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IN THE SUPREME COURT OF THE UNITED STATES

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ARKANSAS GAME & FISH COMMISSION, :

Petitioner : No. 11-597

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Wednesday, October 3, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:54 a.m.

APPEARANCES:

JAMES F. GOODHART, ESQ., Little Rock, Arkansas; on behalf of Petitioner.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:54 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case No. 11-597, Arkansas Game & Fish Commission v. The United States.

Mr. Goodhart.

ORAL ARGUMENT OF JAMES F. GOODHART

ON BEHALF OF THE PETITIONER

MR. GOODHART: Mr. Chief Justice, and may it please the Court:

The issue is whether temporary flooding can ever constitute a taking under the Fifth Amendment. The Federal Circuit said, no, never, ruling that the permanent consequences of the Government's actions were not relevant solely because its actions were not permanent.

Respectfully, Your Honors, that cannot be the rule. There are at least two reasons why.

First, the United States must provide just compensation when its direct physical invasion substantially intrudes upon a landowner's protected property interest, regardless of the particular mode or duration of that invasion.

And, second, the Federal Circuit's decision conflicts with fundamental guarantees that the Takings

1 Clause is intended to preserve, and, therefore, is
2 manifestly unjust.

3 JUSTICE GINSBURG: What about this Court's
4 precedent in, what is it, the Sanguinetti case, where
5 the Court said that for there to be Government
6 responsibility it is at least necessary that the
7 overflow constitute a permanent invasion of the land
8 amounting to an appropriation, not merely an injury, to
9 property?

10 We would have to withdraw or modify that
11 statement, would we not, if you -- if your -- your
12 argument prevails?

13 MR. GOODHART: Justice Ginsburg, we would
14 say that you would not have to overrule Sanguinetti
15 because the language there, "permanent flooding
16 invasion," was -- was not how the case turned on the
17 result. The court there did make an inaccurate summary
18 of the early flood-taking cases -- Pumpelly, Lynah, and
19 Kress. None of those cases said that flooding had to be
20 permanent. The facts in those cases did have a
21 permanent condition of flooding, but that was not made a
22 requirement. And none of those cases said that you
23 could not have temporary flood invasions.

24 But, Your Honor --

25 JUSTICE SCALIA: Was Sanguinetti -- had we

1 had any temporary takings cases before Sanguinetti?

2 MR. GOODHART: Justice Scalia --

3 JUSTICE SCALIA: In other words, was
4 Sanguinetti expressing a special rule for flooding, or
5 was it -- was it simply saying there can't be a
6 temporary taking? If the latter, that dictum if it's
7 dictum or a holding if it was a holding has already been
8 overruled by our later temporary takings cases.

9 MR. GOODHART: Justice Scalia, there --
10 you're correct. There was no temporary takings prior to
11 Sanguinetti. The Court there didn't have occasion to
12 address temporary flooding, whether that could
13 constitute a taking. And all of the cases after
14 Sanguinetti that have actually addressed whether a
15 direct temporary invasion will -- that substantially
16 intrudes upon property interests have held that, yes,
17 you can have a temporary --

18 JUSTICE BREYER: Which ones? Because I
19 counted eleven cases which either say, state, some seem
20 to hold or support the proposition that when it's
21 temporary with a flood it's a trespass, and where it's
22 permanent it's a taking. Okay?

23 I mean, I have eleven. And so I've got from
24 my law clerk. And then I tried to see, well, what are
25 the ones that say the opposite? And so far we've come

1 up with zero. All right?

2 You could argue that there were three cases
3 during the war which might be read that way, though they
4 don't quite mention it. All right?

5 So which of the cases that you -- rather
6 than list my eleven, I'm more interested in what you
7 think, and so I'd like to know which are the ones you
8 think support -- with something like a flood, which it's
9 not -- you're not physically taking hold of the whole
10 thing. You're sending something in that comes back.
11 Which of the ones support you that temporary is not a
12 trespass, temporary is a taking?

13 MR. GOODHART: Justice Breyer, in the
14 Dickinson case in 1947 where the Court found a taking
15 from flooding, Mr. Dickinson reclaimed his property,
16 effectively reclaimed most of the property that had
17 flooded, effectively ending the flood invasion. And the
18 Court there said the taking was a taking when that
19 occurred, regardless of whether the landowner does
20 reclamation.

21 Of course, this Court in the war seizure
22 cases, in General Motors, Petty Motor, Pewee Coal,
23 Kimball Laundry, in all of those cases the Court has
24 found --

25 JUSTICE BREYER: Dickinson -- I got written

1 down Dickinson.

2 MR. GOODHART: Yes, Your Honor.

3 JUSTICE BREYER: Kimball Laundry. Kimball
4 Laundry was the -- laundry facilities.

5 MR. GOODHART: Yes, Your Honor.

6 JUSTICE BREYER: They took the laundry
7 facilities for 3 years, but there what they did is they
8 went in and they took this building, you know, took the
9 whole thing.

10 MR. GOODHART: Yes, Your Honor.

11 JUSTICE BREYER: The problem with a flood is
12 you don't take all the land. You send some stuff in.
13 And the stuff is there for a while, and then it comes
14 back, and -- it's called water. And so I don't know
15 what to make of the cases like Kimball Laundry where you
16 actually appropriate the property. I suspect that they
17 are not quite the same.

18 Anything else? I got Dickinson. I've got
19 Kimball Laundry.

20 JUSTICE SCALIA: We have cases about flying
21 overland -- -

22 JUSTICE BREYER: Yes, Causby.

23 JUSTICE SCALIA: -- cases about shooting --
24 shooting overland. Right?

25 MR. GOODHART: Yes, Your Honor. The Causby

1 case --

2 JUSTICE SCALIA: That's not water, but it
3 ain't taking, either, in the -- in the narrow sense that
4 Justice Breyer has talked about.

5 MR. GOODHART: Yes, Your Honor. The -- the
6 United States flooded the air over the Causby's
7 residence and commercial chicken farm.

8 JUSTICE BREYER: Yes, but in Causby, what
9 they did -- there was a question about whether just
10 flying some airplanes over is a taking or a trespass.
11 But it went on for 25 years, so it was a long time.
12 And, therefore, the permanency of it I don't think is at
13 issue there.

14 MR. GOODHART: Yes. Your Honor, in this
15 case, the court -- the Court of Federal Claims found
16 that these deviations resulted, in over 8 years, 6
17 consecutive years of recurring flood invasions during --
18 during the summertime, during unnatural time periods;
19 and that the facts were more compelling than even in
20 Causby with the -- the overflights or in Portsmouth
21 Harbor with cannon shots flooding the air over
22 Portsmouth Landing Harbor Hotel.

23 This -- these flood invasions happened each
24 year for specific sustained time periods. The United
25 States controlled the timing, the frequency, and the

1 extent of the duration of these floods.

2 JUSTICE SCALIA: What if it hadn't harmed
3 the timber? I mean, you know, the damages claimed are a
4 lot -- a lot of the timber that -- that would have been
5 valuable was -- was impaired by these floodings.
6 Suppose there'd been no harm at all? Suppose it had
7 just been for a certain period of time you were not able
8 to use that land for anything? You couldn't plant
9 anything on it. You couldn't picnic on it. You
10 couldn't do anything. Would that have been --
11 nonetheless, despite the fact that there -- there was no
12 harm done except -- except the flooding -- would that
13 have been a taking?

14 MR. GOODHART: Your Honor, no. If -- there
15 would not have been a taking unless the landowner could
16 show substantial intrusion upon his protected property
17 rights.

