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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 over land -- -

22 JUSTICE BREYER: Yes, Causby.

23 JUSTICE SCALIA: -- cases about shooting --  
24 shooting over lands. 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: Yeah, 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. And,  
12 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 overflies or in Portsmouth Harbor with  
21 cannon shots flooding the air over Portsmouth Landing  
22 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 would have been valuable  
5 was -- was impaired by these floodings. Suppose that  
6 did no harm at all? Suppose it had just been for a  
7 certain period of time you were not able to use that  
8 land for anything? You couldn't plant anything on it.  
9 You couldn't picnic on it. You couldn't do anything.  
10 Would that have been -- nonetheless, despite the fact  
11 that there -- there was no harm done except -- except  
12 the flooding -- would that have been a taking?

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

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

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

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

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

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

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

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

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

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

24 MR. GOODHART: And, Your Honor, what I'm  
25 saying, it's a proof of facts. The physical takings

1 analysis is the same. The legal analysis is the same.  
2 But one flood could effectively destroy timber if it is  
3 a lake; if it sits there. We didn't have that in our  
4 case.

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

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

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

1 something whose consequences you could have seen?

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

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

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

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

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

25 JUSTICE SOTOMAYOR: I guess the problem with

1 this case, and it's part of what's interwoven in your  
2 adversary's arguments, is that with flooding it's going  
3 to occur naturally anyway. The Government generally  
4 builds dams to control that flooding to the benefit of  
5 all of the interests along its affected route. And at  
6 some point, either the Government is going to -- is  
7 going to make a decision that's going to help someone  
8 and potentially hurt someone. And the question is, is  
9 in all of those situations going to be subject to  
10 litigation.

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

21 Isn't that the basic argument? And I don't  
22 know that you've actually announced the rule that  
23 addresses the essence of the policy considerations that  
24 are driving the government decision. So tell me how  
25 your rule makes this a manageable situation.

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

8 JUSTICE SOTOMAYOR: But that's every flood.

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

11 JUSTICE SOTOMAYOR: But that's every flood.

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

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

19 MR. GOODHART: That's --

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

23 MR. GOODHART: Not -- you're correct,  
24 Mr. Chief Justice. Every flood is certainly not rising  
25 to the level of a taking.

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

4 MR. GOODHART: Your Honor --

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

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

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

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

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

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

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

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

18 Now, it can practice --

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

24 MR. GOODHART: Your Honor --

25 JUSTICE KENNEDY: -- if the land was always



1 flooded anyway on the right?

2 MR. GOODHART: That may not be a taking.

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

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

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

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

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

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

1 late -- late winter and early spring, you have your  
2 releases, they dissipate, the water recedes, but you  
3 don't have extensive summertime flooding from a river.

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

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

10 MR. GOODHART: Yes, Your Honor.

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

14 MR. GOODHART: Yes, Your Honor.

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

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

24 Now -- so I'm tempted, if I'm right, to say,  
25 okay, it's not perfect, but let's go with it. There are

1 people all over the country who have probably relied on  
2 this stuff. And that would be so absent a better rule.

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

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

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

13 MR. GOODHART: Yes.

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

16 MR. GOODHART: Yes.

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

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

24 And the -- the Corps of Engineers will  
25 need -- when they know that it's predictable, that it is

1 foreseeable, as the court below found, that -- that  
2 their actions will place water for storage on land that  
3 they know they can purchase flood easements for --

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

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

9 JUSTICE BREYER: Because?

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

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

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

23 JUSTICE BREYER: So our department employee  
24 trying to find a shortcut drives his bulldozer through  
25 Jones's land knocking down his favorite redwood, it's a

1 taking?

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: What was the Kansas City

1 case that you are referring to? I don't --

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

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

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

22 Your Honor, I wish we could have asked for  
23 affirmance. There are several other issues that the  
24 Federal Circuit did not disturb or address. They did  
25 not go into the facts of, on appeal, that the United

1 States --

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

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

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

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

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Kneedler.

22 ORAL ARGUMENT OF EDWIN S. KNEEDLER

23 ON BEHALF OF THE UNITED STATES

24 MR. KNEEDLER: Mr. Chief Justice, and may it  
25 please the Court:



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

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

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

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

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

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

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

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

24           MR. KNEEDLER: No. I --

25           JUSTICE SCALIA: No, I didn't think you were

1 saying that.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: So, so if the  
23 Government comes in and tells a landowner downstream  
24 that every March and April we are going to flood your  
25 property so that you can't use it, from now on, that's

1 the way -- that's part of our plan, that's a taking for  
2 those 2 months, correct?

