No. 11-597

In the Supreme Court of the United States

ARKANSAS GAME & FISH COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Court of Federal Claims found that during several years in the 1990s, temporary and irregular changes in water releases from a flood-control dam operated by the United States Army Corps of Engineers marginally increased the number of days on which part of petitioner's wetland property—which is located 115 miles downstream of the dam and has long been subject to regular natural flooding—was inundated. The question presented is as follows:

Whether the Corps' releases of water effected a Fifth Amendment taking of petitioner's property.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Summary of argument 12

Argument:

The United States did not take petitioner's property 15

A. Any incremental flooding of petitioner's floodplain lands caused by the Corps' operational decisions was not a taking because it was temporary 16

1. This Court has consistently held that temporary flooding of riparian lands is not a taking 16

a. The court of appeals applied a test developed and settled by this Court nearly a century ago 16

b. This Court's flooding cases are foundational and have generated substantial reliance interests 22

c. This Court's distinction between temporary and permanent flooding is sound and practical 28

d. Petitioner's arguments for abandoning this Court's approach to temporary flooding are unpersuasive 30

2. Any incremental flooding resulting from each of the Corps' separate operational determinations was temporary 33

B. Even if the temporary nature of the flooding here does not defeat petitioner's claim, an analysis of other factors as well establishes that the United States did not take petitioner's property 37

Table of Contents—Continued: Page

1. A takings claim based on flooding of private lands downriver of a government project would be subject to an ad hoc factual analysis, not a per se analysis 37
2. The circumstances of this case weigh strongly against finding a taking 42
   a. As a riparian owner of floodplain lands, petitioner could have only limited expectations about the timing and volume of water flows on the River 42
   b. Flood control, like other government responses to forces of nature, permissibly adjusts the benefits and burdens of water to serve the public good 44
   c. The operation of the Dam resulted in, at most, incrementally longer flooding on petitioner's lands 46
      i. There are pervasive flaws in the Court of Federal Claims' analysis of the causation evidence 47
      ii. Even accepting the Court of Federal Claims' erroneous findings, the additional flooding caused by the Corps was slight 50
   d. The effect of the deviations on petitioner's lands was limited in time, highly indirect, and reflected only consequential damage 52

Conclusion 54
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Armstrong v. *United States*, 364 U.S. 40 (1960) 30

Baltimore & Ohio R.R. v. *United States*, 298 U.S. 349 (1936) 36

Barnes v. *United States*, 538 F.2d 865 (Ct. Cl. 1976) 23

Batten v. *United States,* 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963) 31

Bedford v. *United States*, 192 U.S. 217 (1904) 17, 25, 47

Block v. *Hirsh*, 256 U.S. 135 (1921) 21

Bowditch v. *Boston*, 101 U.S. 16 (1880) 45

Danforth v. *United States*, 308 U.S. 271 (1939) 46, 51

Eyherabide v. *United States*, 345 F.2d 565 (Ct. Cl. 1965) 23

First English Evangelical Lutheran Church v. *County of L.A.,* 482 U.S. 304 (1987) 32

Fromme v. *United States*, 412 F.2d 1192 (Ct. Cl. 1969) 23

George Family Trust v. *United States*, 97 Fed. Cl. 625 (2011) 26

Goodman v. *United States*, 113 F.2d 914 (8th Cir. 1940) 23

Harris v. *Brooks,* 283 S.W.2d 129 (Ark. 1955) 43

Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 38

Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 38, 40

Kimball Laundry Co. v. *United States*, 338 U.S. 1 (1949) 32

Cases—Continued: Page

Lingle v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) 40, 45, 52

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) . . . . . *passim*

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 38, 42, 45

Miller v. *Schoene*, 276 U.S. 272 (1928) 45, 46

National By-Products, Inc. v. *United States*, 405 F.2d 1256 (Ct. Cl. 1969) 23

Operation of the Mo. River Sys. Litig., In re, 421 F.3d 618 (8th Cir. 2005), cert. denied, 547 U.S. 1097 (2006) 22

Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001) 41, 53

Peabody v. *United States*, 231 U.S. 530 (1913) 35

Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978) . . . . . *passim*

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 45, 46

Portsmouth Harbor Land & Hotel Co. v. *United States*:

250 U.S. 1 (1919) 35

260 U.S. 327 (1922) 29, 35, 36

PruneYard Shopping Ctr. v. *Robins*, 447 U.S. 74 (1980) 40

Pumpelly v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1872) 18, 19

Ridge Line, Inc. v. *United States*, 346 F.3d 1346 (Fed. Cir. 2003) 23

Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 20, 38

Cases—Continued: Page

Sanguinetti v. *United States*:
264 U.S. 146 (1924) . . . . *passim*
55 Ct. Cl. 107 (1920) 29, 34
Stop the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010) 23
Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) 28, 41, 42, 52
United States v. *Causby*, 328 U.S. 256 (1946) 30, 31
United States v. *Cress*, 243 U.S. 316 (1917) 17, 19, 20, 21, 29
United States v. *Dickinson*, 331 U.S. 745 (1947) 19
United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 32
United States v. *James*, 478 U.S. 597 (1986) 2, 24, 25
United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) 17, 19
United States v. *Lynah*, 188 U.S. 445 (1903) 17, 19
United States v. *Pacific R.R.*, 120 U.S. 227 (1887) 45
United States v. *Petty Motor Co.*, 327 U.S. 372 (1946) 32
United States v. *Pewee Coal Co.*, 341 U.S. 114 (1951) 32
United States v. *79.39 Acres of Land in Breckinridge & Meade Counties, Ky.*, 440 F.2d 1190 (6th Cir. 1971) 27
United States v. *Sponenbarger*, 308 U.S. 256 (1939) 19
United States v. *Welch*, 217 U.S. 333 (1910) 19

Constitution, statutes and regulations: Page

U.S. Const. Amend. V (Just Compensation Clause) . . . . *passim*

Act of June 17, 1902, ch. 1093, 32 Stat. 388 3

Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 22

16 U.S.C. 1536(a)-(d) 22

Flood Control Act of 1917, ch. 144, 39 Stat. 948 . . . . 2, 17

Flood Control Act of 1928, ch. 569, 45 Stat. 534 (33 U.S.C. 702a *et seq.*) 2, 24

