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IN THE SUPREME COURT OF THE UNITED STATES

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CENTRAL GREEN CO., :
Petitioner :
v. : No. 99-859
UNITED STATES :
- - - - -X

Washington, D.C.
Monday, October 30, 2000

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:00 a.m.

APPEARANCES:

TIMOTHY JONES, ESQ., Fresno, California; on behalf of
the Petitioner.

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-859, Central Green Company v. the United
5 States.

6 Mr. Jones.

7 ORAL ARGUMENT OF TIMOTHY JONES

8 ON BEHALF OF THE PETITIONER

9 MR. JONES: Mr. Chief Justice, and may it please
10 the Court:

11 Petitioner's property is being damaged by water
12 leaking from the Madera Canal. The Canal is an irrigation
13 facility and it passes irrigation water to the farmers of
14 Madera County. We were told by the Ninth Circuit panel
15 below that all of the water in this canal constitutes
16 flood water under the immunity provisions of the Flood
17 Control Act of 1928 solely by virtue of the fact that this
18 canal is part of the Central Valley project, a large
19 Federal water project covering one-third of the State of
20 California, with multiple component parts and with
21 multiple originating purposes, only one of which was flood
22 control.

23 The Ninth Circuit made this ruling noting that
24 this canal was not a flood control project by itself, and
25 served no flood control purpose. The Ninth Circuit

1 further indicated --

2 QUESTION: Did they concede that it served no
3 flood control purpose? I wasn't aware of that.

4 MR. JONES: They being the United States, Your
5 Honor?

6 QUESTION: Yes.

7 MR. JONES: No. They did not concede that it
8 served no flood control purpose.

9 QUESTION: And did the Ninth Circuit said that
10 it served no flood control purpose?

11 MR. JONES: Yes, it did, as part of its
12 decision.

13 QUESTION: Now, do you concede that water could
14 be released into the Madera Canal for flood control
15 purposes, for example to make more room in the reservoir
16 for flood waters that are anticipated? Could that happen?

17 MR. JONES: Yes. It would be under a relatively
18 limited circumstances and the problem there is, this water
19 is liquid gold. They marshall it, they organize it, and
20 they know where it goes and why, and if they're going to
21 spill it into that ground --

22 QUESTION: It's liquid gold until December.

23 MR. JONES: Actually, not necessarily, Your
24 Honor, because for most of the years in question they
25 don't put water into that canal even in December. The

1 amount of flood space that they reserve in this canal is
2 only 30 percent of the entire -- in the lake is only 30
3 percent of the entire facility.

4 QUESTION: Well, I have to say -- I recognize
5 the case is here on dismissal of the pleadings.

6 MR. JONES: Correct.

7 QUESTION: And that you have indicated in your
8 brief that in some events maybe the case should go back,
9 that we shouldn't just rule for the Government. I am
10 troubled by the assumption of the Ninth Circuit that the
11 canal is not related to flood control in any respect.
12 That's the inference I get from its statement, and I find
13 that somewhat troubling.

14 MR. JONES: That issue was not briefed at the
15 Ninth Circuit level, Your Honor, but the canal itself was
16 authorized under the reclamation laws and 100 percent of
17 its costs were reimbursed to the United States under those
18 rules. The canal itself is not part of the flood routing
19 system of Millerton Lake.

20 QUESTION: Well, can't it be, though -- I mean,
21 the Government points out in the brief that there are
22 limitations in a flood situation on the amount of water
23 that can be discharged downstream, and in order to comply
24 with those limitations they might have to use this canal
25 to run off surplus water, so the United States is saying

1 that there certainly are situations in which this canal
2 would have a flood control use. Do you concede that
3 that's at least possible?

4 MR. JONES: I do.

5 QUESTION: Okay.

6 MR. JONES: But the fact of the matter is that
7 the facility itself is operated -- if that ever occurred,
8 still it would be a question of fact we'd have to address
9 below, but --

10 QUESTION: And you would say that if the
11 escaping water resulted from that particular kind of flood
12 control use there would be immunity. If the escaping
13 water was not so related there would be no immunity, and
14 you'd in effect have to apportion the damage -- well, not
15 apportion the damages. You'd have to do a causation
16 analysis.

17 MR. JONES: That is exactly correct, Your Honor.

18 QUESTION: Yeah.

19 QUESTION: So you say flood waters would include
20 two things, waters going through a facility that was
21 primarily built for flood control purposes, no? What are
22 your categories? What does flood waters consist of?

23 MR. JONES: Flood waters consist of, and I think
24 this Court's statement in United States v. James at page
25 605 is relatively clear. It requires a Federal flood

1 control project, and the flood waters must be waters that
2 are contained in or passing through that project for
3 purposes of or related to flood control.

4 QUESTION: Well, related -- related to -- I
5 mean, that's pretty wide. If we'd apply that, I think you
6 lose here.

7 MR. JONES: I would challenge that a little bit,
8 Your Honor, respectfully. I think --

9 QUESTION: You acknowledge it's remotely
10 enough -- it's remotely related to flood control in that
11 should there be a flood they can release some of the
12 excess flood waters through this canal.

13 MR. JONES: That might make the canal remotely
14 related to flood control, but it doesn't make the waters
15 that are passing through the canal -- under circumstances
16 in the middle of summer, it's 100 degrees out, the river
17 is dry down below the dam 20 miles, and they're diverting
18 the water into the canal under contractual obligations,
19 where it's bought and paid for. Under those
20 circumstances, I think the water, which is what the
21 statute speaks to, is not flood water.

22 QUESTION: Suppose at that point the dam itself
23 started to leak and caused damage. Would the Government
24 be immune in that instance?

25 MR. JONES: Assuming it's a Federal flood

1 control project, Friant Dam is, it's leaking water into
2 the river channel. That is part of the floodway. What
3 you're looking at is the natural flow of this river and
4 they put a dam in it, and if it leaks into the river --

5 QUESTION: And you're saying the Government then
6 would be immune because it's in the river bed?

7 MR. JONES: It's leaking into the floodway of
8 the river itself. It's leaking into the channel, which is
9 the very river course.

10 QUESTION: So whether or not it's flood water
11 depends on where it ultimately comes out?

12 MR. JONES: It might if that's part of the
13 facility. I mean -- what you're looking at is, is the
14 river channel runs -- this facility, if it were operated
15 as a flood control facility, would impound water at most
16 once every 4 years.

17 QUESTION: Well, in effect you want the
18 opportunity to go back and establish that the water in the
19 Madera Canal has never been released in connection with
20 flood control purposes.

21 MR. JONES: Well, Your Honor, I think two
22 things.

23 QUESTION: Is that right?

24 MR. JONES: Yes, we want the opportunity to go
25 back, and I think that we want to be able to establish

1 that the water has never been -- or at least at times has
2 been released for purposes other than flood control.

3 QUESTION: May it not depend on the kind of
4 claim you're making against the Government? I mean, if
5 water is -- someone is drowned in a boat accident as a
6 result of flood waters being released out of a dam, you
7 have a single incident that occurs right then. I take it
8 your claim is based on leaching out, or some sort of
9 damage to the soil over a period of years.

10 MR. JONES: That's correct. The canal is -- the
11 lining of the canal is cracking, and it's leaking water,
12 it's raising the water table and it's --

13 QUESTION: So it didn't happen on any one day.
14 It happened --

15 MR. JONES: That's right.

16 QUESTION: It seems to me that makes your case a
17 little harder, because it's project-related. This is not
18 like the case where the Corps of Engineers boat was being
19 driven by a drunk driver, which doesn't seem to have much
20 to do with floods at all.

