wildlife Coordination Act of 1958, Public Law 85-624 (codified as amended at 16 U.S.C. §§ 661, et seq.); Water Pollution Control Act of 1961 (Public Law 87-88). Congress has accordingly allocated funds to ensure compliance with these federal requirements. But, again, a Congressionally-authorized purpose does not equate to a contractually-authorized purpose that the Corps may charge to Ohio. The Corps' Contract with Ohio governs which costs it may pass on to Ohio. And nowhere does the Contract refer to The Fish and Wildlife Coordination Act of 1958, the Water Pollution Control Act of 1961, or any other law authorizing the Corps to engage in wildlife preservation and natural resource conservation—even while the Contract does affirmatively reference the Flood Control Act of 1938 and the Water Supply Act of 1958. By consistently and categorically charging Ohio for expenses not necessary for flood risk

management, water supply, or water storage, the Corps breached the Contract as a matter of law.

3. Charges unrelated to the Caesar Creek project

The Corps independently breaches the Contract by charging Ohio for the wrong project. As this Court confirmed, to be chargeable to Ohio, expenses must not only relate to the proper categories, they must also relate to the Caesar Creek project. ECF No. 40 at 6; Contract, Article V, Section (c)(1). Expenses incurred by other projects or by multi-project, regional Corps programs fall outside the scope of this express limitation. Yet the Corps similarly ignores this restriction. The Corps breaches the Contract by billing Ohio for non-Caesar Creek and regional expenses that should be charged to, or shared with, other Corps projects.

Charges for the Miami Area River District Office. The Corps has improperly charged to Ohio various expenses related to the Miami River Area District Office in the Visitor Center, appearing as “Area Office” or “MRA,” as in the following examples: \$3,628.68 for VC/Area Office/Learning Center electric service (Ex. 20 at USA001586); \$138,848.00 to “Replace roof CCL Area Office and Visitor Center” (*id.* at USA001688); \$2,498.86 for replacement kitchenette for Area Office/Workroom (*id.* at USA001700); \$151.99 for MRA carpet cleaning (Ex. 37 at USA001781). Additionally, the Corps has confirmed that Caesar Creek is charged for office supplies that are shared by the Area Office. Babey 30(b)(6) Dep. 157-158.

Expenses for the Miami River Area Office should not be billed to Ohio because the Area Office runs operations for all five lakes in the Miami River watershed, not just Caesar Creek. Baker Dep. 47; O’Boyle Dep. 36. While the employees for the Miami River Area maintain their offices in the Caesar Creek Visitor Center, they work on other projects in the area and travel out to those lakes. Teives Dep. 33; O’Boyle Dep. 37. Employees for the Miami River Area also work under a completely different chain of command from the Project staff and do not report to the

Caesar Creek Park Manager. *Id.* O’Boyle Dep. 35. The operations manager for the Miami River Area reports to the Corps’ Louisville District office. Baker Dep. 47.

The “area office” is not synonymous with “the project office.” The Caesar Creek Project Office, which the Project staff also refer to as the maintenance building, is a separate building located down the street from the Visitor Center. Baker Dep. 72-73; O’Boyle Dep. 44, 134-135; Ex. 8 (Google aerial image of Project Office). While the Park Manager and the rangers have offices in the Visitor Center, the remaining Caesar Creek project staff work in this Project Office. O’Boyle Dep. 44.

The Corps’ program analyst agrees that purchases made for the Miami River Area District office should be distinguished and split out from the purchases made for the Caesar Creek Project. Teives Dep. 45-46; Babey 30(b)(6) Dep. 130. But it is unclear from the itemized costs whether Area Office expenses are separated from the items billed to Ohio or shared among other regional projects. Indeed, the Park Manager acknowledged that expenses for the Visitor Center, the Learning Center, and the Miami River Area District office all “get[] all lumped in under [flood risk management].” O’Boyle Dep. 93. The justification? “That’s just historically the way we’ve done it. . . probably just for convenience.” *Id.* at 93-94. Convenience does not justify passing on costs to Ohio that are not authorized by the water supply Contract. While the Area Office might also have oversight over some aspects of Caesar Creek’s operations, expenses incurred by the Area Office that do not relate to Caesar Creek are not “Project” operations and maintenance costs authorized by the Contract. Those Area Office charges must therefore be separated from the share of costs charged to Ohio under the Contract. By billing the entirety of those expenses to Ohio, the Corps breaches the Contract.