§ 3, 45 Stat. 535 (33 U.S.C. 702c) 24

§§ 3-4, 45 Stat. 535 (33 U.S.C. 702c-702d) 24

Flood Control Act of 1936, ch. 688, 49 Stat. 1570 2

Flood Control Act of 1938, ch. 795, 52 Stat. 1215 4

52 Stat. 1218 4

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 8, 21, 34

42 U.S.C. 4332(2)(C) 22

Tucker Act, 28 U.S.C. 1491 23

32 C.F.R.:

Section 644.4(b) 26

Section 644.4(b)(2)(iii) 26

Section 644.4(b)(2)(iv) 26

Section 644.4(b)(2)(v) 26

43 C.F.R. Pt. 8 25

Section 8.1(b) 26

Section 8.3(b) 26

Miscellaneous: Page

69 Cong. Rec. (1928):
p. 6641 25
p. 7106 25
p. 7126 25
19 Fed. Reg. 381 (1954) 25
27 Fed. Reg. 1734 (1962) 25
31 Fed. Reg. 9108 (1966) 25
44 Fed. Reg. 3168 (1979) 25
Miss. River Comm'n, *2011 MR&T Flood Report*, http://www.mvd.usace.army.mil/mrc/pdf/MRC_2011_Flood_Report.pdf 3
Nat'l Research Council, *National Water Resources Challenges Facing the U.S. Army Corps of Engineers* (2011), http://www.map.edu/openbook.php?record_id=13136&page=R1 3
4A Julius L. Sackman, *Nichols on Eminent Domain* (MB 3d ed. 2008) 24
U.S. Army Corps of Eng'rs:
Civil Works Missions: Navigation, http://usace.army.mil/Missions/CivilWorks/Navigation.aspx 2
Clearwater Lake Water Control Manual (1995) 5
Engineer Pamphlet 870-1-29: The Evolution of the 1936 Flood Control Act (1988) 2
Recreation Study (1990) 25
The U.S. Army Corps of Engineers: A History (2007) 2
U.S. Bureau of Reclamation, Dep't of the Interior, *Reclamation Quickfacts*, http://www.usbr.gov/facts.html 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 637 F.3d 1366. The opinions on denial of rehearing en banc (Pet. App. 165a-179a) are reported at 648 F.3d 1377. The opinion of the Court of Federal Claims (Pet. App. 38a-161a) is reported at 87 Fed. Cl. 594.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2011. A petition for rehearing was denied on August 11, 2011 (Pet. App. 162a-164a). The petition for a writ of certiorari was filed on November 9, 2011, and was granted on April 2, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. For nearly two centuries, the United States Army Corps of Engineers (Corps) has played an essential role in developing, managing, and protecting the Nation's water resources. From the beginning, the Corps has managed and improved navigable waters, and today it is responsible for 25,000 miles of commercial navigtion channels and hundreds of locks and dams. See *The U.S. Army Corps of Engineers: A History* 31-53 (2007); Corps, *Civil Works Missions: Navigation*, http://www.usace.army.mil/Missions/CivilWorks/Navigation.aspx. The Corps' water-resource management responsibilities also include flood control (or, more accurately, flood-damage risk reduction). Federal involvement in flood control dates to at least 1849, but it was after a series of deadly and devastating floods in the early 20th century that Congress enacted legislation "directly and openly aimed at flood control," the Flood Control Act of 1917, ch. 144, 39 Stat. 948. See Corps, Engineer Pamphlet (EP) 870-1-29, *The Evolution of the 1936 Flood Control Act* 3-4, 8 (1988).

The Flood Control Act of 1928, ch. 569, 45 Stat. 534—enacted in response to the catastrophic lower Mississippi River flooding of 1927, which then-Secretary of Commerce Herbert Hoover described as the "greatest disaster of peace times in our history"—authorized the "largest public works project undertaken up to that time in the United States." EP 870-1-29, at 17-18; *United States* v. *James*, 478 U.S. 597, 606-607 (1986). Soon thereafter, Congress established the first nationwide flood-control program. Flood Control Act of 1936, ch. 688, 49 Stat. 1570.

Today, the Corps has built or controls 11,750 miles of levees, and it maintains and operates more than 690 dams that store more than 100 trillion gallons of water.

Those assets serve purposes ranging from flood control—with benefits to life, property, and the environment—to navigation, water supply, hydropower, and recreation. Corps facilities store 3 trillion gallons of municipal and industrial water supplies, provide 24% of the Nation's hydropower capacity, and receive 370 million visitors per year. The Corps' flood-control projects produce great benefits: Between 2000 and 2009, those projects are estimated to have prevented an average of $22.3 billion of damage per year. And those benefits come at a comparatively low cost: On average since 1928, the Corps' projects have cost only $1 for every $7.17 in damage they have prevented. See Nat'l Research Council, *National Water Resources Challenges Facing the U.S. Army Corps of Engineers* 32-33 (2011). Approximately 4.5 million people live or work behind the Mississippi River and Tributaries project, which is the Corps' largest. It protects 22.4 million acres, has provided a 34-to-1 return on investment, and in 2011 alone prevented flooding of more than 10 million acres and damages of more than $110 billion. Miss. River Comm'n, *2011 MR&T Flood Report* 2, 4, http://www.mvd.usace. army.mil/mrc/pdf/MRC_2011_Flood_Report.pdf.

A similar but distinct set of water-management responsibilities is carried out by the Bureau of Reclamation (Reclamation) in the Department of the Interior. Reclamation was charged by Congress in 1902 with "the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in 16 western States. Act of June 17, 1902, ch. 1093, 32 Stat. 388. Today, Reclamation operates 476 dams, 337 reservoirs, and more than 8100 miles of irrigation canals, some of which serve flood-control purposes. Its facilities store nearly 80 trillion gallons of water that irrigate 10 million acres

of farmland, which in turn produce 25% of the Nation's fruit and nut crop and 60% of the Nation's vegetable crop. Reclamation facilities also provide 10 trillion gallons of water for more than 31 million municipal, residential, and industrial water users, and they support 17% of the Nation's hydropower production. See U.S. Bureau of Reclamation, *Reclamation Quickfacts*, http://www.usbr.gov/facts.html.

2. a. The Black River (River) flows south from Missouri into Arkansas. Pet. App. 3a, 46a; J.A. 685. Before it was dammed, the River regularly flooded lands along its banks, including the floodplain areas of petitioner Arkansas Game and Fish Commission's property at issue here. J.A. 437-438, 444, 598, 687; Pet. App. 59a-60a.

In the 1940s, the Corps constructed Clearwater Dam (Dam) to control flood waters from the River. Pet. App. 3a, 46a; J.A. 686; see Flood Control Act of 1938, ch. 795, 52 Stat. 1215, 1218 (authorizing and appropriating funds for the construction of the "general comprehensive plan for flood control and other purposes in the White River Basin," including the Black River). The Corps completed construction of the Dam in 1948. Pet. App. 46a. Approximately 900 square miles of the river basin are above the Dam and approximately 1000 square miles of the basin are below the Dam but upriver of petitioner's property. J.A. 239, 492, 494-497, 733. "The primary purpose of Clearwater Dam is to provide flood protection below the dam and to maintain a permanent conservation pool for recreation, fish and wildlife, and other incidental uses." J.A. 504; see Pet. App. 47a. The direct flood losses prevented by the Dam were estimated to exceed $7.75 million annually, on average, for fiscal years 1982 to 1992. A major portion of those losses would have been damage to crops. Besides this agricultural benefit, Clearwater Lake (Lake) behind the Dam has served about a million

recreational visitors per year. See J.A. 502, 504 (tallying benefits from 1982 to 1992).

b. Petitioner owns and manages the Dave Donaldson Black River Wildlife Management Area (WMA), which begins approximately 115 miles downriver from the Dam. Pet. App. 2a-3a. Typically, it takes six or more days for water released from the Dam to reach the WMA. See J.A. 239-240, 413. The WMA embraces 23,000 acres of floodplain lands straddling 32 miles of the River. Pet. App. 3a, 41a-42a; J.A. 436-438, 500, 732. Petitioner purchased much of the land that constitutes the WMA in the 1950s and 1960s, after construction of the Dam. Pet. App. 42a; J.A. 598.

The WMA regularly flooded before and after the Dam's construction. Pet. App. 14a-15a, 59a-60a; J.A. 444, 598, 687. Petitioner's experts stated that pre-dam flooding on the WMA ranged from 55 days in 1940 to 166 days in 1942, with on average about 54 days of natural high water during the timber-growing season that would lead to flooding of the WMA. J.A. 444, 449, 687; Pet. App. 59a-60a. In addition to the natural flooding, petitioner has created several "green tree reservoirs" on the WMA that it intentionally floods during the winter and spring to facilitate duck hunting. Pet. App. 44a; Pet. Br. 5.

c. The Corps releases waters from the Lake behind the Dam into the River. Pet. App. 3a-4a, 46a. In 1953, the Corps adopted the *Clearwater Lake Water Control Manual* (Manual) to guide operations of the Dam. Pet. App. 4a; J.A. 492-532 (Manual dated July 1995). Pursuant to the Manual, the Corps structured the timing and amount of water releases to reduce flooding on the River. J.A. 504-510. Among other things, the Manual provided for "normal regulation" water releases. Those releases were tied to the stage (*i.e.*, height) of the River measured at a gauge at Poplar Bluff, Missouri, approximately 32

miles downriver from the Dam. Pet. App. 4a-5a, 46a. Specifically, the Manual set water-release levels to target a stage of 10.5 feet at Poplar Bluff during the growing season and 11.5 feet during the non-growing season. J.A. 509-514. The choice of levels "allowed for the quick release of water during the growing season, so flooding occurred in short-term waves rather than over extended periods." Pet. App. 5a.