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

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

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

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

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

1 account --

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Well, I thought --

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

22 CHIEF JUSTICE ROBERTS: Right.

23 MR. KNEEDLER: -- to that person's land.

24 But that's not what's happening when the Government's  
25 operating a dam, and it's operating it with consequences

1 for the basin. It's not aimed at any particular  
2 landowner.

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

5 MR. KNEEDLER: Well --

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

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

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

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

20 Let me take a more -- a more dramatic  
21 example that I think illustrates this point. This  
22 Court's decision in Sponenbarger which we cite in our  
23 brief, that case discusses a prior holding by this Court  
24 in a case called Jackson, which was a situation where a  
25 levee, Government built a levee on one side of the river

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

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

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

14 CHIEF JUSTICE ROBERTS: Okay.

15 MR. KNEEDLER: Unless there was some  
16 emergency justification.

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

25 MR. KNEEDLER: Yes. When they go in with

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

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

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

20 All kinds of things can happen to different  
21 people 200 yards down. Some will be 200 miles down,  
22 200 -- you know. Some will be helpful, some will be  
23 hurtful. Can they never bring a lawsuit? Can they  
24 sometimes recover? How do we look at that?

25 MR. KNEEDLER: I think, under this Court's



1 takings decisions, and specifically those dealing with  
2 effects caused by something outside the property, I  
3 think it is basically a per se rule.

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

10 MR. KNEEDLER: Well, it would be -- it would  
11 be analyzed as a regulatory taking --

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

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

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

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

25 JUSTICE SOTOMAYOR: I'm totally confused

1 now. Is Dickinson decided wrong under your theory?

2 MR. KNEEDLER: No.

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

6 MR. KNEEDLER: Yes. And --

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

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

13 JUSTICE SOTOMAYOR: After it's --

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

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

20 MR. KNEEDLER: Well, assuming it's permanent  
21 in the reservoir, which it's likely to be when the  
22 government is constructing it --

23 JUSTICE SCALIA: Well, no, not necessarily.  
24 Suppose there -- because of a spring melt-off or other  
25 factors, it's clear that the reservoir for several

1 months of the year will be more extensive than it will  
2 the rest of the year.

3 MR. KNEEDLER: Right.

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

7 Now, doesn't the -- doesn't the government  
8 condemn all the land --

9 MR. KNEEDLER: Yes. But that --

10 JUSTICE SCALIA: -- even that which would be  
11 only temporarily flooded?

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

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

22 MR. KNEEDLER: Well, insofar as we're  
23 looking at the temporary aspect of it. It wasn't seven  
24 years, it was -- it was -- it was a series of individual  
25 determinations made by the Corps; but -- but for reasons

1 that tie into the downstream effects, it was releasing  
2 water from the dam and was making a series of  
3 administrative decisions about how to operate the dam.

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

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

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

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

18 JUSTICE SOTOMAYOR: It doesn't matter  
19 whether it's permanent, reoccurring --

20 MR. KNEEDLER: Foreseeable.

21 JUSTICE SOTOMAYOR: -- foreseeable or  
22 anything else?

23 MR. KNEEDLER: No, because Jackson,  
24 Spokenbarger -- Sponenbarger, the revetment case,  
25 Bedford were all cases where --

1 CHIEF JUSTICE ROBERTS: Right.

2 MR. KNEEDLER: -- where it was -- where it  
3 was permanent.

4 If I could mention one other point --

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

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

16 MR. KNEEDLER: No.

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

22 MR. KNEEDLER: But I think it's -- we have  
23 argued, both below and here, that -- that this is  
24 consequential, and that -- that it's downstream and had  
25 those effects.

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

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

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

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

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

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

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

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

15           MR. KNEEDLER: I think what it --

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

18           MR. KNEEDLER: No, but Congress -- no,  
19 it's -- the point is more fundamental than that.  
20 Congress recognized -- and the legislative history shows  
21 this -- Congress recognized that under this Court's  
22 precedence, there would not be takings liability. The  
23 Bedford decision is, in fact, cited in that.

