No. _____

In the
Supreme Court of the United States

MARY SWARTZLANDER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When does a taking claim accrue against the government based on erosion caused by government action, where the erosion for many years was present only on a small fraction of the land, and then expands exponentially after a major flooding event?

LIST OF PARTIES

The name of the Petitioner is:

Mary Swartzlander.

The name of the Respondent is:

United States.

CORPORATE DISCLOSURE STATEMENT

The United States is a government entity. No party is a corporation.

RELATED CASES

To Petitioner's knowledge, there are no related cases.

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CONSTITUTION AND STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mary Swartzlander, petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Federal Circuit (entered April 23, 2020, with rehearing denied July 10, 2020), affirming the Court of Claims' Order and Judgment in favor of respondent United States.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Federal Circuit (Prost, Clevenger, and Dyk, Circuit Judges) is not reported, and is set forth in the Appendix at App. 1a through App. 5a. The relevant Order of the United States Court of Federal Claims (Williams, J.), granting the United States' Motion to Dismiss, dismissing petitioner's case with prejudice, is not reported, and is set forth in the Appendix at App. 6a through App. 18a. The Court of Claims' Judgment is not reported and is set forth in the Appendix at App. 19a. The Federal Circuit Order denying the petition for rehearing is not reported, and is set forth in the Appendix at App. 20a through App. 21a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on April 23, 2020. App. 1a-5a. The Federal Circuit denied petitioner's petition for panel rehearing and rehearing *en banc* on July 10, 2020. App. 20a-21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution (*U.S. Const. Amend. V*) provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This is a case about the Bonneville Power Administration ("BPA") building up one side of Chickahominy Creek in Oregon against erosion with riprap and vegetation, without taking steps to protect petitioner's property directly across the creek, and the devastating damage that has occurred to petitioner's land as a result. Petitioner brings this Fifth Amendment taking claim to seek just compensation for the land the federal government has taken from her through its activities on its side of the creek.

Petitioner filed her complaint in December 2015. The United States moved to dismiss the case as time-barred, or in the alternative for failure to state a claim. After an evidentiary hearing, the Court of Claims granted the motion to dismiss as time-barred. The Court of Appeals upheld the dismissal.

The appellate panel held that Ms. Swartzlander knew or should have known of the permanent nature of the erosion at least as early as 2006. In so holding, the panel overlooked or misapprehended that the erosion at that time, and for years thereafter, involved only a very small percentage of her land, and then expanded exponentially after a major flood event in 2012.

In holding that in 2006 the erosion was not "only mere inches," and thereby distinguishing from prior case law, the appellate panel misapprehended or overlooked the

fact that that precedent never set forth such a narrow view of when a landowner should be on notice, and such an interpretation would make the case precedent virtually meaningless.

In holding that "this is also not a case where the government's mitigation efforts to counter the erosion to landowner's property concealed the erosion's permanent nature," thereby distinguishing from prior case law, the appellate panel misapprehended or overlooked the fact that that case precedent did not rest upon that issue.

REASONS FOR GRANTING THE WRIT

Supreme Court review is appropriate because the Federal Circuit's decision conflicts with this Court's precedent, most notably *United States v. Dickinson*, 331 U.S. 745, 67 S. Ct. 1382 (1947). Consideration by the Supreme Court is therefore necessary to secure and maintain uniformity of the court's decisions.

Furthermore, this case involves a question of exceptional importance – the Fifth Amendment rights of landowners whose property is literally eroded by the actions of the federal government.

ARGUMENT

THE TAKING WHICH WAS THE BASIS OF THIS LAWSUIT WAS NOT *COMPLETE* PRIOR TO THE LIMITATIONS PERIOD

More than sixty years ago, this Court addressed a situation quite similar to the instant case, in *United States v. Dickinson*, 331 U.S. 745, 67 S. Ct. 1382 (1947). In that case this Court held that, where injury from water intrusion emerges gradually over time, such as recurrent flooding, a cause of action for a taking by such a "continuing process of

physical events" does not arise "until the situation becomes stabilized." 331 U.S. at 749. As Justice Frankfurter noted in that case:

> The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" — when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him — for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim — the overflow due to rises in the level of the river — is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.
>
> When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really "taken." Accordingly, we find that the taking which was the basis of these suits was not ***complete*** six years prior to April 1, 1943, nor at a time preceding Dickinson's ownership.