18 JUSTICE SCALIA: Well, he has. It's
19 flooded. He can't --

20 MR. GOODHART: If -- Your Honor, if he can
21 show that the -- he has the right to exclude
22 superinduced invasions of water, that -- so it doesn't
23 interfere with his use and enjoyment. Here --

24 JUSTICE SCALIA: It does. He can't plow on
25 it. He can't picnic on it. How does that not interfere

1 with his --

2 MR. GOODHART: Well, and it very may well,
3 Your Honor. And here, that -- there was that --

4 JUSTICE SCALIA: So it would be a taking.
5 Are you saying yes or no? What is it?

6 MR. GOODHART: I'm saying, yes, if he can
7 show that it intruded on his use and enjoyment, and as
8 you said, indicated, that type of interference, yes. It
9 would be a -- it would be a substantial intrusion on his
10 rights to use his property --

11 JUSTICE GINSBURG: So that would cover a
12 one-time flood.

13 MR. GOODHART: Not necessarily, Justice
14 Ginsburg. A one-time flood that is extensive, it could
15 kill all the trees on this management area in one flood.
16 However, one flood may not result in substantial
17 intrusion on protected property rights. So it's going
18 to depend on the facts, Your Honor, in the case.

19 JUSTICE GINSBURG: I don't understand that.
20 You said if -- if it's one flood, even though it
21 destroys the trees, and certainly would not make --
22 would make it impossible to have picnics, what -- so if
23 that's your position, then you're turning on it happened
24 six times, not once. Is that --

25 MR. GOODHART: And, Your Honor, what I'm

1 saying, it's a proof of facts. The physical takings
2 analysis is the same. The legal analysis is the same.
3 But one flood could effectively destroy timber if it is
4 a lake; if it sits there. We didn't have that in our
5 case.

6 We had intrusion during 1993 to 2000, 8
7 years, 6 of which were substantially throughout the
8 summer where this management area sat in water during
9 June, July, into August, basically, stagnated water that
10 choked the oxygen from the roots of these trees. And in
11 1999 it was termed a brownout. It was massive.

12 Once the timber inventory was done, it
13 revealed that there was over 100,000 trees in a
14 6,990-acre area that were either destroyed or were --
15 were in the process of dying. And that didn't include
16 the other 11,000 acres that we subsequently inventoried.

17 JUSTICE SOTOMAYOR: Counsel, all of our
18 cases in this temporary versus permanent, as I read the
19 cases and I read what the multiple facts that each are
20 relying on, it seems to me that our cases have been
21 attempting, in the term "temporary," to encompass a lot
22 of different concepts. Both intentionality, because an
23 accidental issue is not a taking; causation: Did this
24 -- and that's part of Sanguinetti's holding -- did what
25 the Government do actually and directly cause the injury

1 at issue? And foreseeability: Is what you intended
2 something whose consequences you could have seen?

3 And they are using that in a multifaceted
4 test, one that the Solicitor General is not trying to
5 endorse here, but one that I think is more consistent
6 with our general jurisprudence in this area.

7 So there is never a simple answer on the
8 question of permanent damage, because you can have
9 permanent damage that's not a taking, if all of the
10 other factors I've just mentioned are not in your favor.
11 Is that correct?

12 MR. GOODHART: Yes, Your Honor, you're
13 correct. The -- the invasion has to be direct by the
14 United States.

15 The Court of Federal Claims found that --
16 that it was direct, natural, and probable -- the results
17 were -- from the Government's action.

18 One thing in water cases is you don't have
19 dye in the water. Mr. Causby could look up and see the
20 insignia on the airplanes. And we knew that the cannon
21 fire from the -- from the artillery was coming over the
22 Portsmouth Harbor's land was from the Government. The
23 water, you can't always tell. And so you have to prove
24 that that was directly from the United States. And the
25 commission in this case did.

1 JUSTICE SOTOMAYOR: I guess the problem with
2 this case, and it's part of what's interwoven in your
3 adversary's arguments, is that with flooding it's going
4 to occur naturally anyway. The Government generally
5 builds dams to control that flooding to the benefit of
6 all of the interests along its affected route. And at
7 some point, either the Government is going to -- is
8 going to make a decision that's going to help someone
9 and potentially hurt someone. And the question is,
10 isn't all of those situations going to be subject to
11 litigation.

12 The Government's rule -- I call it the
13 Government's rule, but it's -- is basically simple. It
14 can't. Because, if the deviation is temporary -- and
15 that's what the circuit below said -- it's just
16 exercise. It's either a nuisance or temporary trespass,
17 and we're not going to hold the Government responsible
18 for that loss. Assuming it's going to occur in part
19 because flooding is always going to occur, the question
20 is perhaps when. But in any place you have a dam, it's
21 there because flooding was happening.

22 Isn't that the basic argument? And I don't
23 know that you've actually announced the rule that
24 addresses the essence of the policy considerations that
25 are driving the Government decision. So tell me how

1 your rule makes this a manageable situation.

2 MR. GOODHART: Your Honor, the -- the two
3 elements of the rule, that there must be direct physical
4 invasion by the United States and not from some other
5 cause, and there must be substantial intrusion upon
6 these protected property rights, the right to exclude,
7 the right to use and enjoy, and the right to dispose,
8 that --

9 JUSTICE SOTOMAYOR: But that's every flood.

10 MR. GOODHART: That runs throughout
11 this Court's --

12 JUSTICE SOTOMAYOR: But that's every flood.

13 MR. GOODHART: Yes, Your Honor, it is. But
14 the United States, when it does its flood control --

15 CHIEF JUSTICE ROBERTS: No, no, no, I don't
16 -- why is that every flood? You go through your three
17 factors, you could have lots of flood that aren't a
18 substantial intrusion. You know, you get an extra inch
19 of water, and then it recedes. And it's -- you know --

20 MR. GOODHART: That's --

21 CHIEF JUSTICE ROBERTS: -- you get a note
22 from the Corps of Engineers saying, we're sorry, it
23 won't happen again. That's not -- every flood is not --

24 MR. GOODHART: Not -- you're correct,
25 Mr. Chief Justice. Every flood is certainly not rising

1 to the level of a taking.

2 JUSTICE KENNEDY: I guess what we're asking
3 you is, how do you define the baseline of protected
4 expectations for the property?

5 MR. GOODHART: Your Honor --

6 JUSTICE KENNEDY: You've indicated, I think,
7 in your brief that one year won't do it. This was six
8 or seven years.

9 If that's a baseline of expectations, the
10 Government cannot change that, even if it thinks that
11 there is a higher and -- and more urgent priority in
12 protecting some other land?

13 MR. GOODHART: Your Honor, the -- certainly,
14 the Government is not the insurer of -- of flood
15 control, how they just carry it out.

16 There is the case that's cited in the
17 Government's brief, United States v. Sponenbarger, which
18 says that very thing. The United States is not the
19 insurer of it. But when it takes water and it controls
20 water and releases it in a manner that's not from
21 storms, not from natural, but does it in a manner that
22 they control how it's released and the duration,
23 frequency, and they use property to store that water for
24 eight -- you know, over eight years, that in this case
25 was -- was compelling. And the court found that those

1 facts --

2 JUSTICE KENNEDY: But my question is how do
3 you define the baseline that gives a legitimate
4 expectation, if the Corps of Engineers -- did not happen
5 in this case, but in the hypothetical case -- makes the
6 finding that there is a more urgent and -- and a higher
7 priority for other lands, and it changes its policy? It
8 cannot do that?