21 But here, it has to do with the way the whole
22 facility was constructed, and that seems to me to be a
23 harder case for you.

24 MR. JONES: I'm not sure I understand the part
25 about the way the facility was constructed. Are you

1 talking about the canal or the dam?

2 QUESTION: It's a long-term damage. The damage
3 occurs over a period of time because of the way that the
4 canal was constructed, or misconstructured, and that seems
5 to me to be more closely related to the purpose of
6 immunity, which is to protect the Government when it
7 erects this facility, than in some of these cases where
8 you have -- where people are sucked down into tunnels and
9 so forth during irrigation season.

10 MR. JONES: I don't think that that's what we're
11 saying. What we're saying is, is that the facility -- one
12 of our claims is that they're just not maintaining it.
13 The concrete cracks, they patch some of it, they don't
14 patch the others, and some of it is deteriorating, and it
15 needs to be repaired.

16 QUESTION: But you could say the same thing if
17 it were the dam.

18 MR. JONES: We could, except the dam would be
19 passing water right into the floodway itself. This, it
20 passes on to other people's property. The dam got flowage
21 rights. When Friant was built they obtained flowage
22 rights to pass water in certain ways and the fact that the
23 dam is either leaking or has its gates open isn't going to
24 give rise to a claim.

25 QUESTION: This whole scenario, in effect, was

1 quite beyond the contemplation of Congress in 1928. When
2 it's talking about flooding on the Mississippi. There are
3 no dams on the Mississippi River, needless to say.

4 MR. JONES: I understand, Your Honor, and that's
5 very true. This -- the clear context, and I think this
6 Court in James said that, that the context was a
7 floodworks project like the Mississippi River, and we're
8 not dealing with a floodworks project like the Mississippi
9 River. We're dealing --

10 QUESTION: You say, if I understand your case,
11 you wouldn't take a position that flood waters are
12 never -- you're not going to try to prove that flood
13 waters were never released through this canal, but you
14 would say categorically that the canal itself, when
15 constructed, had no flood control purpose.

16 MR. JONES: I think that's absolutely true,
17 because if this was -- if this canal was going to be
18 constructed for flood control they would have never built
19 it. They'd have never built that dam. They'd have built
20 it much lower -- there's only a fraction of the space of
21 this whole facility that serves any flood purposes.

22 QUESTION: Well, would you concede that the
23 Friant dam has a substantial flood control purpose?

24 MR. JONES: It definitely provides some flood
25 relief. I don't know that I would say it provides a

1 substantial flood purpose, because if they open the gates
2 to channel capacity it would not impound a drop of water
3 for 3 years at a time, maybe 1 year it would impound water
4 for a limited period of time and they'd never reach 25
5 percent or 20 percent of this capacity --

6 QUESTION: But it's part of an entire project.
7 The Sacramento River waters couldn't go to the San Joaquin
8 if the Friant didn't back -- didn't stop the natural
9 tributary.

10 MR. JONES: Yes they do route the Sacramento
11 River water down into the San Joaquin Valley and they do
12 route the water of the river --

13 QUESTION: And they can only do that because of
14 the Friant Dam.

15 MR. JONES: But you don't impound water like
16 this for flood control. If you're going to impound water
17 in the way they impound it -- I mean, the United States
18 said in their brief at page 3, you impound water as soon
19 as possible for irrigation, and you hold it as long as you
20 can until you need it, and that's what they do with this
21 facility, and they said you impound water only at the last
22 moment for flood control when you have to and you evacuate
23 it as quickly as possible. This facility just isn't
24 operated that way.

25 QUESTION: Well, suppose it is, in the sense

1 that when the people were thinking of building this, they
2 thought, we'll use it mostly for irrigation, but you know
3 the San Joaquin floods sometimes too and then what we'll
4 do is we'll have the water held behind the dam. It
5 normally will go into the San Joaquin River, sometimes
6 there's too much of it, sometimes we'll divert it up
7 through the canal, it'll run into the Chowchilla River or
8 the Fresno River. So they're thinking both. They agree
9 most of the time, irrigation, some of the time, for just
10 overflow of flood water. And who wins? And moreover,
11 there's a crack in the canal, so that means most of the
12 time the water that's running out is water that would be
13 there for irrigation, and some of the time the water that
14 runs out through the crack is water that would be -- would
15 have been released because there was too much water behind
16 the dam and the San Joaquin River was filled up. Right,
17 now, who wins under those circumstances?

18 MR. JONES: The first presumption -- the reason
19 the dam is because of the irrigation retention, but
20 assuming I understand the hypothetical, and I think I do,
21 the water that would go into the canal under those
22 circumstances may very well be flood water, and it may
23 very well carry the immunity, but it would be in a very
24 limited circumstance.

25 QUESTION: All right, so you want to divide it

1 say proportionate 90-10. But another to do it is to say
2 that so long as the water that's sometimes in that canal
3 and running out through the crack that was too big is
4 flood water, so long as that's so, as long as that's a
5 substantial amount of the water that's causing the damage,
6 i.e. as long as a substantial amount is water that would
7 have otherwise gone into the San Joaquin River but did not
8 because there is too much water behind the dam and the
9 river was filled up, as long as that's substantial, the
10 Government's entirely immune.

11 MR. JONES: Is that -- I mean, it sounds like
12 that's a causal --

13 QUESTION: That's the opposite theory one way,
14 it's very simple case that way.

15 You know, there's no doubt that there's
16 substantial -- that this is, I'd say, substantially
17 related to flood control, though mostly related to
18 irrigation, the canal, then there's no doubt that some of
19 the time the river, the water that goes through that canal
20 is water that would otherwise be dumped into the San
21 Joaquin, that it was all filled up, but that's a fairly
22 small but still substantial amount of time.

23 And there's no doubt that that water causes some
24 of the damage, but surely not even half. All right. So
25 then I think it comes down to, do we do it on a

1 proportional basis, or do you do it on a, well, if it's
2 substantially mixed in, you lose?

3 MR. JONES: I think our position --

4 QUESTION: How do you analyze it, really?

5 MR. JONES: Well, it seems to me there's a
6 couple of different issues, and if I understood the
7 question properly you're saying if you have a certain
8 percentage of the water going down the canal is flood
9 water, and a certain percentage of the water going down
10 the canal, a larger percentage, is irrigation water, is
11 not immune, then wouldn't you simply look at the damages
12 and deal with that as a matter of causation, because some
13 of that water was not subject to the immunity. It clearly
14 wasn't, and if that wasn't enough to damage the trees, if
15 the amount of water that went in the canal was not enough
16 to damage the trees, that was not immune.

17 QUESTION: Well, I gather it's already a stretch
18 to say, as James said, that water which is held behind a
19 dam that is not really flood water, it's water that's been
20 accumulating over the summer, but if the dam is for flood-
21 control purposes we're going to consider all that water
22 flood water.

23 That's a very unusual use of the term, flood
24 waters. I mean, you think about the raging Mississippi.
25 Those are flood waters.

1 Then what the Government wants is yet another
2 extension, and what Justice Breyer was proposing, and that
3 is that any facility that is even used in part for flood
4 control purposes, all the water passing through that
5 facility, including the nonflood water part, becomes flood
6 waters. That stretches it pretty thin, pretty thin.