Id. at 748-49 (emph. added).

Similarly, in the instant case, Petitioner's claim was not ***complete*** prior to 2009 (the six-year limitations period preceding the 2015 filing of the complaint under the Tucker Act, 28 U.S.C. § 2501). Petitioner presented abundant and robust evidence that a reasonable person would not have been aware of the expanding and permanent nature of the erosion until an extreme high water event in 2012. As the United States and its experts repeatedly stressed in the instant case, Chickahominy Creek is naturally subject

to erosion, at certain locations on the west bank, at other locations on the east bank. Thus, for any lay person to determine that a project on the opposite bank has caused additional erosion on their property would be difficult, if not impossible, until the erosion becomes dramatic. Here, the erosion did not become dramatic until the 2012 high water event.

Petitioner's "situation" either has not yet become "stabilized" or did not until 2012 – either way, rendering this lawsuit timely.

A. The Lower Court Rulings Were Not Consistent with *Dickinson* and Other Relevant Precedent

In *Dickinson*, this Court held that stabilization occurs when "the consequences of inundation have so manifested themselves that a final account may be struck." *Id*. at 749. The Court of Claims and the Federal Circuit Court followed that principle consistently until the rulings in the instant case.

While the "date of first accrual is a matter of law," "takings jurisprudence is 'uniquely fact intensive.'" *John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182, 193 (2003) (citing *Boling*, 220 F.3d at 1370-71; *Ewald v. United States*, 14 Cl. Ct. 378, 382 (1988)). The Federal Circuit has held that a takings claim will only be denied based on the statute of limitations when "facts alleged demonstrate conclusively that such a decision is required as a matter of law." *John R. Sand & Gravel*, 57 Fed. Cl. at 193 (citing *Ewald*, 14 Cl. Ct. at 382).

For example, in *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000), the Federal Circuit held that stabilization occurs when "environmental forces have substantially and permanently invaded the private property such that the permanent

nature of the taking is evident and the extent of the damage is reasonably foreseeable." "The key date for accrual purposes is the date on which the plaintiff's land has been clearly and permanently taken. However, in cases where the government leaves the taking of property to a gradual physical process, rather than utilizing the traditional condemnation procedure, determining the exact moment of claim accrual is difficult." *Id.* at 1370 (internal citation omitted).

In *Boling* the Federal Circuit criticized the lower court's holding that "the claim stabilizes once any small portion of land has been taken" – a situation closely on point with the instant case – noting that such a holding is inconsistent with *Dickinson*. *Id.* at 1372. The *Boling* Court emphasized that this Court has held that "accrual principles should not be rigidly applied in cases involving environmental takings," due to the difficulties facing property owners when the government leaves "the taking to physical events" and puts the onus on the owners to determine the decisive moment in the process to bring suit. *Id.* (citing *Dickinson*, 331 U.S. at 748).

In recent years, the Federal Circuit has continued to rule on the application of the stabilization doctrine: "[T]he touchstone for any stabilization analysis is determining when the environmental damage has made such substantial inroads into the property that the permanent nature of the taking is evident and the extent of the damage is foreseeable." *Mildenberger v. United States*, 643 F.3d 938, 946 (Fed. Cir. 2011) (quoting *Boling*, 220 F.3d at 1372).