Miscellaneous charges for other projects. The Corps has also breached the Contract by

billing Ohio for miscellaneous expenses incurred by other projects. For example, the items billed to Ohio include charges in the amounts of \$1829.43, \$3,917.50 and \$21,285.42 for a biological study involving C.J. Brown, another lake in the Miami River Area District. Ex. 38 at USA001817. Ohio was also charged for an item described as “Site visit Xenia.” *Id.* at USA001822. The Park Manager didn’t know the purposes of these charges and could offer no explanation for why they are necessary to the Caesar Creek Project. O’Boyle Dep. 85, 109. Ohio was also billed for asphalt maintenance at other lakes, C.J. Brown and Brookville. Ex. 20 at USA001585. The Park Manager agrees that those charges should not have been billed to the Caesar Creek Project. Dep. 129-130. Because charges unrelated to the Caesar Creek Project are not authorized under the Contract, this entire category of non-Caesar Creek expenses is in breach of the Corps’ Contract with Ohio.

4. Unauthorized lump-sum retroactive charges

The Corps has also breached the Contract by assessing a lump sum retroactive charge of \$187,150.07 after deciding that its own cumulative billing errors from 2007 to 2017 resulted in a shortfall. As a result of the Congressional inquiry into its billing practices, the Corps concluded that it had underbilled Ohio as a result of having “calculated the O&M amounts different in some years than others.” Ex. 17 at USA013208 (Alicia Graham email). This “systemic error,” the Corps concluded, “resulted in multiple years of incorrect joint cost billing for this lake.” Ex. 19 at USA004212 (Corps audit summary). The Contract, however, imposes on the Corps a duty of billing Ohio on an annual basis. And with that yearly bill, the Corps is required to address any shortfalls from the previous year’s bill resulting from the difference between the estimated and actual operations and maintenance costs. The Contract does not authorize the Corps to assess a multi-year arrearage charge resulting from its own internal accounting confusion.

Article 5, Section (c)(1) of the Contract states that Ohio “shall pay 12.70 percent of the

annual experienced joint-use operation and maintenance costs of the Project.” Ex. 1, Article 5, Section (c)(1). Article 5, Section (c)(2) then sets out how the Corps should bill Ohio, starting with the first year of water storage use. The “first payment will be prorated for that period on the basis of the estimated annual joint-use operation and maintenance costs of the Project.” Article 5, Section (c)(2). After the first payment:

Annual payments will be due and payable in advance on the 1st day of July thereafter. Payments following the first complete fiscal year of operation shall be increased or decreased in an amount to reflect the difference between the prior payment for operation and maintenance and the actual experienced joint use costs of operation and maintenance for the prior years.

Id. The Contract thus contemplates an annual billing cycle whereby the Corps sends a bill based on an estimate of operations and maintenance costs for the fiscal year. The bill for the following year shall be increased or decreased to reflect the difference between the prior year’s payment and the actual experienced joint use costs of operation and maintenance costs. The Contract provides a mechanism for the Corps to reconcile its yearly bill to capture any shortfall that results from the difference between the estimated and actual joint-use operation and maintenance costs.

The Corps’ \$187,000 arrearage charge goes beyond this mechanism in at least two ways. First, the Contract only allows adjustments based on the preceding year’s experienced costs, and only when the current bill is issued. It does not authorize a ten-year lookback and lump-sum bill. Second, the Contract allows for an adjustment only to “reflect the difference between prior year’s payment and the actual experience joint use operations and maintenance” costs. It does not authorize the Corps’ attempt to recoup a shortfall resulting from the Corps using the wrong spreadsheet totals to bill Ohio in prior years.

The language of the Contract is plain: the Corps must bill Ohio on an annual basis. And with that yearly bill, the Corps must reconcile any differences from the previous year between the

estimated and actual experienced joint-use operations and maintenance costs. The Contract does not authorize the Corps to assess a purported multi-year arrearage based on its own billing methodology choices. To the extent that the Corps argues otherwise, any ambiguity in the Contract is construed against the Corps as the drafter. *See United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed.Cir.1987); Ex. 40 at OH00125 (Letter from to ODNR with draft contract, June 30, 1967). Moreover, the Corps acknowledges that it did not consider the Contract before billing Ohio this lump sum arrearage. Babey Dep. 34. The record leaves no disputed issue of material fact that the Corps has breached the Contract by assessing the \$187,150.07 lump sum retroactive charge for the billing errors. As a matter of law, Ohio is entitled to summary judgment on this claim.