7 MR. JONES: Then that's what we think happened
8 here.

9 QUESTION: But that's the Ninth Circuit test, in
10 effect.

11 MR. JONES: Well, yeah. What the Ninth Circuit
12 said is that this immunity, the way they're construing it
13 is so broad that they could not think of a single instance
14 where the immunity did not apply in the Central Valley --

15 QUESTION: It almost reads as though the Ninth
16 Circuit said that but didn't want to say it, that it was
17 very troubled by it's own holding.

18 MR. JONES: I was there at the argument, and I
19 think the court was very troubled by what they were having
20 to do.

21 QUESTION: I think what Justice Breyer's
22 question suggests is that if we were trying to determine
23 causation in order to impose liability, to impose
24 liability, if there are multiple causes, multiple actors,
25 if there's a substantial cause then the actor is joint and

1 severally liable for 100 percent of the damage.

2 The mirror image of that might be that you have
3 100 percent immunity if a substantial purpose of the
4 facility is irrigation, and I guess the problem with that
5 from your standpoint is that we're just stacking the deck.

6 MR. JONES: Right.

7 QUESTION: We're saying, well, you also have a
8 substantial cause, which is irrigation, and you're not
9 immune for that, which leaves us, I guess, right back
10 where we started. I guess standard tort principles don't
11 seem to help us much.

12 QUESTION: Well, are you -- I take it that all
13 you really want us to do here is to say that the Ninth
14 Circuit test,
15 not-wholly-unrelated test, either is a matter of substance
16 or is a matter of creating a presumption in applying the
17 James test, went beyond James, and that we ought to
18 reverse or vacate because that erroneous standard was
19 applied, and I take it that you don't really need to have
20 us or want us necessarily to do anything more at this
21 stage except send it back and say, apply James the way we
22 wrote James, and then if you don't like it later, maybe
23 there'll be another appeal, but am I right that that's all
24 you really want us to do, is to say that not-wholly-
25 unrelated goes beyond James?

1 MR. JONES: Yes. I think that their test is
2 not-wholly-unrelated to the project, which I think is also
3 compounding the problem.

4 QUESTION: Yes.

5 MR. JONES: And so we think the not-wholly-
6 unrelated test is the wrong test applied to the wrong --

7 QUESTION: So you're saying they're using the
8 wrong category: project.

9 MR. JONES: Right.

10 QUESTION: And they're using in effect a --
11 they're creating a kind of presumptoin in applying that
12 category and that presumption is also inconsistent with
13 the way we wrote James, even if they got the category
14 right, is that --

15 MR. JONES: That's correct.

16 QUESTION: Do I understand you?

17 MR. JONES: That's correct.

18 QUESTION: I thought you were asking to do more,
19 not to leave -- to say the Ninth Circuit test is no good,
20 because it's wholly-related -- not-unrelated won't do. I
21 thought you were asking us to substitute another test
22 which you had identified as a primary purpose test.

23 Justice Breyer introduced yet another test,
24 which sounded to me like you figured out how much of the
25 flow was for irrigation, how much for flood control, and

1 then you do kind of an apportionment that wouldn't be an
2 all-or-nothing immunity. I thought that's what he was
3 saying.

4 But you're saying, if the primary purpose is
5 irrigation, then there's no immunity, even if a
6 substantial purpose would be flood control.

7 MR. JONES: What happened is, we don't believe
8 we need to go much beyond the language of James as long as
9
10 not-wholly-unrelated means something more than remotely
11 incidental, but we offered -- in the case the Court
12 decided to try to use this case as a test, we offered a
13 test. We put together what we thought made sense in light
14 of the Flood Control Act and the Federal Tort Claims Act
15 and tried to determine how it would be applied in a
16 multipurpose facility.

17 QUESTION: Well, James, as the Chief Justice
18 indicated, didn't apply to a system where we had
19 irrigation facilities.

20 It does seem to me that the -- that your primary
21 purpose does not give the Government quite enough
22 protection, because a major purpose, part of the major
23 design of this entire system is for flood control
24 purposes.

25 On the other hand, I'm not quite sure how to

1 answer your argument that that protects the Government in
2 every single instance. Is a substantial -- if we said
3 the -- if flood control is a substantial reason for the
4 facility and for the operation that caused the damage,
5 could you go back for trial on that?

6 MR. JONES: Yes, it --

7 QUESTION: And would it give the district court
8 enough guidance?

9 MR. JONES: It would if you didn't take
10 substantial-to-the-injury and say, if flood water was a
11 substantial contributing cause to the injury you have no
12 claim at all, as opposed to saying, if it's a substantial
13 part of the facility, flood control is a substantial part
14 of the facility and, in order for the flood water to be
15 flood water, it has to have a substantial relationship to
16 flood control, then that's fine.

17 But if you take it to the next step of the
18 injury as a cause, then you could wipe out our injury
19 completely, even though three-quarters of it was caused by
20 the United States --

21 QUESTION: Well, can you sustain a proposition
22 that the facility that should be examined is the Madera
23 Canal in this case?

24 MR. JONES: Yes.

25 QUESTION: Because it seems to me if the only

1 facility we examine is the Madera Canal, and what it may
2 get -- you certainly do not give anything close to a
3 substantial use for flood control.

4 MR. JONES: I think that there is no substantial
5 use of that canal for flood control based on anything I've
6 seen.

7 QUESTION: Do I understand correctly, Mr. Jones,
8 that you're willing to acknowledge that the damages your
9 client received should be reduced by the proportion of the
10 total water going through the canal that is really flood
11 water under your interpretation of flood water?

12 MR. JONES: I think we'd have to.

13 QUESTION: Okay.

14 MR. JONES: Yes.

15 QUESTION: Let me ask you a question which I
16 should know the answer to, but I don't, and I want help.
17 Who has the burden of proof on the immunity here?

18 MR. JONES: It's raised as a matter of
19 jurisdiction, and so I think it's our burden --

20 QUESTION: So it's your burden. It's a
21 jurisdictional issue and it's your burden.

22 QUESTION: With respect to the James test, Mr.
23 Jones, there's a phrase in it that I don't understand, and
24 could you tell me how you read the phrase that says that
25 immunity extends to waters flood control projects cannot

1 control?

2 MR. JONES: Yeah, we read that language to say,
3 first of all, the reference to waters is flood waters, not
4 any water, and we read it to say that in the normal
5 operations of the facility, if the water overrides the
6 banks, or overrides whatever control facilities are
7 constructed, the United States would not be liable for
8 injuries caused by that overriding.

9 We think that's wholly different than what we're
10 dealing with here, where it's just a continuous leak out
11 of a nonmaintained facility, and if the water was not
12 flood water going into the canal, it can't be flood water
13 leaking out.

14 QUESTION: I have some difficulty in adopting a
15 test that this is an irrigation facility. It seems to me
16 that the whole design of the Central Valley project is
17 that it's an integrated whole, and I don't know how we
18 could take different pieces, the Madera Canal, the Friant
19 Current Canal, which I take it takes a much larger volume
20 of water, and even the Friant Dam itself and say, well,
21 this is primarily irrigation. I just don't think you can
22 do that with the Central Valley project.

23 MR. JONES: I think the Central Valley project
24 can be identified by segments of the project. I
25 wouldn't -- I can't speak to all of it, but I can speak to

1 the Madera Canal.

2 The Madera Canal itself was funded as an
3 irrigation project. It can relieve the lake of pressure,
4 so to speak, into another natural waterway that itself is
5 out of the same watershed, so when you look at the
6 totality of it, it doesn't make sense for them to operate
7 this for a flood facility. They wouldn't put water into
8 the Madera Canal necessarily just to run it to another
9 river that itself would be flooding.