9 MR. GOODHART: Your Honor, it can go through
10 its law, the National Environmental Policy Act, the
11 Clean Water Act. It can make changes, and then it can
12 pay for what it's going to take from private landowners.

13 JUSTICE KENNEDY: Well, what you're saying
14 is that it can't make that change without paying, right?

15 MR. GOODHART: It -- it cannot make that
16 change where it's going to burden the landowner and
17 interfere with that -- those property rights that the
18 Fifth Amendment is guaranteeing.

19 Now, in practice --

20 JUSTICE KENNEDY: Now suppose, at the very
21 outset of the dam, the -- the Government says, we've got
22 to put this water someplace, we're going to put it on
23 the left bank, not the right bank. That's not a taking
24 as of that time --

25 MR. GOODHART: Your Honor --

1 JUSTICE KENNEDY: -- if the land was always
2 flooded anyway on the right?

3 MR. GOODHART: That may not be a taking.
4 And, for example, in the Bedford case in 1904, where a
5 revetment was in the Mississippi River, it was trying to
6 control natural erosion from a cutoff that had been
7 created, the landowner could not show --

8 JUSTICE KENNEDY: But what I want is the
9 definition of the operable baseline that we can use in
10 order to define whether or not there has been a taking.

11 MR. GOODHART: And, Your Honor, I guess I
12 must say it may not be a bright line. It is -- the
13 analysis here that this Court has used throughout its
14 physical takings cases will separate the torts from the
15 takings.

16 And, here again, the United States -- this
17 has worked well in other cases for the United States,
18 where in Sanguinetti there was no --

19 JUSTICE ALITO: Should the baseline be what
20 would have happened if the dam was never built?

21 MR. GOODHART: Perhaps, Your Honor. And in
22 this case, for example, the court had evidence that this
23 land flourished before the dam. There was evidence that
24 this bottomland hardwood forest existed for generations.
25 And when the control plan was put in effect in 1953, it

1 worked fine because they mimicked natural flow where
2 late -- late winter and early spring, you have your
3 releases, they dissipate, the water recedes, but you
4 don't have extensive summertime flooding from a river.

5 Frankly, anywhere in the country, but
6 certainly not in the southern part of the United States,
7 these rivers do not overflow during June, July, August.
8 This never happens.

9 JUSTICE BREYER: But what do you suggest --
10 what do you suggest -- I looked at the consent.

11 MR. GOODHART: Yes, Your Honor.

12 JUSTICE BREYER: To tell you the truth, I
13 think it's permanent. I think they're thinking it's
14 intermittent, but permanently intermittent.

15 MR. GOODHART: Yes, Your Honor.

16 JUSTICE BREYER: The flood comes like three
17 months a year every year. And the erosion, they say
18 that part that's eroded belongs to the Government now.
19 And if he comes back with his dirt and puts it in,
20 that's fine, but he's trespassing on Government land.

21 So if I'm right in reading that, if I'm
22 right -- and a big if -- it seems that eleven cases
23 somewhat stand for this, I agree, somewhat arbitrary
24 rule.

25 Now -- so I'm tempted, if I'm right, to say,

1 okay, it's not perfect, but let's go with it. There are
2 people all over the country who have probably relied on
3 this stuff. And that would be so absent a better rule.

4 So what do you suggest would be a better,
5 clearer rule for compensating for flooding where our
6 problem is what's a trespass and what's a taking?

7 MR. GOODHART: And, Your Honor, I know it
8 cannot be the Federal circuit's rule that you can never
9 have temporary flooding as a taking. And I guess
10 I would --

11 JUSTICE BREYER: You know, but I want to
12 know what your idea -- I understand the difficulties are
13 there --

14 MR. GOODHART: Yes.

15 JUSTICE BREYER: -- and I'm willing to
16 accept a lot you mentioned.

17 MR. GOODHART: Yes.

18 JUSTICE BREYER: But what I'm
19 asking -- which I just did ask -- is what's your idea of
20 a substitute that would be better?

21 MR. GOODHART: Your Honor, the substitute
22 would be to remain consistent with how this Court
23 analyzes the physical takings, not use anything from
24 regulatory analysis here, but looking at these elements.

25 And the -- the Corps of Engineers will

1 need -- when they know that it's predictable, that it is
2 foreseeable, as the court below found, that -- that
3 their actions will place water for storage on land that
4 they know they can purchase flood easements for --

5 JUSTICE BREYER: So a Department of the
6 Interior employee trespasses on Jones's land, trampling
7 paths, and even limbs fall off trees. That's a taking
8 and not a trespass?

9 MR. GOODHART: No, Your Honor, it's not.

10 JUSTICE BREYER: Because?

11 MR. GOODHART: And because the Court said in
12 the Cress case, it's the character of the Government's
13 action, not the amount of damages resulting from it, so
14 long as that is substantial.

15 And in the cases, the Court has looked at
16 what is substantial intrusion. In Loretto, the Court
17 said a permanent physical occupation on a rooftop in Ms.
18 Loretto's building, small area, that is substantial,
19 even though geographically it was very small, because it
20 cut through these valuable property rights to occupy
21 someone's property.

22 And so -- substantial may not have to be
23 very high.

24 JUSTICE BREYER: So our department employee
25 trying to find a shortcut drives his bulldozer through

1 Jones's land knocking down his favorite redwood, it's a
2 taking?

3 MR. GOODHART: Your Honor, I think we would,
4 again, use the analysis, separate out the torts, where
5 the action is direct, it's been predictable what would
6 that would result in, the United States should know
7 that, and then the intrusion or interference with those
8 property rights is substantial, there will be a taking.

9 Usually that's not going to be the case in a
10 one-time situation, as your hypothetical. And, again,
11 here the court heard six consecutive years of this
12 invasion of water. The commission couldn't turn it
13 away.

14 JUSTICE SCALIA: So our cases -- our cases
15 treat physical occupations differently from other --
16 from other cases, don't they?

17 The park ranger walking through can hardly
18 be called a physical occupation. He's harmed the land,
19 but it's not a physical occupation.

20 What you're -- what you're arguing here is
21 that -- is that flooding the land is a physical
22 occupation for the period that it's flooded.

23 MR. GOODHART: It is, Your Honor. Where
24 it's an occupation, it's certainly clearer and more
25 intrusive. There can be invasions that don't amount to

1 an occupation.

2 JUSTICE SCALIA: Yes, but what you say --
3 here's what troubles me. You say it has to be
4 substantial. But you -- can we -- can we fold into that
5 word substantial a requirement that it have caused
6 substantial financial loss?

7 See, if that were the case, then -- then I
8 could distinguish your case where a lot of valuable
9 trees got destroyed.

10 MR. GOODHART: Certainly, Your Honor.
11 Substantial --

12 JUSTICE SCALIA: And I wouldn't say every --
13 you know, every flood that goes across a land, even two
14 years or three years in a row, would not necessarily be
15 a taking.

16 MR. GOODHART: You could look at the
17 economic part -- yes, definitely, Your Honor. What is
18 substantial is going to be made as a legal determination
19 by the Corps, as a matter of degree.

20 And you can look at the extent of the
21 damages -- if there is destruction of property.
22 Destruction has been -- as in the Kansas City Life case
23 in 1950, the taking is to the extent of the destruction.
24 Beyond that, though, it's looking at interference with
25 use and enjoyment --

1 JUSTICE SCALIA: What was the Kansas City
2 case that you are referring to? I don't --

3 MR. GOODHART: The Kansas City Life
4 Insurance case in 1950, Your Honor, was underflow
5 invasion of water percolating up on property in Missouri
6 from the Mississippi River. And that was found to be a
7 substantial invasion where the property, the 1700 acres,
8 was taken by the United States. And the Court there
9 said, when you destroy the use of that property for what
10 it was being used by the landowner, you owe to the
11 extent of the destruction that you have caused.