5. Interest charges and late fees

The Corps has also breached the Contract by charging Ohio interest on unpaid and contested operations and maintenance charges. The Corps appears to be charging 1% interest on unpaid operation and maintenance charges, plus another 6% for any amount the Corps claims is more than 90 days delinquent. Ex. 16 (2018 adjusted bill for underbilling). The Corps also sent Statements of Account that list the unpaid balance and accrued interest and penalties. Ex. 33 (Notices of Delinquency and Statements of Account, Nov. 8, 2019). The Contract itself, however, does not authorize those charges.

“Where certain things are specified in detail in a contract, other things of the same general character relating to the same matter are generally held to be excluded by implication.” *Nicholson v. United States*, 29 Fed. Cl. 180, 196 (1993). Article 5, Section (c), the operation and maintenance provision, says nothing about charging interest on past-due amounts owed to the Corps. But Article 5, Section (a), the project investment costs provision, does affirmatively authorize interest on unpaid investment cost charges: “If the State shall fail to make payment of any of the aforesaid

payments when due, then the overdue payment shall bear interest at the rate of 3.253 percent until paid.” If the Corps had wanted to also collect interest on the operation and maintenance charges, it should have included an interest provision in Article 5, Section (c). But it did not. The Corps’ inclusion of interest charges for the initial construction and investment stage of the Project but not in the post-construction operations and maintenance stage evidences the Corps’ intention not to charge interest on unpaid operations and maintenance payments.

The Corps’ invoices and correspondence during this lawsuit cite to the Debt Collection Act of 1982 as authorization for the interest charges. But the text of the Act plainly states that it does not apply to the Corps’ Contract with Ohio. The section authorizing interest charges “does not apply . . . to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982,” the effective date of the statute. 31 U.S.C. § 3717(g)(2). The Contract was executed in 1970 and has been in effect since 1970. The Act does not apply, and these charges are unlawful. Even without this express statutory language barring retroactive application of the Act, the Contract itself contains no language providing for any change resulting from the legislative enactment. “The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change.” *Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed.Cir.1995).

The Corps has otherwise been unable to identify any legal justification for imposing interest charges on Ohio. The Corps’ designated RCFC 30(b)(6) representative could not point to any legal authority justifying these charges. Ex. 41, Roxanne Keeling 30(b)(6) Dep. 20-21. Nor could she point to any provision in the Contract authorizing the charging of interest and penalties. *Id.* The Corps could not identify any legal or contract authority for the charges because none exists. As a matter of law, Ohio is entitled to a summary judgment finding that the Corps’ interest charges

are a breach of the contract.

C. The Corps breached the Contract and the implied covenant of good faith by failing to provide sufficient detail and justification for charges it passes on to Ohio and by failing to implement consistent reliable systems for billing processes.

In addition to the charges outlined above that categorically fail to satisfy the contractual prerequisites, there are countless other charges for which the Corps failed to provide sufficient information to determine whether the costs relate to the Caesar Creek project much less whether they pertain to flood control, water supply, or water storage. Many of these charges would undoubtedly fall within the impermissible categories discussed above if sufficient information were provided. More foundationally, however, the lack of billing justification reveals a pervasive and systematic failure to provide Ohio with the information it needs to understand and review the charges. This is in itself a breach of the Contract or, alternatively, a breach of the implied covenant of good faith and fair dealing. This failing is compounded by, or perhaps the result of, the Corps' lack of a consistent and controlled billing methodology demonstrated by the arbitrary and often ad hoc billing practices. This too breaches the Contract or the implied covenant of good faith and fair dealing.

1. The implied covenant of good faith and fair dealing

“Every contract, including one with the federal government, imposes upon each party an implied duty of good faith and fair dealing in its performance and enforcement.” *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019). This duty “prevents a party’s acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract’s purpose and deprive the other party of the contemplated value.” *Mansoor Int’l Dev. Servs. v. United States*, 121 Fed. Cl. 1, 7 (2015). Subterfuges and evasions violate the obligation of good faith, as does lack of diligence and interference with or failure to cooperate in the other party’s performance. *Malone*

v. United States, 849 F.2d 1441, 1445 (Fed.Cir.1988). “[T]he scope of the duty of good faith and fair dealing does not necessarily require a breach of the underlying contract.” *RMA Eng’g S.A.R.L. v. United States*, 140 Fed. Cl. 191, 221 (2018). But “[w]hat is promised or disclaimed in a contract helps define what constitutes lack of diligence and interference with or failure to cooperate in the other party’s performance.” *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990-91 (Fed. Cir. 2014).