10 QUESTION: Well, I have trouble with that in
11 times of high water. I just don't think that's right, but
12 that's for the trier of fact to figure out. I'm just not
13 sure what test we'd use in order to separate out discrete
14 parts of the Central Valley project and say some are
15 irrigation, some are not.

16 Much of the time, all the project is used for
17 irrigation. There's no flood danger.

18 MR. JONES: That's true. This Court did --

19 QUESTION: There's latent flood danger, and the
20 entire project is designed to accommodate that.

21 MR. JONES: I think that that's a fair
22 statement.

23 QUESTION: May I just ask this -- isn't it true
24 that the Government itself classified -- has class I water
25 and class II water that goes through this project, and

1 that class I water would never be flood water?

2 MR. JONES: I believe that that's correct, and I
3 think they have conceded that.

4 Interestingly enough, in their contract with the
5 Madera Irrigation District they define irrigation water as
6 water used primarily in the production of agricultural
7 crops or livestock, including domestic use incidental
8 thereto and watering of livestock. That's at page 8 of
9 their supplemental lodging.

10 QUESTION: Does the agreement require some kind
11 of consent by the parties to release any flood water in
12 the Madera Canal?

13 MR. JONES: I'm not aware of any consent being
14 required. I think they have the power to do that under
15 the circumstances.

16 QUESTION: Unilaterally? I thought there was
17 something in the agreement.

18 QUESTION: I think Justice O'Connor is right.
19 In a document I have called the Post Flood Assessment it
20 says that flood releases may also be made of the Friant
21 Current Canal and Madera Canal if all parties agree, and
22 that's rather baffling to me --

23 MR. JONES: Well, I apologize, but that
24 obviously is in the contract.

25 QUESTION: I thought it was.

1 QUESTION: You mentioned, or Justice Kennedy
2 earlier mentioned some problems that the trier of fact
3 would have. One of those problems might be the existence
4 of records for the purpose to apply this apportionment
5 rule. Do you -- can you represent that in fact they do
6 keep sufficiently detailed records to know when they're
7 using the canal for flood control run-off and when they're
8 using it for normal irrigation purposes?

9 MR. JONES: I believe those records most
10 definitely exist. They calibrate --

11 QUESTION: Okay, but they're not -- I mean, this
12 is a preliminary pleading issue, so they're not in the
13 record of this case, and we'd better -- I suppose we had
14 better be sure of that before we come up with a rule that
15 requires apportionment.

16 MR. JONES: We --

17 QUESTION: Or at least we ought to be sure that
18 they can keep these records in a practical way, and we
19 don't know that, do we?

20 QUESTION: Well, don't we know that they charge
21 a different rate for class I water than they do for class
22 II water, so they have to have some way of apportioning
23 it.

24 MR. JONES: We know that the gauging of the
25 water coming into the lake, we know how much is impounded,

1 we know what the storage is, we know what's diverted and
2 when it's diverted and why it's diverted and who's paying
3 for it and why they're paying for it and whether it's
4 class I, class II, or class II obligation.

5 I think that because this is operated for the
6 economic use of the facility, all of that information is
7 very --

8 QUESTION: They must have it.

9 QUESTION: There's some loss from evaporation.
10 I mean, I don't think you can take figures in the lake and
11 just assume that all of that water ends up in the ditch.

12 MR. JONES: I think that that's true.

13 Unless there's any questions I'd like to reserve
14 the rest of my time.

15 QUESTION: Very well, Mr. Jones.

16 Mr. Frederick, we'll hear from you.

17 ORAL ARGUMENT OF DAVID C. FREDERICK

18 ON BEHALF OF THE RESPONDENT

19 MR. FREDERICK: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 Multiple purpose projects throughout the country
22 operate like the Friant Division of the Central Valley
23 project, which collects water behind Friant Dam to avert
24 flooding along the San Joaquin River and then gradually
25 releases that water to serve both flood control and

1 irrigation needs.

2 QUESTION: Yes, but the Ninth Circuit did say
3 that the Madera Canal is not a flood control project and
4 serves no flood control purpose. Now, if your focus is
5 on the Friant Dam and you look at the overall project in a
6 third of the State of California, you can say it's related
7 to flood control, but if you focus instead in the Madera
8 Canal, the Ninth Circuit said it just wasn't -- it serves
9 no flood control purpose.

10 MR. FREDERICK: Justice O'Connor, we don't know
11 why --

12 QUESTION: So where do we focus?

13 MR. FREDERICK: Well, you focus on what the
14 reality is.

15 QUESTION: Well, the reality is the Madera Canal
16 serves irrigation purposes, that's the reality.

17 MR. FREDERICK: It serves multiple purposes,
18 Justice O'Connor. The water that is released into the
19 Madera Canal for 10 months out of every year has to comply
20 with flood control rules set by the Corps of Engineers.
21 The Bureau of Reclamation cannot release that water, and
22 it must make daily decisions about how much water goes
23 into the canal, and which canal it goes into, and whether
24 it goes in the downstream river, and for that reason --

25 QUESTION: But presumably it can't, under that

1 agreement, release more than the farmers can use for flood
2 control purposes without the agreement of the parties.

3 MR. FREDERICK: Wrong. That is --

4 QUESTION: Doesn't it say that?

5 MR. FREDERICK: That is incorrect. What the
6 agreement says is that the Government can put water into
7 the canal, and it can be flood water, and even the water
8 that the irrigators take and use for irrigation can serve
9 flood control reasons if it has to be released from
10 Millerton Lake to avert a flood, or if putting that water
11 down the San Joaquin River would cause a flood, the dam
12 operator diverts it into the irrigation canals --

13 QUESTION: What if the plaintiffs below show
14 that never in the history of the Madera Canal has that
15 happened?

16 MR. FREDERICK: That would be --

17 QUESTION: Never.

18 MR. FREDERICK: Well, first, the fact that they
19 have asserted in their complaint that it serves an
20 irrigation purpose is not legally relevant to the question
21 of whether sovereign immunity applies, because sovereign
22 immunity is jurisdictional, and the court must satisfy
23 itself that it has jurisdiction --

24 QUESTION: Justice O'Connor asked you a
25 question, Mr. Frederick. I hope you'll get to the answer

1 quite soon.

2 MR. FREDERICK: Mr. Chief Justice, I don't think
3 there's any way that the plaintiffs could show that in
4 this case.

5 QUESTION: Well, but if this was dismissed on
6 the pleadings -- they said they were prepared to show
7 that.

8 MR. FREDERICK: Justice O'Connor, Congress, when
9 it created this project in the 1930's, was facing a fact
10 that between 1900 and 1944 there were 38 devastating
11 floods along the San Joaquin River, and it, in the course
12 of its legislative fact-finding, determined that the way
13 to deal with flooding along this river was to harness that
14 river and then to put it to productive use.

15 Of those 38 floods, 15 were from rain during the
16 period between October 1 and roughly March 15, 23 from
17 snow melt run-off --

18 QUESTION: Mr. Frederick, I don't mean to
19 interrupt you, but I hope you'll tell us some time in the
20 argument what you don't tell us in your brief, whether you
21 defend the Ninth Circuit's test.