12 JUSTICE GINSBURG: Mr. Goodhart, maybe it
13 would help to know what you think if we accept your
14 position would be left over for the Federal Circuit to
15 consider on remand. You -- you haven't asked to -- for
16 outright reversal and have the decision of the Court of
17 Federal Claims be the end of the matter. So if we
18 accept your position, then what issues would be open for
19 the Federal Circuit to resolve on remand?

20 MR. GOODHART: Your Honor, if I may, after
21 answering your question I would like to reserve the
22 remainder of my time.

23 Your Honor, I wish we could have asked for
24 affirmance. We -- there are several other issues that
25 the Federal Circuit did not disturb or address. They

1 did not go into the facts of, on appeal, that the United
2 States --

3 JUSTICE KENNEDY: Well, the question is what
4 do we say to the circuit? What do you want us to tell
5 the circuit to do on remand?

6 MR. GOODHART: We want the remand to say:
7 Apply the rule of law here for physical taking and look
8 at it as the Court of Federal Claims did: Was there a
9 direct physical injury? Did it result in substantial
10 intrusion on the commission's property? If so, the Just
11 Compensation Clause is self-actuating and there should
12 be just compensation.

13 JUSTICE GINSBURG: But what were the other
14 issues that you just mentioned? You said we couldn't
15 ask for an automatic affirmance.

16 MR. GOODHART: The United States raised
17 several issues and the commission cross-appealed in
18 asking for regeneration damages, Your Honor, and those
19 would need to be addressed on the remand.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Kneedler.

23 ORAL ARGUMENT OF EDWIN S. KNEEDLER

24 ON BEHALF OF THE RESPONDENT

25 MR. KNEEDLER: Mr. Chief Justice, and may it

1 please the Court:

2 As has been pointed out, this Court has
3 consistently held in its flooding cases and reaffirmed
4 in Loretto that a -- that a taking occurs in the context
5 of flooding only if the flooding is the direct result of
6 the structure itself and if it results in a permanent
7 effect on the property such that it's an actual
8 appropriation. So --

9 CHIEF JUSTICE ROBERTS: So it's -- there is
10 a little confusion about the Government's position,
11 there was in the court of appeals.

12 Is it -- I'm quoting from your friend's
13 brief, and he says: "The Federal Circuit adopted a
14 categorical rule that temporary Government action can
15 never be a taking if the Government does not intend to
16 create a permanent flooding condition." Is that an
17 accurate statement of your understanding?

18 MR. KNEEDLER: The -- I think the intent
19 point, I guess I would modify that. There are some
20 things that -- I think it would have to be an objective
21 standard. In Dickinson, for example, the -- the
22 modification was intrinsically permanent. The landowner
23 had corrected for it. But it was intrinsically
24 permanent until the landowner had done something about
25 it. So actually Dickinson is consistent with our --

1 with our position.

2 But I do want -- there is a critical piece
3 about this case that Justice Kennedy's questions have
4 touched upon that I think it's very important for this
5 Court to focus upon.

6 This case is not about flooding by the
7 project itself. The reservoir behind the dam, the
8 easements, the flowing easements there, the spillway,
9 the project is the Government and I think it's fair to
10 say the Government is occupying the land when the
11 Government builds the project.

12 What we have here are incidental
13 consequences downstream from the dam as a result of the
14 flowage. And there are -- Loretto, when it is summing
15 up this Court's flooding cases, makes two points. One,
16 it says it has to be permanent, not temporary invasion;
17 but it also distinguishes the category of cases in which
18 there is conduct outside the landowner's property that
19 has consequential damages within the property.

20 JUSTICE SCALIA: I don't -- I don't
21 understand what you're saying. Are you saying that if
22 this landowner owned land behind the dam that was
23 temporarily flooded as often as has happened here, that
24 that would be a taking?

25 MR. KNEEDLER: No. I --

1 JUSTICE SCALIA: No, I didn't think you were
2 saying that.

3 MR. KNEEDLER: No, but what I'm saying is
4 this would be a particularly bad or problematic context
5 for the Court to depart from that.

6 CHIEF JUSTICE ROBERTS: Well, there are
7 pretty clear findings in the Court of Claims on the
8 question of causation, right?

9 MR. KNEEDLER: I don't think it's a question
10 of causation, and if I could just point out two cases,
11 one of which was cited in Loretto in its summing up of
12 this Court's flooding cases is Bedford. Bedford was a
13 situation in which a revetment, as counsel pointed out,
14 a revetment was constructed in the -- in the Mississippi
15 River to protect erosion and access to the City of
16 Vicksburg. It was -- it was clearly shown in that case
17 that over time, over a period of 6 years, as in this
18 case, downstream by 6 miles it resulted in permanent
19 flooding of land as a consequence of that.

20 But what the Court said is that is
21 consequential injury downstream; it is not occupation by
22 the Government.

23 CHIEF JUSTICE ROBERTS: So, so if the
24 Government comes in and tells a landowner downstream
25 that every March and April we are going to flood your

1 property so that you can't use it, from now on, that's
2 the way -- that's part of our plan, that's a taking for
3 those 2 months, correct?

4 MR. KNEEDLER: No. I don't think --

5 CHIEF JUSTICE ROBERTS: No? The Government
6 says you will not be able to use your land because of
7 what we are doing for 2 months -- you have been able to
8 up to now, but from now on, for March and April, you
9 can't. That's not a taking?

10 MR. KNEEDLER: I don't, and -- and let me
11 explain why. What we're talking about here is the Corps
12 of Engineers operating a dam from which it has to take
13 into account multiple considerations. In this case,
14 there was marina operators, there were farmers along the
15 river, there were drainage districts.

16 CHIEF JUSTICE ROBERTS: I'll grant you that
17 it can decide whose land it wants to take. I just want
18 to know why that's not a taking.

19 MR. KNEEDLER: Because this is a classic
20 example of the Government adjusting benefits and
21 burdens. This is why the Federal Government was invited
22 in to construct these projects because along -- along
23 the river there was very serious flooding. So the
24 Government puts in a dam to control the flooding, it has
25 to release the flood waters, and the timing of the

1 release of the flood waters is something that you have
2 to take into account --

3 CHIEF JUSTICE ROBERTS: So if the Government
4 says we've got to release the flood waters and what
5 we're going to do is we're going to have water trucks
6 pull up behind the dam, we're going to load them up and
7 we're going to drive them down river to this person's
8 property and we're going to dump the water there?

9 MR. KNEEDLER: I think that's a different
10 situation because the Government itself is actually
11 putting the water -- I think that's very close to being
12 the reservoir behind the dam. But -- but typically,
13 when the Government -- I think uniformly, when the
14 Government is operating --

15 CHIEF JUSTICE ROBERTS: But your answer is
16 that would be a taking?

17 MR. KNEEDLER: I think because it would
18 be -- it would be specifically deposited on that
19 landowner's land.

20 CHIEF JUSTICE ROBERTS: Well, I thought --

21 MR. KNEEDLER: It would be the same as if
22 they put a pipe from the dam --

23 CHIEF JUSTICE ROBERTS: Right.

24 MR. KNEEDLER: -- to that person's land.
25 But that's not what's happening when the Government's

1 operating a dam, and it's operating it with consequences
2 for the basin. It's not aimed at any particular
3 landowner.