In 2014, the Federal Circuit examined the interplay of the stabilization doctrine with "the accrual suspension rule." *Banks v. United States*, 741 F.3d 1268 (Fed. Cir. 2014). "The accrual of a claim against the United States is suspended, for purposes of 28

U.S.C. § 2501, until the claimant knew or should have known that the claim existed." *Id.* at 1279-80 (citing *Boling*, 220 F.3d at 1373, and other cases). The accrual suspension rule requires that the plaintiff show *either* (1) "that the defendant has concealed its acts with the result that the plaintiff was unaware of their existence" or (2) "that its injury was 'inherently unknowable' at the accrual date." *Id.* at 1280 (citing *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008)).

In *Cotton Land Co. v. United States*, 109 Ct. Cl. 816 (1948), a poorly constructed dam caused sediment to deposit in the riverbed upstream of the dam. Over time, the sediment raised the level of the river bottom until the waters crested the banks, flooding the plaintiff's land. The court found a taking even though the injury had occurred years after the act of constructing the dam, because the flooding was the "natural consequence[] of the collision of the sediment-bearing flowing water with still water, and the progress upstream, of the deposit begun by that collision. 109 Ct. Cl. at 829. *See also Cary v. United States*, 552 F.3d 1373, 1377 (Fed. Cir. 2009) (accrual suspended where harm to the plaintiff's property was the "direct, natural, or probable result" of government action and not "incidental or consequential" injury) (quoting *Ridge Line Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

In *Ark. Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594, 624 (2009), the Court of Claims noted: "Because the [G]overnment set this chain of events into motion through authorized deviations from the water control plan, the fact that there was some later incident that may have 'tilted the scale,' *Cary*, 552 F.3d at 1379, does not break the chain of foreseeable results of the government's authorized action." Here too, the BPA set a chain of events into motion that substantially increased the flooding on Petitioner's

property. As the Federal Circuit noted in *Cary*, 552 F.3d at 1379, "the government did not need to light the match to be liable, but to be a taking, it must have at least authorized supplying the fuel." In the instant case, the BPA provided the fuel for the processes that accelerated erosion and flooding on Petitioner's land.

The full extent of the damage to Petitioner's property was "inherently unknowable" until the 2012 high water event occurred. Whether or not something was inherently unknowable "includes a reasonableness component." *Banks*, 741 F.3d at 1280 (citing *Holmes v. United States*, 657 F.3d 1303, 1320 (Fed. Cir. 2011)). In *Banks*, the court held that the fact "[t]hat the plaintiff's were aware of some erosion is not sufficient for the claim to accrue." *Id.* The court allowed plaintiffs to make an accrual "suspension" argument, based on a lack of understanding that the government's action was causing increased erosion on the plaintiff's' properties. *Id.*

In the instant case, similarly, whether Petitioner was aware of *some* erosion on her property prior to the 2012 high water event is not the appropriate question. Rather, the relevant inquiry is whether Petitioner was (or should have been) aware that the BPA project could have caused the substantial property damage that occurred in 2012, and that has continued since.

B. The Evidence Presented by Ms. Swartzlander and Her Lay and Expert Witnesses Was Sufficient to Demonstrate that the Lawsuit Was Timely Filed

From the time Ms. Swartzlander purchased the property in 2002, until the 2012 high water event, the erosion on her land was limited to a small area. The 2012 high water event was not a 100-year flood; yet it caused extreme damage to Ms. Swartzlander's property. It was only then that she was on notice that something unusual was going on,

and she began investigating.

The *fifteen- to thirty-fold increase* in the amount of erosion, which was not evident until 2012, is a classic example of a situation where the situation had not yet "stabilized" (*Dickinson*, 331 U.S. at 749) and where the harm to the Petitioner's property went from "incidental or consequential" to more apparently a "direct, natural, or probable result" of government action (*Cary*, 552 F.3d at 1377). Indeed, the situation still arguably has not stabilized.