22 MR. FREDERICK: We do defend --

23 QUESTION: If you do, you don't need all these
24 facts.

25 MR. FREDERICK: Well, Justice --

1 QUESTION: All you need is some flood control
2 purpose in the project and that's enough, and you win.

3 MR. FREDERICK: That's correct.

4 QUESTION: Is that your position?

5 MR. FREDERICK: Yes.

6 QUESTION: Then we don't need these facts.

7 QUESTION: Do you also accept the Ninth
8 Circuit's statement that the Madera Canal is for
9 irrigation purposes only?

10 MR. FREDERICK: No. No.

11 QUESTION: You disagree with that?

12 MR. FREDERICK: We disagree with that. The 1937
13 Rivers and Harbors Act said the entire Central Valley
14 project is for, among other purposes, flood control. It's
15 undisputed that --

16 QUESTION: Justice O'Connor asked the question,
17 suppose the trier of fact found 100 percent of the water,
18 or let's say, 98 percent of the water over the last 10
19 years in Madera Canal has been for irrigation purposes
20 only, any difference in the case?

21 MR. FREDERICK: I don't think so, Justice
22 Kennedy, and the reason is the congressional design behind
23 the project, as one of your earlier questions pointed out,
24 it is an integrated project, and the part of the report
25 that you were talking about, if all parties agree, those

1 parties are the Bureau of Reclamation and the Corps of
2 Engineers.

3 QUESTION: The language Congress used is, floods
4 or flood waters. I don't know that that affords any basis
5 for going down -- back to the design of an entire project,
6 instead of looking as to whether the particular waters
7 here were in fact flood waters.

8 MR. FREDERICK: The way, Mr. Chief Justice,
9 courts have consistently looked at the question of what is
10 a flood water is, is that water that would overflow the
11 banks unless controlled by man-made structures, and that
12 was the assumption that the Court in James made behind
13 having the water behind this dam be deemed flood waters.

14 If the waters not controlled by that dam would
15 overflow the river, then it would be deemed flood waters
16 and that's --

17 QUESTION: But then 98 percent of the water in
18 this canal isn't.

19 MR. FREDERICK: And our submission, Justice
20 Breyer, is that the -- first we can show as a matter of
21 historical fact that that's not the case here, that --

22 QUESTION: 98 percent? You can show that the --

23 MR. FREDERICK: Yes.

24 QUESTION: What percent is it?

25 MR. FREDERICK: Well, our brief demonstrates

1 that even if you take class I water out of the picture,
2 and class I water in many circumstances would have to be
3 released for flood storage reasons --

4 QUESTION: Well, I mean, I used to live in
5 California. I mean, it's dry most of the time, so it
6 would be amazing to me if like there's going to be a flood
7 in summer there. I --

8 MR. FREDERICK: Justice Breyer, a flood control
9 project is created for the cataclysm.

10 QUESTION: No, but we're talking about flood
11 water, and the flood water the Chief Justice just pointed
12 out, he gave that definition, and I was saying it seemed
13 to me that 98 percent -- I'll give you at the moment that
14 the canal is part of a flood control project. We could
15 define that as a project that's substantially, but not
16 entirely, used for flood control. Okay, I'll give you
17 that for the sake of argument.

18 But what about the water? The water, you've got
19 the definition he just said. Adopting that definition, I
20 don't see how more than about 1 percent, if that, could be
21 flood water, water that would have overflowed the banks of
22 the San Joaquin or any other of these dry places. I
23 mean --

24 MR. FREDERICK: Justice Breyer, to answer your
25 question, one must look at the flood rules that are set

1 down by the Corps of Engineers with respect to this
2 project. They were set out in 1955, and --

3 QUESTION: Well, why do we look at that when we
4 have a congressional definition of flood waters?

5 MR. FREDERICK: Well, you -- the Congress didn't
6 define the term, flood waters, Mr. Chief Justice. This
7 Court in James defined the term flood waters in section
8 702(c), but what the Corps of Engineers has done in flood
9 control projects is to set out the rules for how those
10 projects operate so that waters do not become floods, and
11 in the establishment of those rules the Corps made very
12 clear that water has to be diverted from Millerton Lake to
13 the canals that are adjoining the dam so that flooding --

14 QUESTION: But surely the inquiry is a factual
15 one, not some directive from the Corps of Engineers that
16 says what may occasionally happen, you know, what has in
17 fact happened with respect to the Madera Canal over the
18 last 10 years.

19 MR. FREDERICK: To the contrary, Mr. Chief
20 Justice, for sovereign immunity to be a functional
21 principle, the Government should be entitled to go into
22 court to say Congress and the applicable agencies have
23 designed and operated this facility for flood control
24 reasons and avoid --

25 QUESTION: Well, Mr. Frederick, that just isn't

1 the immunity statute. That is what we look at, not the
2 construction of the Central California project. We have
3 to focus on the immunity statute that was passed in the
4 wake of that 1927 massive flood of the Mississippi River.
5 Congress didn't have, in this immunity section, in mind
6 the kind of situation we've got with the Madera Canal,
7 where it's used for irrigation purposes and it's alleged
8 to have been constructed in a faulty manner, it's cracked
9 and the water's leaking out. Apparently, to a nonuser of
10 the canal, but flooding the property. Now, they didn't
11 have that in mind.

12 MR. FREDERICK: To the contrary, Justice
13 O'Connor. The entire Central Valley project uses
14 aqueducts and canals --

15 QUESTION: She's talking about the 1928 act --

16 QUESTION: I'm talking about the immunity
17 language, and you seem to conflate the purpose of the
18 construction of the Central California project, and I
19 just -- I have a -- I have trouble converting --

20 MR. FREDERICK: Okay. Let me see if I can help,
21 then.

22 In James what the Court said was that flood
23 waters within the meaning of the immunity statute is all
24 waters carried in or contained through a flood control
25 project for purposes of or related to flood control.

1 QUESTION: James had a very different situation
2 in mind. It did have genuine flood, water escaping
3 through the system and somebody drowning as a result when
4 it flooded over. This is far removed from that.

5 MR. FREDERICK: We don't think so, Justice
6 O'Connor, for this reason. On an average year, Millerton
7 Lake will have 1.7 million acre feet of run-off into it.
8 That's the average year. It has to empty itself, or it
9 has to be emptied, and then it will refill three-and-a-
10 half times during the course of the year. If that water
11 is not released there will be a flood. If it's not
12 controlled, there will be a flood along the San Joaquin
13 River.

14 QUESTION: Well, but blessedly there are farmers
15 who want to use it, so of course it's released. It could
16 be used five times over if there were enough water. The
17 farmers are there, dying for water.

18 MR. FREDERICK: And the fact that there is a
19 multiple benefit, and the hydropower is another benefit,
20 does not mean that the water loses its character as flood
21 water if it is stored to protect against a flood along the
22 river, and what -- in James this Court considered the
23 question of flood waters that were being used for
24 recreational purposes. The specific discharge that was at
25 issue in that case was deemed to be for flood control

1 reasons.

2 But here, the same principle applies because the
3 water is released into the irrigation canals for a flood
4 control purpose.

5 QUESTION: I see that, but -- okay. Suppose --
6 I'm now giving you this. A flood control project is a
7 project that has a substantial purpose related to flood
8 control. Then I think you have to get to water, and the
9 water, as you pointed out, is it's contained or carried
10 through a flood control project for purposes of or related
11 to flood control.

12 All right. Suppose I were to say, what that
13 means is that the water is where it is for a purpose
14 substantially related to flood control.