The Manual also provided for deviations from the "normal regulation" releases for emergencies, unplanned minor deviations, and planned deviations requested for agricultural, recreational, and other purposes. Pet. App. 5a; J.A. 527-530. Planned deviations were "for specific activities that required deviations only for limited periods of time, such as the harvesting of crops, canoe races, and fish spawning." Pet. App. 6a. Such deviations can optimize the flood-control benefits of the Dam by, for example, delaying water releases until a farmer has harvested crops from a field in the River's floodplain. J.A. 505-506 (Manual) ("During the agricultural season, deviations from the normal regulation plan have often been approved due to agricultural needs between Poplar Bluff and the Missouri-Arkansas state line. Regulating stages of 5 to 6 feet at Poplar Bluff are typical of those deviated to during times when crops are being planted and harvested."); J.A. 528 (similar).

The Corps approved a number of different deviations between 1993 and 2000. The various deviations were in response to different requests, were for different times of the year, and provided for different water releases to target different river stages at Poplar Bluff. Pet. App. 6a-13a. This case concerns deviations in 1993 through

1998.[1] See *id.* at 11a-13a (chart summarizing deviations). In particular:

- In 1993, downstream farmers along the River requested that the Corps slow water releases to protect crops through the harvest season. Pet. App. 6a. The Corps approved a 2½-month deviation from normal regulation releases, from September 29 to December 15. *Ibid*. That deviation set the target stage of the River at Poplar Bluff at 6 feet.
- In 1994, the Corps approved deviations from April through November, in response to a proposal from a group of public and private entities that was working to build a consensus on permanent revisions to the Manual. Pet. App. 7a-8a. Those deviations set the target stage at 11.5 feet for the first two weeks of April, then at 8 feet for the next month, and then at 6 feet from mid-May through November. *Id*. at 8a.
- In 1995, the Corps approved deviations that mirrored those in 1994. Pet. App. 8a.
- In 1996, the Corps approved new deviations, with target stages of 6 feet in June and 5 feet from July through November, in response to a proposal from a group of public and private entities related to the group that proposed the 1994 and 1995 deviations. Pet. App. 8a-9a.
- In 1997, the Corps approved a short deviation to a target stage of 6 feet from June 3 to July 5 to prevent possible downstream agricultural flooding. Pet. App. 9a.

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[1] The parties agree that, because of drought conditions, deviations in 1999 and 2000 did not cause any flooding. Pet. 3; Pet. App. 15a, 61a, 75a.

- In 1998, the Corps approved a deviation with a target stage of 5 feet from June 11 to November 30 to prevent possible downstream agricultural flooding. Pet. App. 9a, 12a.

Petitioner did not contend that these deviations were unauthorized.

The Corps also considered whether to amend the Manual to make a permanent change to the water-release patterns. The Corps and petitioner participated in working groups of interested parties weighing various options. Although the working groups proposed some of the temporary deviations described above, they did not reach a consensus on permanent changes. Pet. App. 6a-10a. In April 2001, the Corps decided against any permanent changes to the Manual's normal release patterns, after preparing an Environmental Assessment pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq*. Pet. App. 9a-10a; J.A. 685-727 (Environmental Assessment); J.A. 488-491 (Corps' announcement that it would make normal regulation water releases).

d. According to the testimony of petitioner's experts in this case, the deviations described above caused incrementally longer periods of flooding on the WMA. Petitioner's theory at trial was that the Corps' operational decisions to target lower stages at Poplar Bluff (relative to normal regulation described in the Manual) prolonged the release of water from the Lake; that those prolonged releases resulted in longer sustained high-river stages as measured by the gauge at Corning, Arkansas (approximately 105 miles downriver of the Dam and 10 miles upriver of the WMA, see J.A. 583); that the sustained high river stages at Corning caused ordinary growing-season flooding on the WMA to last longer than

usual before draining; and that the flooding ultimately weakened and damaged petitioner's trees. See Pet. App. 104a-128a.

Petitioner's experts based their theory of causation on the fact that more days with high river stages—specifically stages of 5 feet or higher at Corning, which were associated with flooding on the WMA—were noted during the deviation years than during years prior. Assuming, *arguendo*, that causation can be properly inferred from those observations alone (but see pp. 47-50, *infra*), petitioner's experts' data characterized the size of the effect of the Corps' operational decisions in the following ways:

- During the important growing-season months of June, July, and August, the Corning gauge registered 5 feet or higher an average of 14.2 days per month during the deviation years (1993-1999) versus an average of 11.4 days per month in the decade prior (1983-1992). App., *infra*, 2a; see J.A. 463.
- During the full timber-growing season (approximated as April through September), the Corning gauge registered 5 feet or higher an average of 17.3 days per month during the deviation years (1993-1999) versus an average of 14.7 days per month in the decade prior (1983-1992). App., *infra*, 3a; see J.A. 463.
- During the full timber-growing season (early April through mid-October), the Corning gauge registered 5 feet or higher an average of 15.6 days per month during the deviation years (1993-1999) versus an average of 11.0 days per month in the years after the Dam's construction (1949-1992). App., *infra*, 1a; see J.A. 449; Pet. App. 60a.

Thus, petitioner's experts' testimony was, in effect, that the WMA was already subject (depending on what data are used) to 11-15 days of flooding each month during the growing season on average, and the Corps' operational decisions added a few days per month, for a total of 14-17 days of flooding each month on average.

3. In 2005, petitioner sued the United States in the Court of Federal Claims (CFC), alleging that the deviations in 1993 through 1998 effected a taking of its property under the Fifth Amendment. Pet. App. 13a; Pet. Br. 2-3. Petitioner asserted that the chain of causation described above weakened many trees, causing some to later die or decline during a 1999-2000 drought. Pet. Br. 12, 16-17; Pet. App. 13a, 15a. In response, the United States argued that petitioner's forested floodplain lands were already subject to regular growing-season flooding; that the releases had very little effect on the duration of flooding or drainage time; that any increase in flooding did not harm petitioner's trees; and that any increased flooding did not rise to the level of a taking. Pet. App. 13a-14a, 16a, 41a, 86a-87a.

The CFC conducted a bench trial. The court held the United States liable for a taking of a temporary flowage easement over the WMA. Pet. App. 2a. The court awarded petitioner a total of approximately $5.8 million in compensation for dead timber, declining timber, and restoration costs, plus interest. *Id.* at 2a, 161a.

4. The court of appeals reversed. Pet. App. 1a-37a. As relevant here, the government argued that the deviations did not actually lead to any significant increase in flooding 115 miles downstream from the Dam, contending that the CFC erred in rejecting the government's modeling of the impact of the deviations and crediting petitioner's simplistic reliance on gauge-level data. Gov't C.A. Br. 31-37; see pp. 47-50, *infra*. The government

further argued that, in all events, the deviations did not effect a taking because they were only temporary, any increased flooding attributable to the deviations was insubstantial and incremental, the government did not directly benefit from the deviations, the flooding was not predictable, and the cumulative weighing of these factors indicated that no taking had occurred. Gov't C.A. Br. 18-41.

The Federal Circuit held that petitioner had failed to establish a taking of a flowage easement over its floodplain property. The court determined that any increased flooding was an "inherently temporary condition" resulting from "ad hoc or temporary" releases. Pet. App. 21a, 23a. The court traced the distinction between government-caused flooding that is at most a tort and government-caused flooding that is a taking. Tortious flooding results in "[a]n injury that is only 'in its nature indirect and consequential,'" *id.* at 18a (quoting *Sanguinetti* v. *United States*, 264 U.S. 146, 150 (1924)), while flooding that rises to the level of a taking consists of overflows that "constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property," *ibid.* (quoting *Sanguinetti*, 264 U.S. at 149 (emphasis omitted)).

The court of appeals stressed that "all of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year." *Id.* at 24a. The court concluded that, because the deviations here "were plainly temporary * * * [and] cannot be characterized as inevitably recurring," they cannot constitute a taking and "at most created tort liability." *Id.* at 27a-28a.

Judge Newman dissented. She would have held that the flooding constituted a taking because it was not of a "short duration" and it caused significant damage. Pet. App. 29a-37a.