BPA planted saplings on its side of the creek to try to stabilize its side of the bank. No one from the BPA explained to Ms. Swartzlander what was going on on the BPA side, and how that could affect her land. Initially the saplings were small and had minor effect on the channel configuration, causing only a small amount of erosion along Petitioner's 600 foot creek bank. Petitioner's expert explained that as the plants matured and grew, they provided greater resistance to the creek flow – as intended by the project – causing the creek channel to migrate away from the BPA side toward Petitioner's property. The expert explained that none of this was obvious until the 2012 high water event, when Petitioner first experienced complete inundation of her property, significant avulsion of her land, and the fracturing of her stream banks. Despite that *prima facie* evidence, the Court of Claims erred by dismissing the case rather than proceeding to a jury trial.

Ms. Swartzlander; the person she bought the property from; the realtor; and a worker who helped her address the small initial erosion *all* testified that prior to 2012, the erosion on the property was minor and limited to two small areas. The size of the original erosion before the 2012 event was, by various testimonies, only fifteen to forty feet of her bank. The erosion is now along more than 500 feet of her 600-foot creek bank, causing

steep dropoffs and overhangs where there were once gentle slopes down to beaches along the creek.

After the 2012 high water event, Ms. Swartzlander began to realize there was a major erosion problem developing and began requesting documents, which revealed the ninebark plantings and other details of the project. In 2015 she consulted with the expert, Mr. Schlieder, and began learning more about the connection between the BPA project and the ongoing erosion. She filed this lawsuit well within the statute of limitations.

According to Petitioner's expert, Gunnar Schlieder, the BPA project lacked quantitative surveys of the creek channel, both contemporaneous and historic, which would have allowed the project planners to predict the impact of the project on the creek channel. Project design drawings were not to scale and the channel configuration as shown on most of the drawings did not resemble the channel configuration that was visible on historic air photos taken around that time. Additionally, cross section drawings of the project were, for the most part, not measured or surveyed and were not drawn to scale.

According to Petitioner's expert, the project has achieved its goals insofar as halting the erosion on BPA's stream bank where mitigation work was done. It has done so, however, at Petitioner's expense.

Initially, the saplings planted on the BPA side of the creek were relatively small, with minor effect on the channel configuration. As the plants matured and grew, according to Petitioner's expert, the resistance to the creek flow on the BPA side was magnified, and the channel of the stream was deflected away from the BPA's stream bank toward Petitioner's stream bank. At first, this caused only minor erosion and

undercutting to two small areas of Petitioner's stream bank. When Petitioner brought the minor erosion to the attention of BPA and Oregon Fish and Wildlife representatives in approximately 2005-2006, she was told that the BPA's side of the creek was looking good, and the BPA was unwilling to undertake any efforts to reverse the project to address Petitioner's concerns.

Around 2010, Petitioner planted willows and placed branches in one of the areas on her property where she saw minor erosion, and this appeared to correct the problem. Because the erosive power of streams increases exponentially with increasing discharge, according to Petitioner's expert no significant erosive changes were expected during periods of low flow in the creek. During high water times, however, when the creek level was at peak discharge, significant channel relocation would have occurred.

In 2012, extensive damage occurred on Petitioner's property, and the project's substantial impact on Petitioner's land became apparent. Large sections of Petitioner's property washed away, taking with it trees, vegetation, and fencing. Petitioner was left with steep, unstable walls of dirt with deep, visible fissures and fractures that appear likely to further crumble away. In 2015, the creek continued to wash out sections of Petitioner's property, allowing water to flood sections of her land.

Petitioner estimates that she has lost over 2000 square feet of land since 2012. Because the property near the creek is now unstable, Petitioner can no longer allow her animals to graze in the pasture near the creek. Petitioner no longer enjoys walking or sitting by the creek, as the once gradual slope is gone, replaced by a steep and unstable walls of dirt.

Prior to 2012, Petitioner did not imagine that the initial minor erosion caused by

the project would have resulted in the large property loss and extensive damage that has occurred, and continues to occur, on her property. She timely filed this lawsuit, less than six years after the 2012 high water event.