15 Now, if that's so, except for a tiny little bit,
16 this is not flood control water.

17 MR. FREDERICK: To the contrary.

18 QUESTION: Because?

19 MR. FREDERICK: Because every release from
20 Millerton Lake has to serve a flood control purpose,
21 number 1.

22 QUESTION: Ah, but I said, is where it is, and
23 it's not in the San Joaquin bed, which is where it would
24 be. It's diverted over because -- and let's take it in
25 August, okay. In August, that water would normally be

1 released into the San Joaquin bed, and now it isn't
2 released to the San Joaquin bed, why, for irrigation
3 purposes, 100 percent. That's the answer to that
4 question, nothing to do with flood control.

5 MR. FREDERICK: Justice Breyer, if I could
6 answer your question in two ways. The first is, if this
7 complaint alleged a discrete release of water, there might
8 be an argument that the Government was not entitled to
9 immunity under your theory because the discrete purpose of
10 the release could be identified.

11 But this complaint asserts that this canal has
12 leaked, and on page 54 of the joint appendix they say, we
13 don't know when the leaking started, so you have to look
14 at the overall purposes of the project, and you have to
15 look at the reasons why water gets released from Friant
16 Dam.

17 QUESTION: Okay, let's accept that. That's why
18 I think you have to get to the third part of this, which
19 is the causation part, if we're going to say anything
20 useful, and on that I thought you'd say, look across the
21 year about 98 percent of the time it is diverted from the
22 San Joaquin bed just for irrigation purposes.

23 Some percent of the time -- I'll give you as
24 much as you want, but it's not going to be more than 50 --
25 it's diverted for, let's say, flood control purposes, and

1 now we have to say that the causation problem is solved by
2 saying, you know, one, this water wouldn't have been
3 substituted by some other water, and the second thing is,
4 you have to apportion the damages, I think.

5 Now, I'm putting that whole thing out to get
6 your comment.

7 MR. FREDERICK: Well, my --

8 QUESTION: But I don't see how else to make it
9 work.

10 MR. FREDERICK: Okay. My comment is that if
11 you're looking at why Congress would have put billions of
12 dollars into these water projects, it did so with the
13 assumption that the immunity would apply, and that is a
14 very important principle here, because when establishing
15 sovereign immunity principles you don't allow the
16 Government to be engaged in fact-finding. They've asked
17 for every single document relating to this project since
18 the 1930's as part of their discovery effort.

19 QUESTION: What is --

20 QUESTION: Well --

21 QUESTION: -- the basis for your statement that
22 Congress assumed that immunity would apply when it did
23 this particular project? It wasn't until James that we
24 held that immunity applied to anything except property
25 damage.

1 MR. FREDERICK: Because this is property damage,
2 Justice Stevens.

3 QUESTION: I know. I know.

4 MR. FREDERICK: It -- the Court --

5 QUESTION: But it hadn't been addressed until
6 then.

7 MR. FREDERICK: In 1936, when Congress directed
8 the Corps of Engineers in the Flood Control Act of 1936 to
9 study the San Joaquin River and figure out a way to stop
10 flooding on the San Joaquin River, it incorporated by
11 reference the 1928 flood act which contains the immunity
12 provision in this case.

13 In 1937, Congress then authorized --

14 QUESTION: And of course, which except for
15 property damage wasn't even necessary, because the Federal
16 Tort Claims Act --

17 QUESTION: There was no Federal Tort Claims Act.

18 QUESTION: -- hadn't even been passed.

19 MR. FREDERICK: Well, no, but the case of United
20 States v. Cress had been in present -- by -- decided by
21 this Court, and the question of whether or not and when
22 flooding would constitute a taking.

23 QUESTION: That's right.

24 MR. FREDERICK: And so the issue was very much
25 how will Congress protect the Government from paying out

1 in lawsuits for faulty structures or negligent design or
2 damage from flood waters, you know, for decades out into
3 the future, and the interrelationship between the flood
4 control purpose and irrigation is probably the most
5 important thing that we would like the Court to understand
6 here, because you cannot segregate the purposes. They're
7 all serving these purposes simultaneously.

8 QUESTION: All right, then on your theory -- and
9 what you've just said raises the same question that your
10 answer to Justice Breyer raised with me. On your theory,
11 will there ever be a situation in which the immunity won't
12 apply?

13 MR. FREDERICK: Yes.

14 QUESTION: What?

15 MR. FREDERICK: When, in an accident --

16 QUESTION: The discrete situation?

17 MR. FREDERICK: The discrete situation.

18 QUESTION: All right. If the discrete situation
19 applies in the accident, why shouldn't the discrete
20 situation, in effect, rule apply here if they can show by
21 the records kept by the dam that except in, let's say,
22 five instances in which the canal was used for overflow
23 for flood control purposes, all the other water that was
24 diverted into that canal was for nonflood-control purposes
25 and therefore you would get your immunity on some

1 apportionment theory? Why wouldn't that apply, if you
2 accept the discrete release exception --

3 MR. FREDERICK: Well, first it would be --

4 QUESTION: -- to liability?

5 MR. FREDERICK: First, it would be an unusual
6 way to treat subject matter jurisdiction of the courts, on
7 an apportionment basis.

8 QUESTION: Well, it may be an unusual way,
9 unless we are going to allow your theory of immunity to
10 become a plenary theory in which there will never be
11 liability, isn't that what we're going to have to do?

12 MR. FREDERICK: When you were talking about the
13 project itself and how the project --

14 QUESTION: No, but isn't that what we're going
15 to have to do?

16 MR. FREDERICK: Well, I --

17 QUESTION: Yes or no.

18 MR. FREDERICK: No, I don't think so, Justice
19 Souter --

20 QUESTION: Why?

21 MR. FREDERICK: -- and the reason is that
22 Congress wanted there to be broad immunity. It drafted
23 this statute in the broadest possible --

24 QUESTION: But it didn't want there to be
25 complete immunity, did it?

1 MR. FREDERICK: No.

2 QUESTION: All right, so we're going to have to
3 have some kind of mechanism to apportion causation for
4 jurisdictional purposes, don't we?

5 MR. FREDERICK: No, I -- no, Justice Souter, I
6 think there ought to be a discrete -- I think conceptually
7 there are two different problems dealing with this
8 statute. James dealt with the conceptual problem of an
9 accident occurring in flood waters within a project and is
10 there a relationship between the accident that occurs and
11 the flood control purpose of the project, and what the
12 Court there said was, if it -- if the accident is related
13 to the purposes of the flood control project, the immunity
14 applies.

15 QUESTION: Okay, and that was a -- that really
16 stretched the statute, didn't it?

17 MR. FREDERICK: This --

18 QUESTION: Because the statute didn't have a
19 related-to condition.

20 MR. FREDERICK: This problem, Justice Souter, is
21 really at the core of what Congress was getting at in 1928
22 which is, we're going to pour billions of dollars into
23 building these structures to protect flood water, and
24 we --

25 QUESTION: Now, wait a minute, you think

1 Congress was talking about damming the Mississippi River?

2 MR. FREDERICK: No, but Mr. Chief Justice, when
3 Congress created the extensive levee system it spent four
4 times the amount that it had on the Panama Canal, and it
5 also appropriated money in the 1928 act to put dams on the
6 Sacramento River and to protect against flooding on the
7 Sacramento River, which is integrated in the water system
8 with the San Joaquin River.

9 QUESTION: And you think Congress really thought
10 that if they built the levee on the Mississippi, and the
11 if the levee leaked during the middle of the summer, when
12 there were no flood waters in sight, that the immunity
13 would attach?