5. The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 162a-164a. Concurring in the denial of rehearing, Judge Dyk, the author of the panel opinion, explained that the Corps "made a series of ad hoc and independent decisions to deviate from the normal release rates at a dam in Missouri, which sometimes caused intermittent flooding on the plaintiff's property." *Id.* at 167a-168a. "Each interim plan differed from the next, as the Corps and interested parties tried different ideas and attempted to come to an agreement." *Id.* at 168a. Judge Moore and Judge Newman filed opinions dissenting from the denial of rehearing en banc. *Id.* at 170a-179a.

SUMMARY OF ARGUMENT

This case concerns whether the Corps' temporary and discrete determinations about operating Clearwater Dam took petitioner's floodplain lands by subjecting them to longer-than-normal periods of flooding. There was no taking.

A. Any incremental flooding of petitioner's lands caused by each of the Corps' separate operational decisions was not a taking because it was temporary. This Court has "consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

That distinction was firmly established nearly a century ago, and it permits a determination that there was no taking to be made without considering other factors that might, under other circumstances, bear on whether the government has taken private property. This Court and lower courts have consistently adhered to that distinction; Congress has enacted extensive flood-control legislation against the backdrop of that distinction; and the Executive's land-acquisition practices and operational decision-making likewise have been undertaken in conformity with that distinction.

Moreover, the distinction between temporary and permanent flooding is sound and practical. Because floodwaters recede, flooding that is not permanent does not burden land in the way this Court has demanded to find a physical taking. The rule that temporary flooding is not a taking makes particular sense in the context in which this Court has recognized the rule, *viz.*, where the claimant's land is already subject to flooding, and the government causes only incremental flooding.

Petitioner argues that this Court's flooding cases are inconsistent with the concept of a "temporary taking." Petitioner is mistaken for two basic reasons. First, the decisions on which petitioner relies do not address flooding and therefore do not eclipse this Court's flooding-specific precedents. Second, petitioner's argument relies entirely on cases that either recognize a taking when the government exclusively occupies private property for a finite period of time, or hold that such a taking requires just compensation. Those cases shed no light on the question here, which is whether a temporary invasion of riparian land by floodwaters brings about a taking in the first place.

In this case, any incremental flooding resulting from each of the Corps' separate operational determinations was temporary. As the court of appeals explained:

> [A]ll of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year.

Pet. App. 24a.

B. Even without giving controlling effect to the temporary nature of the flooding here, petitioner's claim fails.

Petitioner's amici argue that the standards articulated in this Court's flooding cases should be jettisoned in favor of a per se rule that any flooding resulting from the operation of a government project is a taking. That approach cannot be squared with *Loretto*; it rests on inapt analogies to cases involving direct physical occupation by the government; and it would be too blunt an instrument to evaluate an issue as complex as downstream flooding resulting from the operation of a dam.

Rather, as petitioner recognizes, if the temporary nature of the flooding does not preclude finding a taking, then a takings claim based on flooding of private lands downriver of a government project would be subject to an ad hoc factual analysis. Full consideration of a range of factors shows that petitioner has failed to establish a taking of a flowage easement over its floodplain lands. Four considerations weigh strongly against recognizing a taking here. First, as a riparian owner of floodplain lands, petitioner could have only limited expectations about the timing and volume of water flows on the River. Second, flood control, like other government responses

to forces of nature, permissibly adjusts the benefits and burdens of water to serve the public good. Third, the WMA is already subject to extensive flooding. The CFC's finding that the Corps' operational choices caused incremental flooding on the WMA was fundamentally flawed to begin with. But even accepting that finding, the most that petitioner's experts' testimony established is that the WMA was ordinarily flooded a dozen or so days each month, and adjustments to the Dam's operation increased that flooding by a few days per month. Fourth, even if operational decisions at the Dam in 1993 had an effect the following decade on trees over 100 miles downriver, that effect can only be described as indirect and consequential, and therefore is not compensable as a taking.

ARGUMENT

THE UNITED STATES DID NOT TAKE PETITIONER'S PROPERTY

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The question presented is whether the Corps' temporary and discrete determinations about operating Clearwater Dam in 1993 through 1998 took petitioner's floodplain lands by subjecting them to longer-than-normal periods of intermittent flooding. Applying the foundational precedents from this Court on which the Nation's systems of flood control and irrigation rely, the court of appeals correctly held that the operational effects of the Corps' determinations were too temporary and ad hoc to effect a taking. But even if the Court were to depart from those longstanding precedents, an analysis of other relevant factors as well shows that the Corps' flood-control activity did not rise to the level of a taking of petitioner's property. Under either

approach, the judgment of the Federal Circuit denying compensation should be affirmed.

A. Any Incremental Flooding Of Petitioner's Floodplain Lands Caused By The Corps' Operational Decisions Was Not A Taking Because It Was Temporary

The trial in this case established that "all of the deviations from 1993 to 2000"—and hence the flooding that the CFC found them to cause—"were approved only as temporary" measures, and "[t]he multiple interim plans differed." Pet. App. 24a. Those critical facts control this case under this Court's long-established rule that temporary invasions of riparian land by floodwaters do not constitute a taking.

1. This Court has consistently held that temporary flooding of riparian lands is not a taking

By drawing and applying a distinction between temporary and permanent flooding, this Court has made clear that temporary flooding of riparian land is not a taking. That distinction is sound; the government has long relied on it in deciding whether to build and how to operate flood-control projects across the Nation; and it has long been a background rule governing the property interests of riparian landowners.

a. The court of appeals applied a test developed and settled by this Court nearly a century ago

In its leading modern decision concerning takings of private property by physical occupation, this Court emphasized that it has "consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the

former situation." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982) (citing *United States* v. *Lynah*, 188 U.S. 445, 468-470 (1903); *Bedford* v. *United States*, 192 U.S. 217, 225 (1904); *United States* v. *Cress*, 243 U.S. 316, 327-328 (1917); *Sanguinetti* v. *United States*, 264 U.S. 146, 149 (1924); *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 809-810 (1950)). That sensible distinction controls this case.

i. The distinction between temporary and permanent flooding was firmly established nearly a century ago, in the era of the first major federal flood-control legislation, the Flood Control Act of 1917. In its 1924 decision in *Sanguinetti*, this Court held that to constitute a taking, government-caused flooding of land already subject to flooding must (among other criteria) "constitute an actual, permanent invasion of the [private] land." 264 U.S. at 149. The claimant's land in *Sanguinetti* sat between a river and a slough. The land was periodically subject to flooding from the river and from heavy rainfall. *Id.* at 146. To improve the river's navigability, the Corps constructed a canal to divert water from the slough into the river, dammed the slough to divert water into the canal, and built a levee along the lower side of the canal. After the canal was completed, there was one flood of "unprecedented severity" and, in some of the following years, "recurrent floods of less magnitude." *Id.* at 147. Much as petitioner claims here, the floods in *Sanguinetti* "damag[ed] and destroy[ed] crops and trees and injur[ed] to some extent the land itself." *Ibid.*

The landowner sued the United States, contending that the temporarily flooded property had been taken. This Court noted several factual weaknesses in the landowner's case, including that the land would have flooded in the absence of the canal, that the difference in the extent of flooding was unknown, that the flooding did not

ultimately prevent the land's use for agriculture, and that the government did not anticipate that the canal would prove insufficient during heavy rainfall. *Sanguinetti*, 264 U.S. at 147-148. But in deciding the case, the Court unmistakably interpreted the Just Compensation Clause to rule out temporary flooding as a taking: "to create an enforceable liability against the Government, it is, at least, necessary that the overflow [on private land] be the direct result of the [government-built and managed] structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." *Id.* at 149.

The Court recognized "that there was probably some increased flooding due to the canal and that a greater injury may have resulted than otherwise would have been the case." *Sanguinetti*, 264 U.S. at 150. But the landowner's takings claim nonetheless failed because the Court held that the permanent-invasion requirement was not met. There was no ouster of possession, and any limitation on the landowner's "customary use of the land" was for "short periods of time." *Id.* at 149. Nor was there evidence of "permanent impairment of value" of the land itself, *ibid.*, as distinguished from the concededly "damag[ed] and destroy[ed] crops and trees," *id.* at 147. The injury was "indirect and consequential," at most a tort, not a taking. *Id.* at 150.