4 CHIEF JUSTICE ROBERTS: Again, I think the
5 Court of Claims' findings are to the contrary.

6 MR. KNEEDLER: Well --

7 CHIEF JUSTICE ROBERTS: They said the
8 Government knew that this water was going to go right
9 here, right?

10 MR. KNEEDLER: Well, it was not -- there is
11 no suggestion that it was targeted at this land, which
12 is -- which is I think something quite different. This
13 was -- this was an incidental consequence of what was
14 happening downstream. Again, in the Bedford case you
15 had permanent --

16 JUSTICE SCALIA: A foreseeable and certain
17 incidental consequence.

18 MR. KNEEDLER: No, I don't believe
19 foreseeable is enough. It was -- it could have been --
20 it could have been foreseeable in Bedford.

21 Let me take a more -- a more dramatic
22 example that I think illustrates this point. This
23 Court's decision in Sponenbarger which we cite in our
24 brief, that a -- that case discusses a prior holding by
25 this Court in a case called Jackson, which was a

1 situation where a levee, Government built a levee on one
2 side of the river which had the effect of flooding
3 property on the opposite side of the river because it --
4 it kept it from going to this side and channelled it
5 into the river and it caused it to overflow the -- the
6 land on the other side, and the Court said that is not a
7 taking.

8 CHIEF JUSTICE ROBERTS: What if the
9 Government decides for purposes of flood control -- I
10 don't know -- I don't know the ecological way -- but the
11 water has to percolate or whatever down in this area.
12 So it goes onto this person's land and it cuts down \$5
13 million worth of his trees. The same purpose, to assist
14 in flood control. No doubt that that's a taking, right?

15 MR. KNEEDLER: I think that would be --

16 CHIEF JUSTICE ROBERTS: Okay.

17 MR. KNEEDLER: Unless there was some
18 emergency justification.

19 CHIEF JUSTICE ROBERTS: Sure, sure. And so
20 the Government then comes down and says, we're going to
21 flood your land and we know -- again, looking at the
22 factual findings -- we know that will result in your
23 trees dying, but because we're doing it for flood
24 control, that's just too bad. Different case when they
25 go in with a chain saw than when they go in with the

1 water?

2 MR. KNEEDLER: Yes. When they go in with
3 the chain saw the Government is actually going on the
4 property and the Government is, to use counsel's term,
5 directly cutting down the trees. I think it's very hard
6 to explain consequences 110 miles downstream as being
7 direct. It's -- and there is no case that -- that
8 Petitioner has pointed to with that sort of incidental
9 consequence --

10 JUSTICE BREYER: What is the legal rubric?
11 I mean what you're -- what I haven't thought of until
12 you've been putting it this way is that the Government
13 builds a dam. When it does it, water backs up behind
14 the dam, and that water might flood somebody's land.
15 That's a taking, if it's at least permanent, and so
16 forth.

17 Okay. Now, the Government builds a dam, all
18 that happens. Because the Government builds a dam, a
19 lot of other things happen. They release water
20 sometimes. They make electricity sometimes. Different
21 animals come in.

22 All kinds of things can happen to different
23 people 200 yards down. Some will be 200 miles down,
24 200 -- you know. Some will be helpful, some will be
25 hurtful. Can they never bring a lawsuit? Can they

1 sometimes recover? How do we look at that?

2 MR. KNEEDLER: I -- I think, under this
3 Court's takings decisions, and specifically those
4 dealing with effects caused by something outside the
5 property, I think it is basically a per se rule.

6 JUSTICE BREYER: Well, then, suppose what
7 the Government said is, Mr. Smith, you live 150 miles
8 from here, and we have a rule, and our rule is you can't
9 cut down any of your trees, and you can't farm the land,
10 and you can't even walk on it without a boat. All
11 right, that would be at least a regulatory taking.

12 MR. KNEEDLER: Well, it would be -- it would
13 be analyzed as a regulatory taking --

14 JUSTICE BREYER: So why -- now, they're
15 doing exactly the same thing here, but, instead of a
16 regulation, they send some water in to do it. So should
17 we analyze it as a regulatory taking?

18 MR. KNEEDLER: It -- it has certain
19 parallels in that respect in the sense that the
20 Government has to make a choice. It constructed the
21 dam, and its releases are going to help someone and hurt
22 someone. It can't be put in a position where it's going
23 to have to pay compensation every time it chooses one --
24 one thing or another.

25 There's another point I'd like to make --

1 JUSTICE BREYER: Well, but that's the issue.

2 JUSTICE SOTOMAYOR: I'm totally confused
3 now. Is Dickinson decided wrong under your theory?

4 MR. KNEEDLER: No.

5 JUSTICE SOTOMAYOR: They built a dam. It
6 raised the water level and flooded the petitioner's
7 land, and the court gave recompense.

8 MR. KNEEDLER: Yes. And --

9 JUSTICE SOTOMAYOR: But you just said two
10 minutes ago -- or I thought I heard you say -- that when
11 the Government builds a dam, even if it floods some
12 people and not others, that there's no taking.

13 MR. KNEEDLER: I'm talking about downstream,
14 not the -- not the reservoir. And after it goes --

15 JUSTICE SOTOMAYOR: After it's --

16 MR. KNEEDLER: -- after it goes through --

17 JUSTICE SOTOMAYOR: So the baseline -- tell
18 me what the baseline is. And perhaps you can answer
19 Justice Kennedy's question more directly. Anything in
20 the reservoir is a taking. Anything downstream is never
21 a taking.

22 MR. KNEEDLER: Well, assuming it's permanent
23 in the reservoir, which it's likely to be when the
24 Government is constructing it --

25 JUSTICE SCALIA: Well, no, not necessarily.

1 Suppose there -- because of a spring melt-off or other
2 factors, it's clear that the reservoir for several
3 months of the year will be more extensive than it will
4 the rest of the year.

5 MR. KNEEDLER: Right.

6 JUSTICE SCALIA: So you could say, just --
7 just as here, that there's only been a temporary taking
8 of some of the land behind the reservoir.

9 Now, doesn't the -- doesn't the Government
10 condemn all the land --

11 MR. KNEEDLER: Yes. But that --

12 JUSTICE SCALIA: -- even that which would be
13 only temporarily flooded?

14 MR. KNEEDLER: Well, but that -- that
15 is covered by this Court's decision in *Cress*, in which
16 the Court said that if you have a situation where
17 property is permanently liable to inevitably recurring
18 flooding, that that's the same thing as a permanent --
19 even though sometimes it's not -- it's not covered, it
20 is permanently liable.

21 JUSTICE KENNEDY: And the only difference in
22 that formulation and this case is that it was for seven
23 years and not permanent? Is that your --

24 MR. KNEEDLER: Well, insofar as we're
25 looking at the temporary aspect of it. It wasn't seven

1 years, it was -- it was -- it was a series of individual
2 determinations made by the Corps; but -- but for reasons
3 that tie into the downstream effects, it was releasing
4 water from the dam and was making a series of
5 administrative decisions about how to operate the dam.

6 It has a water control manual. Downstream
7 landowners are protected, not by retroactive award of
8 damages under the Just Compensation Clause, but by
9 public participation requirements --

10 JUSTICE SOTOMAYOR: I must be -- I must be
11 slow today because I'm -- I'm having significant problem
12 with your articulation of your test.