14 MR. FREDERICK: Yes.

15 QUESTION: Then I still --

16 QUESTION: It isn't clear to me. I think it's
17 already a stretch to say that the waters held behind a
18 flood control project even during a period when there's no
19 risk of flood are flood waters. That's just a stretch of
20 the English language, and to carry it further, as you now
21 want us to do, that even canals leading off of the main
22 flood control project which are sometimes used for the
23 release of flood waters, it's so breathlessly beyond what
24 Congress has said in the statute.

25 MR. FREDERICK: Justice Scalia, first the Court

1 took a different view in James, and that view is
2 certainly --

3 QUESTION: Whatever view it took in James was
4 dictum. It couldn't be clearer that the accident there
5 occurred from flood waters, in the real sense of flood
6 waters.

7 MR. FREDERICK: No, those waters were captured
8 behind the dam, and they were being released to create
9 more flood storage space in that lake, just as here, the
10 waters released into the irrigation canals to create more
11 flood storage space --

12 QUESTION: Well, but it will create much more
13 flood storage space.

14 MR. FREDERICK: I'm sorry?

15 QUESTION: It will create more flood storage
16 space by releasing into the canals, but I don't know that
17 we can or should make the assumption that it was released
18 into the canals for that purpose.

19 MR. FREDERICK: We can because in -- the way the
20 project was designed, in 1944 the Corps of Engineers
21 reported back to Congress and it said that if more than
22 7,000 cubic feet per second of water is released into the
23 San Joaquin River there will be a flood at Skagg's Branch,
24 and it also said the flood capacity of the dam is 12,000
25 cubic feet per second, and if you add 1,000 for the Madera

1 Canal and 4,000 for the Friant Current Canal, it is
2 unmistakably clear the Corps of Engineers intended for
3 these canals to receive the flood waters.

4 QUESTION: But that's true -- that's true, and
5 so you take those times when in fact the San Joaquin below
6 the dam is filled to more than 7,000 -- what is it, cubic
7 feet per second.

8 Now, when we look at those days, we get maybe --
9 I don't know how many days per year, but not all that
10 many, and maybe one every 3 years or something, but let's
11 say it's 100 days a year. It's not more than that, which
12 it isn't anywhere near that, but still, let's assume that.

13 Very well. On those 100 days, those releases
14 put water in the canal where it is at that time because it
15 is flood water, but on all the other days the water in
16 that canal is not where it is, because of any flood
17 control purpose, so we're talking about the water on all
18 those other days.

19 MR. FREDERICK: Justice Breyer --

20 QUESTION: Yes.

21 MR. FREDERICK: -- as a factual matter --

22 QUESTION: Yes.

23 MR. FREDERICK: -- 4 out of the last 5 years, if
24 the water had not been put into the canals, there would
25 have been flooding on the San Joaquin River.

1 QUESTION: On some days.

2 MR. FREDERICK: Through some months.

3 QUESTION: All right, fine.

4 MR. FREDERICK: -- through months-long periods.

5 QUESTION: Through some months. How many months
6 you want, two?

7 MR. FREDERICK: That's related to flood
8 control --

9 QUESTION: Excellent. Now let's talk about the
10 other 10 months. The other 10 months, the water, on your
11 theory, is not where it is in the canal because of flood
12 control, and so I think what Justice Souter was driving
13 at, and what I was, if all the water in the canal is
14 causing that damage, what reason would there be for
15 calling the water in those other 10 months flood water and
16 subjecting it to immunity?

17 MR. FREDERICK: Because they are making space so
18 that floods don't occur in those months.

19 QUESTION: But let me ask you -- let me ask you
20 a hypothetical I have. Suppose in the Madera Canal
21 there's a valve, and it goes into field A or field B.
22 Both are -- just for irrigation, and by mistake they open
23 the valve and it goes into field A and they leave it open
24 for 24 hours when it's only 12, and the barn gets flooded.
25 Immunity?

1 MR. FREDERICK: No.

2 QUESTION: Why?

3 MR. FREDERICK: The water's left the Federal
4 project. It's -- that's --

5 QUESTION: Well, the water's left the Federal
6 project in this case, too.

7 MR. FREDERICK: Yes, and --

8 QUESTION: It's leaked out the canal.

9 MR. FREDERICK: Right, but in your hypothetical
10 the Madera district is operating those cut-off valves.

11 QUESTION: No. No, I'm assuming the Corps of
12 Engineers. It's a hypothetical case.

13 MR. FREDERICK: Okay. Okay.

14 QUESTION: Assume the Corps of Engineers opens
15 the valve and they do it the wrong way.

16 MR. FREDERICK: Then there would be --

17 QUESTION: Instead of irrigating field A, they
18 irrigate field B, or vice-versa, and there's damage.

19 MR. FREDERICK: Yes.

20 QUESTION: Liability?

21 MR. FREDERICK: No. That would be immunity. I
22 mean, if the Government's actions are negligent in
23 releasing the water, the immunity applies. The statute
24 says --

25 QUESTION: Because it's flood waters?

1 MR. FREDERICK: Yes. Yes. That's water that's
2 inundating an area where it is not supposed to be. That's
3 the definition of a flood.

4 QUESTION: Oh, I see --

5 MR. FREDERICK: Inundating an area where the
6 water is not supposed to be.

7 QUESTION: -- now -- well then, why don't you
8 win in this case, anyway?

9 MR. FREDERICK: We do.

10 (Laughter.)

11 MR. FREDERICK: We think we do, Justice Kennedy.

12 QUESTION: But on a theory that there's a new
13 flood.

14 QUESTION: So, yeah, overflow is basically a
15 flood.

16 MR. FREDERICK: Yes.

17 QUESTION: In other words, if every --

18 QUESTION: Let me just change Justice Kennedy's
19 hypothetical --

20 MR. FREDERICK: There's no difference in our
21 view from an overflow and a leak if the structure isn't
22 working properly --

23 QUESTION: No, no, just change the hypothetical
24 to say that the release didn't cause a flood, it didn't --
25 but it was sudden release and somebody drowned in the

1 accident, then would there be immunity?

2 MR. FREDERICK: Yes, and every court of appeals
3 has so held.

4 QUESTION: There would be immunity there?

5 MR. FREDERICK: Yes.

6 QUESTION: Even though it was released for
7 irrigation purposes?

8 MR. FREDERICK: If the project is a flood
9 control project and there is a relation to flood control,
10 the courts have upheld the Government's immunity.

11 QUESTION: In response to a question from
12 Justice Souter you agreed there could be an accident where
13 there wouldn't be immunity attached.

14 MR. FREDERICK: Yes, and that would be --

15 QUESTION: What is your example?

16 MR. FREDERICK: Where a Government official like
17 a Fish & Wildlife Service official is on a flood control
18 facility, commits an act of negligence that causes a
19 person to drown --

20 QUESTION: Okay.

21 MR. FREDERICK: -- that would not be covered by
22 the immunity.

23 QUESTION: So it's only the difference
24 between --

25 QUESTION: But it would be covered under the

1 Ninth Circuit test, would it not?

2 MR. FREDERICK: It -- arguably, yes. Yes.

3 QUESTION: All right. So you don't really
4 support the Ninth Circuit test.

5 MR. FREDERICK: Well, Justice Stevens, let me
6 just say that the Ninth Circuit itself is not wholly
7 consistent on this point. In the McCarthy case, which was
8 a personal negligence case, the Ninth Circuit said there
9 must be a substantial factor between the Government's
10 activities and the accident, so even in the McCarthy case
11 the Court of Appeals for the Ninth Circuit did not
12 strictly hew to its wholly-unrelated standard.