Earlier decisions addressing claims of flooding-based takings had already established the principles that coalesced in *Sanguinetti*'s holding. In *Pumpelly* v. *Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166 (1872), this Court addressed a claim (under a provision of the Wisconsin Constitution "almost identical in language" to the Just Compensation Clause, *id.* at 177) for what is now recognized as the archetypal taking by flood-

waters: the inundation of land by backwaters behind a dam. The "superinduced" backwaters in *Pumpelly* were a permanent result of the completed dam, which raised the level of an existing lake behind the dam and caused "irreparable and permanent injury" to the claimant's land. *Id.* at 177, 181. The Court again stressed permanence as the hallmark of a taking by floodwaters in *Lynah*, holding that, where a dam caused the claimant's property to be "permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog," there was a taking. 188 U.S. at 469 (citing *Pumpelly*).[2]

Then, in *Cress*, this Court addressed the situation of riparian lands on a tributary "subject to frequent"—but not continuous—"overflows of water from the [tributary]," caused by a downstream lock and dam erected on the main river. 243 U.S. at 318. The Court's precedents at that time left open the possibility that such flooding would not be a taking (because it was temporary, even if recurring). And the Court had not had occasion to distinguish between temporary and permanent flooding, so it would have been possible for the Court to hold for the claimant even if it had regarded the intermittent invasions as temporary. Indeed, the United States' primary argument in *Cress* was that a distinction should be recognized between temporary and permanent flooding, and that the land in question had not been permanently flooded in a way recognized as a taking. See U.S. Br. at 6-10, *Cress*, *supra* (O.T. 1916, No. 84).

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[2] Many of this Court's other flood-related cases likewise have stressed the controlling significance of a permanent occupation of the land. See, *e.g.*, *Kansas City Life*, 339 U.S. at 810; *United States* v. *Dickinson*, 331 U.S. 745, 746-747 (1947); *United States* v. *Sponenbarger*, 308 U.S. 256, 266-267 (1939); *United States* v. *Welch*, 217 U.S. 333, 338-339 (1910).

It was thus a significant step—and not some "fortuit[y]," Nat'l Fed'n of Indep. Bus. Amicus Br. 9 n.6 (citation omitted)—that this Court resolved *Cress* by drawing the now-recognized distinction between temporary and permanent flooding, and giving content to that distinction by classifying "inevitably recurring" flooding as permanent. As *Cress* explained, the dispositive consideration was that it was "not a case of temporary flooding or of consequential injury, but a permanent condition, resulting from the erection of the lock and dam," 243 U.S. at 327, and there is "no difference of kind * * * between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows," *id.* at 328.

ii. The judgment that temporary flooding of riparian land is not a taking can properly be made without considering other factors that might, under other circumstances, bear on whether the government has taken private property. That is particularly clear from *Cress*'s articulation of permanence as a freestanding requirement and *Sanguinetti*'s reliance on the distinction between temporary and permanent flooding as a sufficient basis for rejecting the landowner's takings claim. Petitioner argues (*e.g.*, Br. 31) that the court of appeals should have weighed what petitioner regards as other relevant factors as well, but none of this Court's many flooding cases has called for balancing, in every case, the degree of permanence of the government action against all other possible considerations.

Indeed, in applying the Just Compensation Clause in other contexts, this Court has sometimes found it appropriate to resolve, on the basis of a single factor, cases that might have instead been resolved by balancing several considerations. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984) (rejecting takings claim

subject to the regulatory-takings framework of *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), on the single factor that the claimant lacked a reasonable, investment-backed expectation); *Block* v. *Hirsh*, 256 U.S. 135, 157 (1921) (Holmes, J.) ("The [temporary tenant holdover] regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.") (citations omitted).

Petitioner expresses concern (Br. 47) that if the temporariness of flooding is a sufficient basis for denying a takings claim, then the government may be able "to avoid takings liability" by "refus[ing] to make a decision on how it will act even one year from now." That concern is exaggerated, in both a legal and a practical sense. From a legal standpoint, a sufficiently prolonged series of nominally temporary but substantively identical deviations "might properly be viewed as permanent or 'inevitably recurring,'" and thus support a takings claim. Pet. App. 169a (Dyk, J., concurring in the denial of rehearing en banc) (quoting *Cress*, 243 U.S. at 328). That principle would be an appropriate check against the sort of scheme petitioner hypothesizes. But that principle does not operate here, because the record showed, and petitioner did not challenge, that "there was genuine uncertainty about the nature of the policies from year to year as the Corps responded to individualized concerns and individualized circumstances." *Ibid.*

From a practical standpoint, the procedural requirements of various environmental laws tend to cause the Corps (and other governmental actors) to make long-term decisions about how water will be managed; any ensuing flooding that could be regarded as "permanent" would potentially be compensable. For example, NEPA

requires the Corps to prepare an environmental impact statement for every major action that will significantly affect the quality of the environment, see 42 U.S.C. 4332(2)(C). Similarly, the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, may require preparation of a biological assessment by the Corps and a biological opinion by the Fish and Wildlife Service, see 16 U.S.C. 1536(a)-(d). See generally *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005) (discussing ESA and NEPA requirements related to Corps operation of flood-control and irrigation project on the Missouri River), cert. denied, 547 U.S. 1097 (2006). Those procedures necessarily require the Corps to articulate with some particularity how it proposes to operate a project so that the Corps and other agencies can evaluate the effects of a proposed course of action. That process in turn lends a relative permanence to most significant decisions affecting water-project management. See pp. 34-35, *infra* (discussing the Corps' decision, in the course of complying with NEPA, not to make permanent changes to Clearwater Dam's operation).

b. This Court's flooding cases are foundational and have generated substantial reliance interests

This Court and lower courts have consistently adhered to the foundational flooding cases discussed above; Congress has proceeded in conformity with those cases in enacting flood-control legislation; and the Executive's land-acquisition practices and operational decision-making in this field have been undertaken against the background of those cases.

i. Every flood-related case in which the Court has recognized a taking has involved a "permanent" condition, in which the land was continuously inundated or permanently liable to intermittent but inevitably recur-

ring overflows. The Court has never suggested, much less held, that anything less could effect a taking by floodwaters. And any doubt that the flooding cases retain their vitality in the modern era is put to rest by *Loretto*, which quotes *Sanguinetti* as controlling in the flooding context: "[T]o be a taking, flooding must 'constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.'" 458 U.S. at 428 (quoting 264 U.S. at 149); cf. *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality) ("[I]t is a taking when a state regulation forces a property owner to submit to a permanent physical occupation.") (citing *Loretto*, 458 U.S. at 425-426).

The Federal Circuit (and before it, the United States Court of Claims) has consistently applied this standard in deciding takings cases brought against the United States under the Tucker Act, 28 U.S.C. 1491, requiring permanence as a necessary condition to find the taking of a flowage easement. See Pet. App. 18a-22a; *Barnes* v. *United States*, 538 F.2d 865, 870 (Ct. Cl. 1976); *Fromme* v. *United States*, 412 F.2d 1192, 1197 (Ct. Cl. 1969); *National By-Products, Inc.* v. *United States*, 405 F.2d 1256, 1273-1274 (Ct. Cl. 1969); see also *Goodman* v. *United States*, 113 F.2d 914, 918-919 (8th Cir. 1940); cf. *Ridge Line, Inc.* v. *United States*, 346 F.3d 1346, 1357-1358 (Fed. Cir. 2003) (addressing claim of surface-water runoff); *Eyherabide* v. *United States*, 345 F.2d 565, 569 (Ct. Cl. 1965) (recurring invasion of claimant's land by military ordnance held a taking by reference to flooding cases).

A leading treatise on eminent domain summarizes the black-letter rule of those cases as follows:

> When a claimant's land is permanently flooded (which includes inevitable recurring overflows or continuous

> overflow) as a result of a public project, the condemnee is entitled to damages. However, if the project has resulted in a temporary injury or invasion of the land which is but the consequential result of or merely incidental to the improvement, [there is no] taking.