2. The Corps’ failure to provide sufficient information and explanation for charges breaches the implied covenant of good faith and fair dealing.

Labor charges. The Corps’ cursory list of labor expenses is one particularly egregious example of charges passed on to Ohio without any billing justification. In response to requests from both Rep. Stivers and ODNR, the Corps provided an annual summary of the labor hours charged to Ohio as operations and maintenance costs from 2007 to 2017. *See, e.g.*, Ex. 20 at USA001590; *id.* at USA001605 (July 2016 to June 2016). The summaries show labor charges by position title, pay plan, number of hours and the total cost of labor hours for that year. *Id.* According to the Corps, employees can designate their time in 15-minute intervals by entering a code that corresponds to a project purpose. Graham Dep. 138-139. The code corresponds with a funded work item. Babey 30(b)(6) Dep. 50. The Corps’ labor summaries, however, do not provide any codes or any other information that would identify the purpose of the labor hours. Graham Dep.135. The labor charges that the Corps billed to Ohio include rangers’ salaries, which, on their face, have no nexus to any operations and maintenance costs related to water supply, water storage or flood control. Indeed, Rep. Stivers expressed his concern that rangers’ salaries should not be included in the joint use operational and maintenance costs passed on to Ohio. Ex. 14 (Rhiannon Ryan email, “Call with Congressman Stivers. . .”).

The testimony of at least one Caesar Creek ranger validates Rep. Stivers' concern. Kimberly Baker has been stationed at Caesar Creek for at least 27 years, first as a temporary ranger and then as a permanent ranger. Baker Dep. 12-13, 20. Ms. Baker estimates that she spends about 60% of her time on visitor assistance matters at the Visitor Center: i.e., helping visitors find what they need, giving directions, and talking about the attractions and activities on site. *Id.* at 23, 25. On an average summer weekend, she spends an additional estimated 20% of her time helping visitors with permits for fossil hunting, a popular activity at Caesar Creek. *Id.* at 25-26. Ms. Baker's responsibilities also include mulching trails, pulling weeds, working on Visitor Center displays, prairie maintenance, and patrolling the lake on weekends. *Id.* at 22, 33-35. Ms. Baker is trained to handle the hydraulic gates that control the water level of the reservoir. *Id.* at 31. The four members of the maintenance staff at Caesar Creek, however, are mainly responsible for operating the dam, while the rangers provide backup assistance. *Id.* at 32-33. Ms. Baker handles the dam gates about once or twice a year. *Id.* at 32. Should park rangers need to intervene with dam operations, they can readily document their labor in 15-minute intervals. But they do not. Instead, the Corps charges Ohio 12.7% of the entire rangers' salaries.

Although rangers spend a significant amount of their time on recreational activities that involve interacting with visitors, the Corps justifies billing the entirety of ranger salaries by characterizing their duties as being related to multiple budgetary purposes. Babey 30(b)(6) Dep. 147-148, 187-188. According to the Corps' representative, rangers inspect the project site to "enforce and apply each of the project purposes." *Id.* at 148. The Corps posits that rangers perform inspections of the project site to make sure that everything is in working order. *Id.* at 149-150. The Corps' labor cost summaries, however, provide no information from which a water supply customer like Ohio could determine whether rangers performed any work necessary to water

supply, water storage or flood control. Indeed, the labor summaries contain such little information that even Ms. Baker could not identify which line item represented her own personnel costs. Baker Dep. 70.

Unspecified travel expenses. The Corps' list of itemized charges is replete with travel orders and mileage expenses containing no description of their purposes. *See, e.g.*, Ex. 20 at USA001585 (five charges for "travel order"); *id.* at USA001603 (four charges for "mileage and rental"). The Corps has also passed on to Ohio mileage and rental charges for staff use of vehicles, which belong to the General Services Administration ("GSA") but are kept at Caesar Creek. O'Boyle Dep. 54. For example, the 2014-2015 summary contains four charges for "mileage & rental" of GSA vehicles, with each charge exceeding \$3,000. Ex. 20 at USA001618.

The Corps contends that these charges are properly passed on as operations and maintenance costs because there would have been a purchase request and commitment that links back to a funded work item for Caesar Creek. Babey 30(b)(6) Dep. 165. The item descriptions, however, contain no justification for these expenses, let alone anything that identifies their connection to flood risk management, water storage, or water supply. All charges must be related to joint use operations and maintenance costs "of the Project"—which raises the question: why would travel off site be a necessary operation and maintenance cost for the flood control or water supply at Caesar Creek?