13 But I would point out --

14 QUESTION: Mr. Frederick, may I go back to your
15 answer to Justice Stevens' question? I take it, then,
16 that the only -- that there will always be immunity if the
17 release is, in fact, an intentional release as opposed to
18 the negligent release, because whenever there is an
19 intentional release, as I understand your reasoning, there
20 will be, in fact, the creation of space to hold flood
21 water.

22 MR. FREDERICK: That's correct.

23 QUESTION: And so that the only case in which
24 there will be -- there will not be immunity is the
25 negligence case, as in your example.

1 MR. FREDERICK: No. The immunity would apply to
2 negligence cases, too, Justice Souter, for precisely --

3 QUESTION: Well, you just gave --

4 MR. FREDERICK: For precisely the same reason.
5 That's flood water --

6 QUESTION: -- an example of a case in which
7 there would not be immunity.

8 MR. FREDERICK: Well, let me distinguish
9 between --

10 QUESTION: A negligence case like the negligence
11 case you just posited to Justice Stevens, that will be the
12 only kind of situation in which there will not be
13 immunity?

14 MR. FREDERICK: Yes. Escaping waters cases,
15 which is what this one is. This water is not where it's
16 supposed to be. It has escaped from the project.
17 Congress built the project to keep the water contained,
18 and that project is --

19 QUESTION: But wait --

20 MR. FREDERICK: -- collectively failing, is
21 foursquare within what Congress debated in the 1928 act.
22 It wanted these structures to succeed, but it did not want
23 the Government to have to defend lawsuits like this one
24 for time immemorial if they did not.

25 QUESTION: I'll grant you, and this is directly

1 related to what was just said, that the water has come out
2 from behind the dam in order to make space for other
3 water. That's flood control.

4 But the question here is, the water that came
5 out from the dam would naturally go into the San Joaquin.
6 It wouldn't naturally go into the Merced Canal, and if you
7 focus on the month of August, and you focus on the
8 decision to turn it from the San Joaquin below the dam
9 over to the Merced Canal, what has that to do with flood
10 control?

11 MR. FREDERICK: Justice Breyer, I conceded that
12 if you were not to accept our broad view of every release
13 being for flood control, that you would then look at
14 whether or not there was a relation between the release
15 and flood control activities.

16 QUESTION: Well, isn't part of the answer that
17 it allows release from the Sacramento into the San
18 Joaquin, which --

19 MR. FREDERICK: Yes. I mean --

20 QUESTION: -- greatly alleviates the flood
21 waters on the Sacramento?

22 MR. FREDERICK: That's correct. It is a totally
23 integrated system, but Justice Breyer, if you were not to
24 accept our broadest submission, even under our narrower
25 submission we should prevail and get immunity in this

1 case, because it can be shown through contracts, through
2 regulations, through statutes that this canal serves and
3 is related to a flood control purpose, and the empirical
4 water data collected by the U.S. Geological Service that
5 we quoted in our brief indicates that well over half of
6 the water released in the last 20 years undoubtedly serves
7 a flood control purpose.

8 I mean, you know --

9 QUESTION: Was this brought out at trial?

10 MR. FREDERICK: No. This was done on the
11 pleadings, Mr. Chief Justice, and we are allowed to defend
12 the judgment on an alternate ground and to provide public
13 record material --

14 QUESTION: We rarely affirm on an alternate
15 ground.

16 MR. FREDERICK: Well, in a way this is and this
17 is not an alternate ground. It is support for the
18 judgment and the rationale for the judgment by showing the
19 relation of flood control in this particular project, and
20 we have --

21 QUESTION: -- what the judgment on a different
22 ground, this Court rarely takes submissions, even judicial
23 notice submissions as a matter of first instance. You
24 would be asking us to sit essentially as the court of
25 first view on this theory and to look at things that were

1 never presented below, and that is an extraordinary thing
2 to ask this Court to do.

3 MR. FREDERICK: Not when they're legal sources,
4 Justice Ginsburg. This is the statutes. This is the
5 regulations. This is historical public record material.
6 This is stipulations they have agreed to in the
7 stipulations of fact.

8 QUESTION: No, but don't we have to understand
9 the terms of the contract where they have class I water
10 and class II water and class I water is for irrigation,
11 they pay a higher -- or they pay a lower rate, I guess, or
12 a higher rate for class I and so forth?

13 MR. FREDERICK: No, you don't need to understand
14 all the terms of the contract to get the central point,
15 which is that --

16 QUESTION: You don't want us to know about water
17 being in two classes?

18 MR. FREDERICK: No, Justice Stevens. What we
19 want you to know is that the contract provides for flood
20 water to be put into the Madera Canal, and therefore it
21 serves a flood control purpose. That's all you really
22 need to understand about the contract, because it is a
23 matter that they've stipulated to, this is how the water
24 gets into the canal, and the parties have agreed that
25 flood water will be put into the canal as a matter of

1 agreement.

2 So when you look, Justice Ginsburg, at the
3 sources that we have relied upon to defend the judgment
4 and the rationale of the court of appeals, there is not
5 anything that would be developed by going back. All that
6 would be accomplished is that the Government would be
7 forced to defend, you know, document requests that called
8 for every scrap of paper in the Central Valley project and
9 in the Madera Canal over the last 65 years, and the
10 question of sovereign immunity would not be one that could
11 be established at the pleadings stage.

12 It would, in fact, be subject to proof at every
13 step of the way, and this Court has made clear that not
14 only is sovereign immunity a principle of jurisdiction,
15 but it -- to prevent against the Government being liable,
16 but it's also a principle to avoid the Government having
17 to defend against vexatious litigation.

18 QUESTION: But often it hinges, when you're
19 talking about immunity it hinges upon factual
20 determinations that can only be found later. That's not
21 at all unusual.

22 MR. FREDERICK: I --

23 QUESTION: Thank you, Mr. Frederick.

24 Mr. Jones, you have 2 minutes remaining.

25 REBUTTAL ARGUMENT OF TIMOTHY JONES

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ON BEHALF OF THE PETITIONER

MR. JONES: Thank you, Your Honor.

If I could take you to our reply brief, because we did address, although we objected to the judicial notice of all the facts we did address them there, and we noted that in a majority of the years in the 1979 to 1999 period selected by respondent, flows from the dam into the river bed never approached 8,000 cubic feet per second, which petitioner gauged by setting thresholds of 7600 cubic feet per second on a single day of the entire year and so, as far as petitioner could determine on those days that flows into the river bed did approach 8,000 cubic feet per second they showed no correlation with the higher flows in the Madera Canal.

Point 2. This project was funded as a reclamation project. The canal was identified as an irrigation canal. This is not a project where Congress put money out and exposed its treasury to something it wasn't going to be reimbursed for. This is not the context of the Mississippi River flood project.

And I would like to answer any questions, if there are any others.

QUESTION: Was the Shasta Dam funded and constructed by the Bureau of Reclamation?

MR. JONES: The Shasta Dam, as I understand it,

1 was, and I don't know the answer to that. I should know,
2 but I don't. It probably was.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Frederick. The case is submitted. Not Mr. Frederick,
5 Mr. Jones. Excuse me.

6 (Whereupon, at 11:59 a.m., the case in the
7 above-entitled matter was submitted.)

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