4A Julius L. Sackman, *Nichols on Eminent Domain* § 14A.07[4] at 14A-119 to -120 (MB 3d ed. 2008) (footnote omitted). The judicial decisions above not only have precedential force in litigation, but have also governed riparian owners' expectations and the scope of their property interests vis-a-vis flood-control projects.

ii. In 1928, when Congress embarked on "the largest public works project undertaken up to that time in the United States"—the comprehensive flood-control plan for the Mississippi River Valley—it displayed "a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of [flood-control] projects." *United States* v. *James*, 478 U.S. 597, 606-607 (1986). Congress accordingly provided that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." Flood Control Act of 1928, ch. 569, § 3, 45 Stat. 536 (33 U.S.C. 702c). And it correspondingly provided the Corps with authority to acquire property interests in particular circumstances in constructing flood-control projects. *Id.* §§ 3-4 (33 U.S.C. 702c-702d).

Those provisions reflect that Congress was authorizing flood-control projects with an understanding that conformed to this Court's cases holding, *inter alia*, that incidental consequences of flood-control project operation—such as temporary flooding of riparian land—would not lead to government liability. Congress understood in particular that "[d]amages to land by flooding"

that are "consequential * * * do not constitute a taking of the land flooded." 69 Cong. Rec. 7106 (1928) (remarks of Rep. Cox) (quoting headnote to *Bedford*, 192 U.S. at 217); see *id.* at 7126 (reprinting letter from President Coolidge cautioning that "it would be very unwise for the United States in generously helping a section of the country to render itself liable for consequential damages").

Congress justifiably understood in 1928 and the years that followed that, under this Court's precedents, authorizing flood-control projects would "not * * * open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years." *James*, 478 U.S. at 607 (quoting 69 Cong. Rec. 6641 (1928) (remarks of Rep. Snell)). Yet petitioner argues for a rule that would do just that. The obvious result would be that the long-term cost and benefits calculus upon which Congress originally authorized flood-control projects would be upset by a new and unaccounted-for potential liability to pay just compensation when waters flowing through such projects temporarily flood downstream property.

iii. The Corps' practices in developing water resources in general, and in constructing flood-control projects in particular, are also consistent with this Court's precedents. The modern expression of the Corps' policy is the Joint Policy for Land Acquisition that the Departments of the Army and the Interior first issued in 1953. 19 Fed. Reg. 381 (1954); see 27 Fed. Reg. 1734 (1962); 31 Fed. Reg. 9108 (1966); 44 Fed. Reg. 3168 (1979).[3] It is now codified at 43 C.F.R. Pt. 8, and the Corps' applica-

[3] "Prior to 1953, the amount and character of land needed for a project was largely determined on a project-by-project basis. Usually, fee title to the land up to the project design flood line was acquired." *U.S. Army Corps of Engineers Recreation Study* 5 (1990).

tion of the policy is elaborated at 32 C.F.R. 644.4(b). The policy requires acquisition in fee of backwater land that lies below the level that will be permanently inundated (plus an appropriate margin above that level)—the prototypical taking by floodwaters. 43 C.F.R. 8.1(b). Easements are appropriate in more remote upstream areas where backwaters may form in connection with operations that raise the reservoir level—a form of inevitably recurring flooding under this Court's cases. 43 C.F.R. 8.3(b); 32 C.F.R. 644.4(b)(2)(iii) and (v).

The interest to be acquired in downstream lands is limited to an easement "required only for operational purposes." 32 C.F.R. 644.4(b)(2)(iv). This Office has been informed by the Corps that, although the voluminous and dispersed nature of the Corps' real estate records makes compiling an exhaustive catalog impracticable, those downstream acquisitions are in practice most often made when (1) project operations are expected to cause frequent and recurring flooding in the project's vicinity, or (2) there is concern that a downstream landowner might use property in a way that could effectively interfere with project operations (for example, jeopardizing the safe operation of a project by building a structure for human habitation in a risky area). The Corps has identified to this Office some examples of acquisitions of land substantially downstream of a flood-control project. But where no taking of such land is evident, the Corps does not acquire a property interest. See, *e.g.*, *George Family Trust* v. *United States*, 97 Fed. Cl. 625 (2011). And of greatest relevance here, the Corps has informed this Office that it has had no general policy or practice of

acquiring temporary easements over lands far downstream of its projects.[4]

Thus, for example, in connection with the flood-control project at issue here, the Corps acquired in fee some 18,606 acres of backwater lands lying at or below the elevation of the Dam's spillway, and has also secured easements for certain upstream areas at slightly higher elevations that the Dam has rendered permanently liable to intermittent but inevitably recurring flooding. See J.A. 493. But consistent with this Court's cases, the Corps has not acquired any interest in downstream lands on the River, let alone a temporary interest. See *ibid.* (reflecting no downriver real estate acquisition in connection with the project here).

Because those acquisition practices—as well as estimates of project costs and benefits, budget requests, and congressional appropriations—are premised in part on the distinction recognized by this Court between temporary and permanent flooding, any retreat from that distinction could be highly disruptive. Relatedly, the responsible and beneficial day-to-day or year-to-year man-

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[4] Amicus Wolfsen Land & Cattle Co. cites several cases involving condemnation of flowage easements, asserting that those cases illustrate that the government "routinely condemns and pays for flowage easements" like the one petitioner claims was taken here. Wolfsen Amicus Br. 18-19. But those cases merely illustrate the government's practice of condemning a fee interest or a permanent easement in permanently flooded lands. One case does use the phrase "permanent and temporary flowage easements," but without explanation; whatever the nature of that interest, it sheds no light on this case because the land in question there lay in counties *upriver* from the proposed dam. See *United States* v. *79.39 Acres of Land in Breckinridge & Meade Counties, Ky.*, 440 F.2d 1190, 1190 (6th Cir. 1971) (per curiam). None of the cited cases remotely suggests that temporary, incremental flooding downriver of a flood-control dam requires the government to secure a flowage easement.

agement of a flood-control project will often call for temporary and ad hoc operational decisions that necessarily have the effect of temporarily increasing or decreasing water flows at particular times and places downstream. See J.A. 527-530. Those decisions are often made in real time in response to changing conditions with the opportunity to realize significant benefits for affected landowners. The full value of a flood-control program cannot be realized if such decisions must always be made in the shadow of potential takings liability to numerous downstream landowners. Cf. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) (warning against an interpretation of the Just Compensation Clause that "would transform government regulation into a luxury few governments could afford").

Petitioner makes a seemingly more modest proposal that, at least once the government has adopted a plan for releasing water, it cannot adjust that plan in a way that reduces overall flooding damage without compensating landowners who experience temporary additional flooding. See Pet. Br. 48. But for similar reasons, that sort of blind adherence to normal operating plans in the face of changing conditions would equally hamstring the operations of the Nation's flood-control system and cast in doubt the future of the government's long-running, widespread, highly successful, and socially beneficial programs of flood control (and other forms of water management).

c. This Court's distinction between temporary and permanent flooding is sound and practical

The most salient characteristic of temporary flooding is that it is temporary. Because floodwaters recede, flooding that is not permanent does not burden land in the way this Court has held to be a necessary condition

to finding a physical taking. To be sure, temporary flooding can have short-term consequences for the use of land, such as harming a season's worth of crops (see *Sanguinetti*, 264 U.S. at 147), requiring some restoration work (*Sanguinetti* v. *United States*, 55 Ct. Cl. 107, 142 (1920) (*Sanguinetti I*)), or influencing the character of natural vegetation growing on the land (as petitioner contended here). But that sort of consequential damage has always been understood to be in the nature of a tort, not a taking. See *Sanguinetti*, 264 U.S. at 149-150; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 330 (1922) (*Portsmouth Harbor III*). Neither petitioner nor its amici offer any satisfactory explanation why, on their understandings of the Just Compensation Clause, every passing flood attributable to the government's operation of a flood-control project, no matter how brief, could not be characterized as the taking of a flowage easement requiring payment of just compensation.