13 Basically, you're saying once a dam is
14 built -- once a dam is built, no downstream owner has a
15 claim? Or, you're building an exception from when the
16 claim can be applied to a downstream owner?

17 MR. KNEEDLER: I -- I -- I think, under this
18 Court's current precedence, there would be no claim
19 downstream.

20 JUSTICE SOTOMAYOR: It doesn't matter
21 whether it's permanent, reoccurring --

22 MR. KNEEDLER: Foreseeable.

23 JUSTICE SOTOMAYOR: -- foreseeable or
24 anything else?

25 MR. KNEEDLER: No, because Jackson,

1 Spokenbarger -- Sponenbarger, the revetment case,
2 Bedford were all cases where --

3 CHIEF JUSTICE ROBERTS: Right.

4 MR. KNEEDLER: -- where it was -- where it
5 was permanent.

6 If I could mention one other point --

7 CHIEF JUSTICE ROBERTS: Well, just before
8 you get off, because I think part of the confusion, at
9 least for me, is the difference between what the Federal
10 circuit decided and what you're arguing.

11 You seem to be arguing that it doesn't make
12 any difference, it's not -- whether it's temporary or
13 permanent, right? The Federal circuit thought it was
14 dispositive that this they viewed as temporary and not
15 permanent. So it seems to me that you're fighting, and
16 you're fighting a lot of the court of claims' very
17 exhaustive findings, to present a different argument.

18 MR. KNEEDLER: No.

19 CHIEF JUSTICE ROBERTS: It seems to me that
20 if we disagree, and we think it makes a difference that
21 it doesn't have to be 50 years, but it might be
22 something less, then maybe you've preserved all these
23 other arguments or maybe not, but --

24 MR. KNEEDLER: But I think it's -- we have
25 argued, both below and here, that -- that this is

1 consequential, and that -- that it's downstream and had
2 those effects.

3 We agree with the -- with the Federal
4 circuit, we are not disagreeing with that conclusion,
5 because this is -- these were temporary -- a series of
6 individual temporary decisions made for their own
7 reasons.

8 CHIEF JUSTICE ROBERTS: I know, but you
9 agree -- you agree with the Federal circuit, but then
10 you're presenting all these other arguments in which it
11 doesn't depend.

12 So, if we disagree with the Federal circuit,
13 it seems to me that we ought to say that, and maybe you
14 can make these other arguments about it's too far
15 downstream or --

16 MR. KNEEDLER: Well, but -- but I think, in
17 deciding what's temporary, you shouldn't divorce it from
18 context. And -- and here, the context is the
19 consequences downstream.

20 This is -- this is not -- if you were to
21 depart from the Court's rule up until this point about
22 permanence -- and there has to be -- something less than
23 permanent will do, I don't think you should ignore the
24 fact that the consequences are not the sort of direct
25 governmental occupation of the land like at the

1 reservoir, but the sort of consequences downstream that
2 affect -- that can affect a whole range of people.

3 And I would like to make one very important
4 point about context, and that is, in 1928, after the
5 Great Mississippi Flood of 1927, Congress first got into
6 the flood control business in a massive way, but it --
7 it -- it was unwilling to do that if it was going to be
8 held liable for consequential damages from flood waters
9 downstream.

10 It therefore included Section 702(c) in the
11 Flood Control Act of 1928, which says that the
12 Government shall not be liable for any damage to any
13 property at any place resulting from floods or flood
14 waters.

15 JUSTICE SCALIA: Of course, that can't
16 overrule the Takings Clause, can it?

17 MR. KNEEDLER: I think what it --

18 JUSTICE SCALIA: I mean, that's nice that
19 Congress doesn't want to be liable.

20 (Laughter.)

21 MR. KNEEDLER: No, but Congress -- no,
22 it's -- the point is more fundamental than that.
23 Congress recognized -- and the legislative history shows
24 this -- Congress recognized that under this Court's
25 precedence, there would not be takings liability. The

1 Bedford decision is, in fact, cited in that.

2 This Court pointed out in its James
3 decision, which recounts the history of that, that there
4 was a proposal to -- to make the Government responsible
5 under the flood -- flood control projects for any taking
6 or any damage to property. And this Court said that
7 went way beyond anything the Fifth Amendment would
8 require, and it was cut back. And Congress said it's
9 not going to be liable for any damage.

10 And I think that shows a very important
11 reliance interest on the part of Congress with respect
12 to the line that this Court has drawn. Congress was not
13 going to --

14 JUSTICE GINSBURG: What about --
15 Mr. Kneedler, what was wrong with Judge Newman's
16 position on this temporary versus permanent? It said --
17 she said that temporary versus permanent, the target
18 should not be the Government's action, but the effect of
19 that action; that is, if trees are killed and they
20 weren't revived, the damage is permanent. That's where
21 we should vote, not whether the Government is going to
22 do this year after year.

23 MR. KNEEDLER: I don't believe that that's
24 correct. I mean, that -- that would turn on the
25 happenstance of what a particular landowner had -- had

1 on his property downstream.

2 And -- and I think the Government, in
3 operating the general project, cannot be held to do an
4 investigation of every property owner. Again, it's
5 releasing water generally. And if we -- maybe if I
6 could use the levee example here.

7 This -- the release changes that were made
8 here were made to protect farmers so that they could --
9 so that they could plant more crops and not -- and be
10 protected during their harvesting.

11 If you shift back to what the Corps -- to
12 the Corps' regular operating scheme, it affects the
13 farmers. There might be a flood --

14 JUSTICE SCALIA: I mean, the issue is who is
15 going to pay for that wonderful benefit to these
16 farmers. Should it be everybody, so that the Government
17 pays, and all of us pay through taxes, or should it be
18 this -- this particular sorry landowner who happens to
19 lose all his trees?

20 MR. KNEEDLER: It is in the nature --

21 JUSTICE SCALIA: That doesn't seem to me
22 particularly fair.

23 MR. KNEEDLER: It is in the nature of living
24 along a river. Riparian ownership carries with it
25 certain risks and uncertainties, from weather, from

1 intervening causes. The Government is -- there are a
2 thousand square miles, more square miles of drainage
3 area --

4 JUSTICE SCALIA: I don't think -- one of
5 those risks has to be the Government's going to make you
6 pay for protecting somebody else.

7 Is that one of the risks?

8 MR. KNEEDLER: Well, when -- picking up on
9 what I said about Congress, Congress would not have
10 gotten into the flood control business without this
11 protection of liability. People --

12 JUSTICE SCALIA: I doubt that.

13 MR. KNEEDLER: Well, this Court in James
14 said it was an important condition for Congress getting
15 into it, that it was not -- Congress was not going to be
16 held liable for the -- for the damages downstream.

17 That came to be the basis, the baseline, of
18 expectations for people downstream from --

19 CHIEF JUSTICE ROBERTS: Or upstream, under
20 your theory.

21 MR. KNEEDLER: Well, if it's -- but the
22 construction of the project itself and the flooding of
23 the reservoir, the Government condemns that land,
24 purchases that land. It recognizes --

25 JUSTICE KENNEDY: Well, the hypothetical is,

1 suppose it doesn't. Suppose that there's some land
2 that's up -- that's fairly far upstream from the main
3 reservoir, but it's flooded once every other year.

4 MR. KNEEDLER: Well, the question would be
5 whether it falls within the Cress test of whether it is
6 permanently liable.

7 JUSTICE KENNEDY: Your -- but your position
8 seems to be that if it's downstream, somehow it's not
9 the Government. There's a series of administrative
10 actions and it's not really the Government's water.
11 It's like -- it's like the old moral refuge that the
12 rocket designers take: You know, I make the rockets go
13 up; where -- where they come down is not my concern.