24           This Court pointed out in its James  
25 decision, which recounts the history of that, that there

1 was a proposal to -- to make the government responsible  
2 under the flood -- flood control projects for any taking  
3 or any damage to property. And this Court said that  
4 went way beyond anything the Fifth Amendment would  
5 require, and it was cut back. And Congress said it's  
6 not going to be liable for any damage.

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

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

20 MR. KNEEDLER: I don't believe that that's  
21 correct. I mean, that -- that would turn on the  
22 happenstance of what a particular landowner had -- had  
23 on his property downstream.

24 And I think the government, in operating the  
25 general project, cannot be held to do an investigation



1 of every property owner. Again, it's releasing water  
2 generally. And if we -- maybe if I could use the levy  
3 example here.

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

8 If you shift back to what the Corps -- to  
9 the Corps' regular operating scheme, it affects the  
10 farmers. There might be a flood --

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

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

18 JUSTICE SCALIA: That doesn't seem to me  
19 particularly fair.

20 MR. KNEEDLER: It is in the nature of living  
21 along a river. Riparian ownership carries with it  
22 certain risks and uncertainties, from weather, from  
23 intervening causes. The government is -- there are a  
24 thousand square miles, more square miles of drainage  
25 area --

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

4 Is that one of the risks?

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

9 JUSTICE SCALIA: I doubt that.

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

14 That came to be the basis, the baseline, of  
15 expectations for people downstream from --

16 CHIEF JUSTICE ROBERTS: Or upstream, under  
17 your theory.

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

22 JUSTICE KENNEDY: Well, the hypothetical is,  
23 suppose it doesn't. Suppose that there's some land  
24 that's up -- that's fairly far upstream from the main  
25 reservoir, but it's flooded once every other year.

1           MR. KNEEDLER: Well, the question would be  
2 whether it falls within the Cress test of whether it is  
3 permanently liable.

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

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

20           This case has both of those features. You  
21 have a series of temporary decisions --

22           JUSTICE BREYER: But building a Government  
23 project, let's say an electricity plant or high tension  
24 wires, you could require the taking of some land to  
25 build it. Now, you've got that and you begin to run it.

1 You could run it in such a way that it takes some of the  
2 property. I mean, the electricity could, for example,  
3 because of some odd thing run around over somebody's  
4 land and kill all the chickens. That wasn't expected  
5 but it happens, and it happened because of the way the  
6 Government runs the plant.

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

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

19 JUSTICE BREYER: The collateral consequence  
20 is to make some piece of land 4 miles away quite  
21 unexpectedly but totally uninhabitable. Now, what's  
22 supposed to happen there? That's not just a trespass  
23 because it's permanent. And even if it's once every  
24 2 years, it's permanently once every 2 years.

25 MR. KNEEDLER: I think it would depend on

1 whether -- and there was a -- a case -- I believe it's  
2 the Baltimore & Ohio Railroad --

3 JUSTICE BREYER: What does it say?

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

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

8 MR. KNEEDLER: -- but -- but if you focus it  
9 on someone --

10 JUSTICE BREYER: Yes.

11 MR. KNEEDLER: If -- if you pipe it -- if  
12 you pipe it to the person's property, that's a -- that  
13 may be a different matter.

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

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

23 JUSTICE BREYER: Well, here they're focusing  
24 it on his land.

25 MR. KNEEDLER: They're not focusing it on

1 his land. His land -- first of all, the commission's  
2 land has always been subject to flooding and, as we  
3 pointed out in our brief, even under -- even under  
4 Petitioner's analysis, it results in an incremental  
5 flooding of 5, 4 or -- 3 or 4 days.

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

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

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

22 CHIEF JUSTICE ROBERTS: It strikes me that  
23 that's a valuation question. But I understood you to  
24 say that if there was a pipe coming out of the dam and  
25 it went to somebody's -- right to the property line of

1 somebody's land and that's where you dump the water,  
2 that would be a taking.

3 MR. KNEEDLER: Yes. Because --

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

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

14 CHIEF JUSTICE ROBERTS: What about 6 years  
15 later, when it was doing the same thing and the water  
16 went to the same place?