Ohio asks the Court to find that this entire category of expenses—where the Corps fail to identify any billing justification, let alone any explanation related to water supply, water storage, or flood control—are in breach of the Contract or alternatively the implied covenant of good faith and fair dealing.

3. The Corps' arbitrary billing practices and failure to ensure compliance with the Contract violate the covenant of good faith and fair dealing.

The Corps has breached its duty of good faith and fair dealing by failing to implement fair and consistent billing practices that comport with the Contract. According to the Corps, the manner in which the work category codes are tied to a budgetary purpose eliminates any subjectivity. Babey 30(b)(6) Dep. 49. To the contrary, the whole coding process is fraught with subjectivity and completely disregards the Corps' Contract with Ohio. According to the Louisville District office, the park staff are responsible for determining which project purpose—and thus, which work category code—to use for each expense. Teives Dep. 41, 54. The decision to charge a water safety expense, for example, to recreation or flood risk management or both would depend on the park managers' "interpretation of what they are actually doing" with that particular expense. *Id.* at 54. The Corps, however, does not provide any written or verbal guidance to project staff on the Corps' water supply Contract with Ohio or the Contract's relevance to purchasing or coding decisions. O'Boyle Dep. 72; Baker 79-80. Indeed, one park ranger testified that she didn't even know that Ohio paid a percentage of operations and maintenance costs until she received a notice for her deposition in this litigation. Baker 79-80.

The Corps' decision in 2019 to credit Ohio with some recreational expenses but not others further demonstrates that the Corps' billing process relies on arbitrary considerations that have nothing to do with the Contract. As explained earlier, Babey did not credit the majority of Visitor Center charges because she determined that most of the Visitor Center operational expenses advanced the Corps' environmental stewardship and flood risk management purposes. Babey Dep. at 45-46. Babey wasn't aware of any policy, procedure, or authority for her conclusion. *Id.* at 51. She did not consult the Contract during her analysis of the itemized charges. *Id.* at 71. Babey did not consider the contractual prerequisites, as articulated by this Court, for billing an operation and

maintenance cost to Ohio. ECF No. 40 at 9. Nor did she consider whether each itemized charge was necessary to operate the project effectively for flood control or water supply. *Id.* at 71-72.

Ohio's inquiry laid bare the Corps' own internal confusion about its billing practices. In response to Ohio's 2018 request for information, the Louisville District did not know how the Corps defined joint-use costs, what the work category codes mean, where to find the work category codes, whether the codes change yearly, and whether the Corps' billing practices for Caesar Creek were consistent with the methodology in a Corps working paper. Ex. 23 (Corps email re "ODNR Request to Corps – Caesar Creek," June 2018). It is no wonder that one Corps employee asked, "are we billing for the wrong things?" *Id.* at USA009863. The Corps also acknowledges that it has not made any changes to provide greater transparency or more detail in its invoices. Ex. 4, Babey 30(b)(6) Dep. 55-58, 68.

By failing to implement transparent, fair, and consistent billing practices and instead creating a methodology unmoored from the requirements of the Contract, the Corps has breached its implied obligations of good faith and fair dealing and has interfered with Ohio's ability to receive the benefit of its contracted agreement with the Corps.

VI. Conclusion

The record here leaves no triable issue of fact on Ohio's claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The Corps has adopted an ill-defined and arbitrary methodology that results in categorically billing Ohio for expenses that are not authorized by the Contract and fall outside the Court's definition of "joint-use operation and maintenance costs of the Project." Accordingly, Ohio asks the Court to conclude that six categories of expenses billed by the Corps fall outside the Court's definition of "joint-use operation and maintenance costs of the Project": (1) recreation charges, (2) environmental stewardship charges,

(3) charges for regional expenses and projects other than the Caesar Creek Project, (4) charges where the Corps fail to identify any billing justification, let alone any purpose related to water supply, water storage, or flood control, (5) a retroactive lump-sum charge attempting to recoup a 10-year shortfall resulting from the Corps' billing errors, and (6) interest charges and late fees assessed by the Corps. Plaintiff State of Ohio therefore respectfully asks this Court to grant Ohio's motion for summary judgment on liability and to find that Ohio is entitled to damages in an amount to be determined.

Respectfully submitted,

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