14 MR. KNEEDLER: It -- it was basically -- I
15 mean, it was the rationale of this Court's cases in --
16 in Bedford, in Sponenbarger, and reaffirmed by this
17 Court in Loretto, a modern takings case dealing with the
18 question of physical occupation. And the Court said
19 that -- and it made two points. Again, it said -- it
20 made the temporary versus permanent point, but it also
21 made the point about conduct outside the land that has
22 an effect inside the land.

23 This case has both of those features. You
24 have a series of temporary decisions --

25 JUSTICE BREYER: But building a Government

1 project, let's say an electricity plant or high tension
2 wires, you could require the taking of some land to
3 build it. Now, you've got that and you begin to run it.
4 You could run it in such a way that it takes some of the
5 property. I mean, the electricity could, for example,
6 because of some odd thing run around over somebody's
7 land and kill all the chickens. That wasn't expected
8 but it happened, and it happened because of the way the
9 Government runs the plant.

10 Now, I guess there would be a taking in such
11 circumstance if in fact, because of the way it's run, it
12 makes that land which no one thought would happen, as a
13 consequence of the project uninhabitable; wouldn't there
14 be?

15 MR. KNEEDLER: Well, again, it depends. If
16 the Government -- if the Government is occupying the
17 land when it happens, yes. But there's -- as you've I
18 think pointed out, there's a critical difference between
19 a tort and a taking. And there -- there can be
20 collateral consequences of what the Government does
21 that -- that cause injury.

22 JUSTICE BREYER: The collateral consequence
23 is to make some piece of land 4 miles away quite
24 unexpectedly, but totally uninhabitable. Now, what's
25 supposed to happen there? That's not just a trespass

1 because it's permanent. And even if it's once every
2 2 years, it's permanently once every 2 years.

3 MR. KNEEDLER: I think it would depend on
4 whether -- and there was a -- a case -- I believe it's
5 the Baltimore & Ohio Railroad --

6 JUSTICE BREYER: What does it say?

7 MR. KNEEDLER: It says if the -- it had to
8 do with releasing smoke from -- from a train. And the
9 Court said just -- just releasing it into the air --

10 JUSTICE BREYER: Yes, but they made this --

11 MR. KNEEDLER: -- but -- but if you focus it
12 on someone --

13 JUSTICE BREYER: Yes.

14 MR. KNEEDLER: If -- if you pipe it -- if
15 you pipe it to the person's property, that's a -- that
16 may be a different matter.

17 JUSTICE BREYER: All right. So -- well,
18 that's the part -- that's the point. The reason they
19 don't compensate there is it apparently had something to
20 do with everybody suffering the cinders. But where the
21 cinders went out of the train and they ended up on just
22 one person's property because there were some pipes or
23 something, then it was a taking.

24 MR. KNEEDLER: It was focused, and that's
25 not -- not true in the operation of the dam.

1 JUSTICE BREYER: Well, here they're focusing
2 it on his land.

3 MR. KNEEDLER: They're not focusing it on
4 his land. His land -- first of all, the commission's
5 land has always been subject to flooding and, as we
6 pointed out in our brief, even under -- even under
7 Petitioner's analysis, it results in an incremental
8 flooding of 5, 4 or -- 3 or 4 days.

9 JUSTICE SCALIA: Not flooding that time of
10 year. That's the problem. I mean -- yes, flooding at a
11 time when it wouldn't harm the trees.

12 MR. KNEEDLER: But it is land -- it is land
13 in a floodplain that would be suitable for any sort of
14 construction or development. It is land in a
15 floodplain. And they have -- they have not argued, and
16 in fact, their appraiser in this case acknowledged, that
17 there is no permanent decrease in the valuation of the
18 land. They are -- they are arguing only about trees.

19 And that is -- that seems classic
20 consequential tort-type damages, that -- that flood
21 waters, it -- we'll assume in somewhat greater
22 increments, went on the land and damaged trees. They
23 didn't damage the land. In fact, the commission --
24 there was still hunting on the land during this period
25 of time.

1 CHIEF JUSTICE ROBERTS: It strikes me that
2 that's a valuation question. But I understood you to
3 say that if there was a pipe coming out of the dam and
4 it went to somebody's -- right to the property line of
5 somebody's land and that's where you dump the water,
6 that would be a taking.

7 MR. KNEEDLER: Yes. Because --

8 CHIEF JUSTICE ROBERTS: Okay. I thought the
9 factual findings in the trial court said that was this
10 case, that you knew when you opened up the dam that this
11 is where the water was going to go.

12 MR. KNEEDLER: First of all, the Court --
13 the Court did not say that the Government knew. In
14 fact, it said the Government was unaware -- this
15 discussion's between 95a and 99a in the Court of Federal
16 Claims decision -- that the Government was unaware in --
17 in 1993.

18 CHIEF JUSTICE ROBERTS: What about 6 years
19 later, when it was doing the same thing and the water
20 went to the same place?

21 MR. KNEEDLER: The taking goes -- the taking
22 claim here goes from 1993 to 1998. The Court of Federal
23 Claims said even as of 19 -- at least until 1996, it was
24 generally assumed that the operations of the dam did not
25 have a significant impact below the Missouri-Arkansas

1 line. Again, this is 110 miles downstream. This was in
2 no way focused on the -- on the commission's land,
3 but --

4 JUSTICE ALITO: Are you saying there's a
5 difference between the situation where the Government
6 particularly wants the water to go to a -- to a place,
7 and the situation where the Government knows that's
8 where it's going to go, but doesn't particularly care
9 where it's going to go?

10 MR. KNEEDLER: I think there's a -- I don't
11 know about the "intend." I mean, in the hypothetical
12 with the Chief Justice the Government was actually
13 transmitting the water. It was essentially using the
14 land as -- as a reservoir. And that -- that's, I think,
15 what Petitioner's counsel was trying to conjure up by
16 saying the Government was using this land for storage.
17 The Government was not using this land for storage. The
18 -- this wasn't the Government's water. There weren't
19 any outtakes from the commission's land to use this
20 water.

21 These were flood waters, which again the
22 Flood Control Act says the Government is not liable for
23 the release of flood waters from a project, that ended
24 up on the land that is an incidental consequence of the
25 operation of a flood control project.

1 People who live in a basin where there is a
2 flood control project get enormous benefits in the
3 control of that. The water has to be released. And it
4 has long been the case that the way that problem is --
5 that issue is handled about how it will be released is
6 by ordinary administrative law principles, basically,
7 with the Corps, in operating the dam, they have
8 requirements of public participation. In this case, the
9 commission participated on ad hoc planning groups.

10 This manual had not been updated in 50
11 years. Corps regulations say that manuals should be
12 updated to keep apace of changing circumstances,
13 population changes, different uses, environmental
14 concerns, so that when that happens, the commission
15 acted responsibly here and, had --

16 JUSTICE SCALIA: You -- you would say that
17 even -- even if this land was permanently flooded, okay,
18 permanently flooded so he couldn't use it at all, since
19 it was downstream, no harm done, right?

20 MR. KNEEDLER: I think that's the
21 consequence of this -- but there's no -- the Court
22 doesn't have to decide that here.