C. The Panel Overlooked or Misapprehended the Fact That Erosion in 2006, and for Years Thereafter, Involved Only a Very Small Percentage of Appellant's Land, and Then Expanded Exponentially after a Major Flood Event

Until the 2012 flooding event, the size of the original erosion was only about fifteen feet of bank, according to Ms. Swartzlander. Even the government witness estimated it to have been only thirty feet. The erosion is now along more than 500 feet of her creek bank. Ms. Swartzlander is a nurse, not a trained engineer or any other type of specialist who could be expected to know that the erosion was **permanent** – until that flood, when she did retain such experts. It was error for the panel to hold otherwise.

D. The Panel Erred in Distinguishing from Prior Precedent on the Factual Basis of "Inches" versus "Feet"

Dickinson and the cases following it did not limit their analysis to a situation where only a few inches (as opposed to a few feet) have eroded. To the contrary, in *Dickinson* this Court clearly contemplated some injury to land being apparent for a period of time long exceeding the statute of limitations, without requiring the landowner to sue until the situation had "stabilized." Similarly, the *Boling* court stated: "In general, a takings claim accrues when '*all events* which fix the government's alleged liability have occurred and the petitioner was or should have been aware of their existence." 220 F.3d at 1370 (emph. added). The *Boling* court continued: "Thus, the key date for accrual purposes is the date on which the petitioner's land has been *clearly and permanently* taken. However, in cases where the government leaves the taking of property to a gradual physical process, rather

than utilizing the traditional condemnation procedure, determining the exact moment of claim accrual is difficult." 220 F.3d at 1370 (emph. added) (internal citation omitted).

As discussed *supra*, here, there was abundant evidence that the erosion was a very small portion of appellant's land until the 2012 event. The fact that it was a few feet rather than "inches" is not the relevant inquiry. It was error for the panel to rely on *Boling* to hold otherwise.

E. The Panel Erred in Narrowing *Banks* to "A Case Where the Government's Mitigation Efforts to Counter the Erosion to Landowner's Property Concealed the Erosion's Permanent Nature"

Another error of the Federal Circuit panel was in distinguishing from the *Banks* case because where the government's mitigation efforts arguably concealed the permanent nature. The key issue in *Banks* was not whether the government for a while mitigated the erosion on the citizen's property. Rather, the *Banks* court held that the court must consider whether a property is "subject to natural erosion and other natural fluctuations" when determining the precise point when petitioner's "knew or should have known of their alleged takings claims." 741 F.3d at 1281. The *Banks* court held that the statute of limitations is tolled in at least two instances: (1) where "the defendant has concealed its acts with the result that the petitioner was unaware of their existence" and (2) **where the "injury was 'inherently unknowable' at the accrual date."** *Id*. at 1280.

Here, the government never advised Ms. Swartzlander that it had planted ninebark to armor its own banks. Because of the naturally meandering nature of the creek, without armoring a little erosion would naturally occur on *each* bank over the seasons and years. But when the government armored its side, the water was forced to eat away only on Ms. Swartzlander's bank. This was gradual until the 2012 flood.

To hold that a non-engineer should somehow intuit that the government has planted a type of vegetation that will armor the opposite bank is a gross mischaracterization of the protections that were set in place by this Court in *Dickinson*, and in the later cases of *Banks* and *Boling*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted. The "situation" either has not yet become "stabilized" or did not until 2012 – either way, rendering this lawsuit timely.

As the *Boling* court noted, the *Dickinson* opinion stands for the proposition that "accrual principles should not be rigidly applied in cases involving environmental takings," due to the difficulties facing property owners when the government leaves "the taking to physical events" and puts the onus on the owners to determine the decisive moment in the process to bring suit. 220 F.3d at 1372 (citing *Dickinson*, 331 U.S. at 748). Indeed, in *Boling* the Federal Circuit criticized the lower court for holding that "the claim stabilizes once any small portion of land has been taken," noting that such a holding is inconsistent with *Dickinson*. *Id*.

The instant case is on all fours with *Dickinson* and its progeny. Petitioner demonstrated that she filed her complaint within the statute of limitations. Petitioner respectfully requests that this Court reverse the lower courts' decisions and remand for trial.

Respectfully submitted,

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