17 MR. KNEEDLER: The taking goes -- the taking  
18 claim here goes from 1993 to 1998. The Court of Federal  
19 Claims said even as of 19 -- at least until 1996, it was  
20 generally assumed that the operations of the dam did not  
21 have a significant impact below the Missouri-Arkansas  
22 line. Again, this is 110 miles downstream. This was in  
23 no way focused on the -- on the commission's land,  
24 but --

25 JUSTICE ALITO: Are you saying there's a

1 difference between the situation where the Government  
2 particularly wants the water to go to a -- to a place,  
3 and the situation where the Government knows that's  
4 where it's going to go but doesn't particularly care  
5 where it's going to go?

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

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

22 People who live in a basin where there is a  
23 flood control project get enormous benefits in the  
24 control of that. The water has to be released. And it  
25 has long been the case that the way that problem is --



1 that issue is handled about how it will be released is  
2 by ordinary administrative law principles, basically,  
3 with the Corps, in operating the dam, they have  
4 requirements of public participation. In this case, the  
5 commission participated on ad hoc planning groups.

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

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

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

19 JUSTICE SCALIA: But that's your position.

20 MR. KNEEDLER: That -- that's I think the  
21 necessary consequence of this Court's holdings in  
22 Bedford, in Bedford and related cases. And -- it may  
23 have harshness in some circumstances. But again, when  
24 you live on a river and you know the consequences of  
25 having a flood control project on the river, that --

1 that's what happens, but this is not arbitrary. There  
2 is this planning process. There is notice and comment.  
3 There's NEPA --

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

10 (Laughter.)

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

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

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

24 MR. KNEEDLER: Well --

25 JUSTICE SOTOMAYOR: -- you're saying

1 permanency -- permanency, repetition, nothing counts,  
2 he's just -- loses.

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

9 JUSTICE SCALIA: Yeah, but he loses because  
10 the Corps comes in and says, yeah, indeed, we did flood  
11 2, but, in order to save, you know, 1 and 3 through 10.  
12 Right? And -- and he'd lose.

13 MR. KNEEDLER: Well, the Corps cannot be  
14 arbitrary in doing that.

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

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

21 JUSTICE GINSBURG: Mr. Kneedler, does your  
22 essential argument turn on this being indirect, as you  
23 say? This is consequential; therefore, it isn't -- it  
24 doesn't belong in the takings category, anything that's  
25 consequential rather than direct?

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

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

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

21           MR. KNEEDLER: I don't think analytically,  
22 for the reasons I said about -- about the downstream;  
23 but, to the extent the Court is focusing on temporary,  
24 these were self-limiting, and there was no guarantee  
25 they were going to be renewed.

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

4                   CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Kneedler.

6                   Mr. Goodhart, you have four minutes  
7 remaining.

8                   REBUTTAL ARGUMENT OF JAMES F. GOODHART  
9                   ON BEHALF OF THE PETITIONER

10                  MR. GOODHART: Thank you.

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

18                  That -- that that's in the record, that they  
19 knew that they were using this land to store this water.  
20 And the commission could not get their attention to stop  
21 it until our director -- it was on Valentine's Day in  
22 2001 -- brought the appraisal to the Corps of Engineers'  
23 office, a whole roomful of people from both sides, and  
24 placed that report from -- from 2000, that said, over \$4  
25 million worth of valuable timber is gone, please stop.

1 We -- we were -- we were pleading. So they knew.

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

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

19 And, Your Honor, I think --

20 JUSTICE SOTOMAYOR: Is the baseline -- go  
21 back to Justice Kennedy's question -- is it before the  
22 dam or after the dam, and why is it one or the other?

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

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

9 In this situation, the evidence --

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

13 MR. GOODHART: Your Honor --

14 JUSTICE SOTOMAYOR: -- would have possibly  
15 caused this, you would lose?

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

22 JUSTICE SOTOMAYOR: Pre-dam. In the  
23 recorded history.

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

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

3                   JUSTICE SOTOMAYOR: I'm not sure that's not  
4 open to dispute. There is some argument here that  
5 rainfall that was naturally occurring contributed to  
6 what was happening to the trees.

7                   MR. GOODHART: And I --

8                   JUSTICE SOTOMAYOR: I think that there is --  
9 at least that's what I understood some of the factual  
10 argument to be.

11                   MR. GOODHART: No, Your Honor. I think the  
12 record is clear that this was directed naturally,  
13 probably without the -- without the interference or  
14 addition of nature.

15                   Thank you, Your Honor.

16                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17                   Counsel, the case is submitted.

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

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