The distinction between temporary and permanent flooding is particularly sensible where, as in *Sanguinetti* and here, the claimant's land is already subject to flooding. "[I]t is the character of the invasion, not the amount of damage resulting from it, * * * that determines the question whether it is a taking." *Cress*, 243 U.S. at 328. The "character of the invasion" in this context is the same whether the floodwaters arrive by natural forces or by human intervention: the land floods, and the flood abates. At most, two floods will differ in the "amount of damage resulting from [each]," but that does not control whether a taking has occurred. *Ibid.* It is only when the challenged flooding is permanent—*i.e.*, a continuous or inevitably recurring inundation—that it assumes a "character" materially different from the pre-existing burden on the land, and could call for compensation as a taking.

Moreover, in the specific context of a flood-control dam, this Court's distinction between temporary and permanent flooding produces equitable results by assuring compensation to the relatively small class of landowners who bear distinct and significant burdens for the public good, but not for the large class of landowners who experience a mere "adjust[ment of] the benefits and burdens of [riparian] life." *Penn Central*, 438 U.S. at 124; see *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). In particular, the relatively small number of upstream landowners who suffer permanent backwater flooding are compensated, while riparian landowners ranging a hundred miles or more downstream of the dam generally must accept the benefits, and sometimes the temporary burdens, of the dam's operation.

d. Petitioner's arguments for abandoning this Court's approach to temporary flooding are unpersuasive

Petitioner argues (Br. 32-41) that this Court's flooding cases are inconsistent with the concept of a "temporary taking." That is incorrect. The Court's recognition that some invasions by floodwaters are too temporary in character to rise to the level of a taking is fully consistent with its recognition that property may be taken in the constitutional sense for a finite period of time.

In the most basic terms, the temporary-takings decisions on which petitioner relies (Br. 32-35) do not eclipse precedents like *Sanguinetti* and *Cress* addressing issues peculiar to flooding, because none of the decisions petitioner cites addressed flooding, and they are, in any event, distinguishable. For example, in *United States* v. *Causby*, 328 U.S. 256 (1946), the Court concluded that low-altitude government flights over a chicken farm imposed a servitude and remanded the case to determine if the easement was temporary or permanent. *Id.* at 268.

Causby involved the direct occupation by government instrumentalities of the airspace over the claimant's lands, rather than the indirect effects of waters that passed through a dam more than a hundred miles upriver. That indirectness, typical of flooding cases and especially evident here, distinguishes *Causby* and makes the distinction between temporary and permanent action salient here in a way it was not in *Causby*. See, *e.g.*, *Loretto*, 458 U.S. at 428, 430-431 (distinguishing temporary or indirect consequential effects of flooding from the physical occupation in *Causby*); *Batten* v. *United States*, 306 F.2d 580 (10th Cir. 1962) (refusing to extend *Causby* to find a taking by noise, vibration, and smoke from government airplanes that did not invade airspace above claimants' property), cert. denied, 371 U.S. 955 (1963). The *Causby* claimant's land instead resembles the land submerged below the backwaters behind a dam; in both cases, the government project itself is atop the claimant's land and thus amounts to governmental appropriation of that land.

Moreover, although *Causby* stands for the proposition that the government can in some circumstances take an easement for a finite period of time, it does not address the duration or degree of permanence necessary for recognizing that some easement has been taken to begin with. In *Causby*, there was no occasion to consider the minimum threshold number of temporary and ad hoc authorizations of flights over the claimant's farm that would have been necessary to effect a taking, because all agreed there were "frequent and regular flights of army and navy aircraft over respondents' land." 328 U.S. at 258.

The rest of petitioner's argument for abandoning this Court's flooding precedents suffers from the same flaw. It is irrelevant here "that once an invasion brings about

a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'" Pet. Br. 33 (quoting *First English Evangelical Lutheran Church* v. *County of L.A.*, 482 U.S. 304, 321 (1987)). The question in this case is whether a temporary invasion of riparian land by floodwaters "brings about a taking of property" in the first place. Petitioner's reliance on *First English* is thus misplaced because the Court there *assumed* that a taking had occurred; it did not address what a claimant must demonstrate to establish a temporary regulatory taking, let alone endorse the notion of a temporary taking by floodwaters. See 482 U.S. at 312-313.

For the same reason, petitioner is not aided by the World War II-era cases it cites in which the government physically occupied or took control of a claimant's property for a period of time. See *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). As *First English* points out, 482 U.S. at 318, the sort of direct and continuous physical seizure of private property at issue in those cases is so clearly a taking that those cases addressed the measure of just compensation; they did not speak to flooding in particular or, indeed, to whether any particular governmental action is a taking in the first place. Moreover, *Loretto* discussed both *Sanguinetti* (458 U.S. at 428) and *Pewee Coal* (*id.* at 431) and found that they fit comfortably together (*id.* at 432).

2. Any incremental flooding resulting from each of the Corps' separate operational determinations was temporary

This Court's "consistent[] distin[ction] between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion," *Loretto*, 458 U.S. at 428, controls here.

a. The record here established, without contradiction, that the Corps' deviations from normal operations were each conceived and implemented as temporary, and varied in their timing and justifications:

> [A]ll of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year.

Pet. App. 24a. In turn, the court of appeals correctly concluded that because the deviations were "inherently temporary," any flooding they caused could not be "inevitably recurring" in the way this Court's precedents demand. *Id.* at 25a.

i. Many of the material facts here mirror facts in *Sanguinetti* that led this Court to conclude the flooding there was not a taking:

- Both the land here (see p. 5, *supra*) and the land in *Sanguinetti* (264 U.S. at 146, 149) were already long subject to periodic flooding.
- Both on the record here (see pp. 9-10, *supra*) and on the record in *Sanguinetti*, "[t]he most that can be said is that there was probably some increased flooding due to the [government's actions] and that a greater injury may have resulted than oth-

erwise would have been the case," though "the injury was in its nature indirect and consequential." 264 U.S. at 150.

- Both here (see pp. 5-10, *supra*) and in *Sanguinetti* (264 U.S. at 147), there were floods of varying magnitude for several years.[5]
- Neither here nor in *Sanguinetti* was the land permanently flooded. See 264 U.S. at 147.

Two other features uniquely present here underscore the limited and discrete nature of the Corps' actions, and hence the temporary nature of any flooding on the WMA. First, the deviations were in response to different requests, they lasted (at most) for a few months, they occurred at different times of the year, and they provided for different water releases (as measured by river stages at Poplar Bluff, more than 80 miles upriver of the WMA). Pet. App. 6a-13a.

Second, the Corps' deviations were avowedly not permanent. In compliance with NEPA, the Corps prepared an Environmental Assessment (J.A. 685-727) to evaluate a proposed permanent change to the Manual; but the Corps *rejected* permanent changes. Pet. App. 9a-10a; J.A. 488-491. Petitioner describes that process as "the Corps mov[ing] forward to make permanent the water release changes in the Clearwater Lake Control Man-

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[5] The claims in *Sanguinetti* sought compensation based on a single year's flooding, but the claimant's petition emphasized that the lands had suffered similar (if less severe) flooding in later years. See Tr. of R. at 2-3, *Sanguinetti*, *supra* (O.T. 1923, No. 130); see also *Sanguinetti I*, 55 Ct. Cl. at 115-116, 127 (reporter's statement). The government acknowledged the later flooding, but it pointed out that there was no evidence that later flooding reflected substantial and inevitably recurring flooding. See U.S. Br. at 6-7, *Sanguinetti*, *supra* (O.T. 1923, No. 130).

ual." Br. 31. But the fact that the Corps *considered* permanent changes, yet *rejected* them and never implemented any permanent change to water releases, in fact proves the temporary nature of what had come before.

ii. Outside the flooding context, this Court has also occasionally drawn a distinction in takings law between temporary and permanent governmental action. In particular, the Court's three decisions culminating in *Portsmouth Harbor III*, *supra*, further support the conclusion that the flooding here was not a taking. Those cases arose from the erection of a government fort inland of a seaside resort; guns were from time to time noisily fired from the fort out to sea, over the claimant's property, assertedly imposing a servitude on the claimant's property. The Court accepted from the start that there would be a taking "if the Government had installed its battery * * * with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it * * * whenever it saw fit." *Portsmouth Harbor III*, 260 U.S. at 329 (quoting *Peabody* v. *United States*, 231 U.S. 530, 538 (1913)).