23 JUSTICE SCALIA: But that's your position.

24 MR. KNEEDLER: That -- that's I think the
25 necessary consequence of this Court's holdings in

1 Bedford, in Bedford and related cases. And -- it may
2 have harshness in some circumstances. But again, when
3 you live on a river and you know the consequences of
4 having a flood control project on the river, that --
5 that's what happens, but this is not arbitrary. There
6 is this planning process. There is notice and comment.
7 There's NEPA --

8 CHIEF JUSTICE ROBERTS: If there's notice
9 and comment -- so the choice is, there are 10 landowners
10 downstream. The question is which one you're going to
11 flood. And you flood number 2, and there is a public
12 process in which number 1 and 3 through 10 get to say,
13 yes, this sounds fine to me.

14 (Laughter.)

15 MR. KNEEDLER: No, that's not -- that's not
16 what happens. What the Corps was working for here, it's
17 commendable. The Corps was trying to develop a
18 consensus of downstream water users, which is why it
19 convened this ad hoc working group: The commission
20 drainage districts, representatives of farmers, the
21 marina, the Corps of Engineers, getting everybody
22 together to try to come up with a -- with a way to
23 handle the problem. And --

24 JUSTICE SOTOMAYOR: But what difference does
25 that make? It's nice that you try to reach consensus.

1 If number 2 is not going to be part of the
2 consensus because he's the one always affected --

3 MR. KNEEDLER: Well --

4 JUSTICE SOTOMAYOR: -- you're saying
5 permanency -- permanency, repetition, nothing counts,
6 he's just -- loses.

7 MR. KNEEDLER: No. He doesn't lose because
8 he has an action under the Administrative Procedure Act.
9 He's not -- the -- the Corps is required to take into
10 account various factors including, specifically, the
11 impact on other people in the basin when it's making a
12 decision. If the Corps --

13 JUSTICE SCALIA: Yes, but he loses because
14 the Corps comes in and says, yes, indeed, we did flood
15 2, but, in order to save, you know, 1 and 3 through 10.
16 Right? And -- and he'd lose.

17 MR. KNEEDLER: Well, the Corps cannot be
18 arbitrary in doing that.

19 JUSTICE SCALIA: Okay. It's not arbitrary.

20 MR. KNEEDLER: But the -- but the Corps
21 requires a broad ambit of discretion in managing a river
22 over time, and it has to be able to change to update
23 circumstances without exposing the United States to
24 massive liability.

25 JUSTICE GINSBURG: Mr. Kneedler, does your

1 essential argument turn on this being indirect, as you
2 say? This is consequential; therefore, it isn't -- it
3 doesn't belong in the takings category, anything that's
4 consequential rather than direct?

5 MR. KNEEDLER: We have two submissions. I
6 mean, it's the confluence of both factors mentioned in
7 Loretto. And the Court doesn't have to decide anything
8 broader than that. It's the temporary nature of the
9 decisions.

10 These were individual decisions made often
11 with a recommendation or concurrence of the ad hoc
12 committee. So it's temporary in nature -- self
13 limiting, as everyone knew as part of this ongoing
14 planning process -- but, also, particularly in this
15 case, where it has only consequential effects
16 downstream, which is, again, the way the Court --
17 including in Lionel, one of the leading cases -- the
18 Court says that this is consequential.

19 JUSTICE ALITO: Why should it make a
20 difference whether the court had -- the Corps has a plan
21 which says, we're going to release this water every
22 summer, and a situation where, year after year after
23 year, somebody makes an ad hoc decision in the summer
24 that we're going to release the water?

25 MR. KNEEDLER: I don't think analytically,

1 for the reasons I said about -- about the downstream;
2 but, to the extent the Court is focusing on temporary,
3 these were self-limiting, and there was no guarantee
4 they were going to be renewed.

5 And, in fact, at the end of this process,
6 the court -- or the Corps decided not to adopt a
7 permanent change after going through the NEPA process.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Kneedler.

10 Mr. Goodhart, you have four minutes
11 remaining.

12 REBUTTAL ARGUMENT OF JAMES F. GOODHART

13 ON BEHALF OF THE PETITIONER

14 MR. GOODHART: Thank you.

15 As -- as my friend has said about these
16 damages being consequential and just affecting trees and
17 not -- not the land, the -- the court did not find that
18 this was just consequential downstream damage; that this
19 was direct, natural, and probable from these releases
20 that the commission had protested and complained about
21 for years.

22 That -- that that's in the record, that they
23 knew that they were using this land to store this water.
24 And the commission could not get their attention to stop
25 it until our director -- it was on Valentine's Day in

1 2001 -- brought the appraisal to the Corps of Engineers'
2 office, a whole roomful of people from both sides, and
3 placed that report from -- from 2000, that said, over \$4
4 million worth of valuable timber is gone, please stop.
5 We -- we were -- we were pleading. So they knew.

6 And I think the Court of Federal Claims
7 found that they -- they had the understanding that they
8 were using this to accommodate the farmers who were
9 using marginally low property, that the U.S. Fish and
10 Wildlife Service says in the record probably should have
11 been cleared anyway, but they were wanting to provide
12 and adjust the benefits for those landowners and use the
13 commission's property to store the water.

14 And, Your Honor, I don't know, Justice
15 Kennedy, where the line should be drawn, but the cases
16 of Sponenbarger and Bedford and Sanguinetti say that
17 when it's not the United States' structure or it's not
18 the policy -- and the landowner cannot show that, that
19 it's from storms or from something in nature -- that's
20 not going to incur liability. Even negligence may not
21 incur liability unless it's direct that what -- how it
22 caused, and then substantial intrusion.

23 And, Your Honor, I think --

24 JUSTICE SOTOMAYOR: Is the baseline -- go
25 back to Justice Kennedy's question -- is it before the

1 dam or after the dam, and why is it one or the other?

2 If flooding was going to occur more
3 unpredictably before the dam, and possibly summer
4 flooding of this kind could have happened, do you lose?

5 MR. GOODHART: Your Honor, under that --
6 under those facts, if it could have happened and the
7 landowner knew that, and that that is -- that is a
8 cause, not the United States, if -- if the United States
9 takes away its flood protection and this land goes back
10 to what it would be naturally, then the landowner can't
11 prove that it's direct from the United States. The
12 landowner would not recover in that instance.

13 In this situation, the evidence --

14 JUSTICE SOTOMAYOR: Even though after the
15 dam and the dam's plan was to ensure that it didn't
16 happen, you would still lose? If natural conditions --

17 MR. GOODHART: Your Honor --

18 JUSTICE SOTOMAYOR: -- would have possibly
19 caused this, you would lose?

20 MR. GOODHART: If -- if it's not
21 super-induced invasions directly from the United States,
22 the landowner is going to have that as a natural
23 condition. Here, that was certainly not the case.
24 Summertime flooding of this type never happened in
25 the recorded history.

1 JUSTICE SOTOMAYOR: Pre-dam. In the
2 recorded history.

3 MR. GOODHART: In the pre-dam or during the
4 whole first 40 years of how this was operated.

5 It was when it was adjusted that the United
6 States used this land and then took the valuable timber.

7 JUSTICE SOTOMAYOR: I'm not sure that's not
8 open to dispute. There is some argument here that
9 rainfall that was naturally occurring contributed to
10 what was happening to the trees.

11 MR. GOODHART: And I --

12 JUSTICE SOTOMAYOR: I think that there is --
13 at least that's what I understood some of the factual
14 argument to be.

15 MR. GOODHART: No, Your Honor. I think the
16 record is clear that this was directed naturally,
17 probably without the -- without the interference or
18 addition of nature.

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Counsel, the case is submitted.

22 (Whereupon, at 11:55 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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