Applying that standard in the first case (*Peabody*), this Court found no taking because guns had been fired on only two occasions, and there was no proof that further shots would be fired. *Portsmouth Harbor III*, 260 U.S. at 328. "The second case was like the first except for 'some occasional subsequent acts of gun fire.'" *Ibid.* (quoting *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U.S. 1, 2 (1919)). The trial court denied relief in the third case on the pleadings, but this Court reversed because it found that the allegations about past firing and recent emplacement of guns at the fort with a view to firing them over the claimant's land were sufficient to "warrant a finding that a servitude has

been imposed." *Id.* at 329-330. As Justice Holmes explained for the Court, "while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the taking]." *Ibid.*

The facts here are analogous to the facts of the first and second *Portsmouth Harbor* cases. The Corps' temporary and irregular operational decisions, like the limited number of shots fired over the *Portsmouth Harbor* claimant's land, were isolated events rather than part of an established pattern of governmental action that permanently burdened private land. Conversely, the steps toward permanency the government allegedly took in *Portsmouth Harbor III* have no counterpart here; indeed, by deciding not to permanently amend the Manual after preparing the Environmental Assessment, the Corps affirmatively demonstrated its lack of intent to make a permanent change.

b. Petitioner suggests that the court of appeals simply deferred to the government's label for the Corps' operational decisions, and that the government could improperly exploit this Court's distinction between temporary and permanent flooding simply by labeling its actions as temporary. Pet. Br. 3, 44, 47; see Pet. App. 171a (Moore, J., dissenting from the denial of rehearing en banc). But that is not what the court of appeals did. And it is for lower courts, and ultimately for this Court, to determine whether governmental action constitutes a taking. Cf. *Baltimore & Ohio R.R.* v. *United States*, 298 U.S. 349, 364 (1936) ("As the Congress itself could not be, so it cannot make its agents be, the final judge of its own [takings] power under the Constitution.").

Here, it was the substance of the irregular deviations and the decisions surrounding them, not some superficial label for the Corps' actions, that established that any flooding resulting from the deviations was temporary

and not a taking. The Manual provides for such temporary deviations under appropriate circumstances (see J.A. 527-530), and the Corps approved deviations that were limited in duration, varied in the concerns they were devised to address, and varied as to the time of year when the deviation occurred. See pp. 6-8, *supra*; Pet. App. 6a-13a; *id.* at 169a (Dyk, J., concurring in denial of rehearing en banc) ("[T]his was a situation in which there was genuine uncertainty about the nature of the policies from year to year as the Corps responded to individualized concerns and individualized circumstances over (in the aggregate) a short period of time. The government's actions and the surrounding context demonstrate that the policies were temporary and not inevitably recurring.").

B. Even If The Temporary Nature Of The Flooding Here Does Not Defeat Petitioner's Claim, An Analysis Of Other Factors As Well Establishes That The United States Did Not Take Petitioner's Property

This Court should, as the court of appeals did, resolve this case by applying the settled rule that temporary flooding is not a taking. But if the Court departed from that rule, or declined to apply it here, a full analysis of other factors as well would equally compel the conclusion that the Corps' flood-control activities did not take petitioner's floodplain lands.

1. A takings claim based on flooding of private lands downriver of a government project would be subject to an ad hoc factual analysis, not a per se analysis

a. A permanent physical occupation of private property by the government or its designee is a taking per se. *Loretto*, 458 U.S. at 434-435. But as explained above:

> [T]his Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.

Id. at 428. If, however, the Court were to depart from that principle, as petitioner requests, then it would be appropriate to regard the flooding petitioner claims as at most a form of physical invasion of petitioner's property (albeit not a permanent *occupation* amounting to a per se taking), and accordingly look to a range of considerations to decide whether petitioner's property was taken. See *id.* at 432 ("[This Court's] cases state or imply that a physical invasion is subject to a balancing process," even though "a permanent physical occupation would [n]ever be exempt from the Takings Clause."). Petitioner itself endorses such a flexible framework, under which the Court would "engag[e] in * * * [an] essentially ad hoc, factual inquir[y]," *Penn Central*, 438 U.S. at 124. See Pet. Br. 26-27, 29-30, 36-37, 40; Pet. 15-16, 23.

That approach would be consistent with this Court's cases. "As has been admitted on numerous occasions, this Court has generally been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action must be deemed a compensable taking." *Monsanto*, 467 U.S. at 1005 (internal quotation marks and citations omitted); see also *Penn Central*, 438 U.S. at 124; *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). Thus, except in "extraordinary circumstance[s]" presented only in "relatively rare situations," *Lucas* v.

South Carolina Coastal Council, 505 U.S. 1003, 1017-1018 (1992), courts are to evaluate each takings claim based on its specific facts.[6]

b. Petitioner's amici argue instead that the standards articulated in this Court's flooding cases should be jettisoned in favor of a per se rule that any flooding resulting from the operation of a government project is a taking. See Wash. Legal Found. Amicus Br. 19-23; Owners' Counsel Amicus Br. 5-11; Pac. Legal Found. Amicus Br. 6-18, 27-30; Nat'l Fed'n of Indep. Bus. Amicus Br. 6-17; Wolfsen Amicus Br. 27-31. There is no support for such an approach.

First, *Loretto* makes clear that flooding resulting from operation of a government project is not a per se taking unless it entails a permanent physical occupation. "[W]hen [a] physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." 458 U.S. at 426 (quoting *Penn Central*, 438 U.S. at 124). *Loretto* particularly emphasizes cases of permanent inundation by floodwaters—as distinguished from other forms of flooding, like that claimed here—in explaining the principle that only "a permanent physical occupation" of property is a per se taking. See *id.* at

[6] Petitioner invites this Court to remand the case to the court of appeals to decide the ultimate question whether a taking occurred here. Pet. Br. 21, 49; Pet. 1, 22-23. The Court should not follow that course because it would unnecessarily prolong this litigation and disserve the orderly development of the law. In particular, if the Court were to depart from or qualify the distinction between temporary and permanent flooding that has functioned well for nearly a century, then it ought to illustrate for lower courts the correct approach, rather than simply directing the court of appeals to consider (as petitioner suggests) "all the facts and circumstances," Pet. 1.

428.[7] Conversely, *Loretto* explains that government invasions of private property that amount to less than a complete occupation of the land are not subject to per se takings analysis. See *id.* at 433 (explaining that the taking in *Kaiser Aetna*, *supra*, "was not considered a taking *per se*" because it involved an "easement of passage, not * * * a permanent occupation of land"); *id.* at 434 (describing *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), as "[a]nother recent case underscor[ing] the constitutional distinction between a permanent occupation and a temporary physical invasion," under which physical invasion is not per se "determinative"). Here, of course, petitioner does not contend that its land was completely occupied by the government.

Second, petitioner's amici's analogies between this case and cases involving a direct physical occupation are inapt. In those cases—such as *Loretto* and *Kimball Laundry*—the government itself (or its designee) physically occupied private property. Such "direct government appropriation or physical invasion of private property" is uniquely disruptive to the landowner's property right, and therefore it is the "paradigmatic taking requiring just compensation." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). In the flooding cases, by contrast, only water enters onto property, and (with the possible exception of backwater that can be regarded as part of the project) it is not sensible to regard the water as being an occupation by the government. Rather, the water originates from natural sources, and in the present context, any flooding of a downstream riparian parcel is typically the consequence of government action outside,

[7] This Court has, of course, recognized another category of per se taking (*viz.*, governmental action that renders property permanently valueless, a claim not made here). But the Court has drawn a line there. See, *e.g.*, *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

and not specific to, that parcel, much like general governmental regulation of the use of private property. Here, for example, the government activity that petitioner challenges occurred over 100 miles upriver from petitioner's lands.

Finally, a per se rule that there is a taking whenever flooding occurs is far "too blunt an instrument," *Tahoe-Sierra*, 535 U.S. at 342 (quoting *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 628 (2001)), to evaluate an issue as complex as downstream flooding resulting from the operation of a dam. If the temporary character of flooding is not sufficient to conclude that a taking has *not* occurred, then such a claim should at least be evaluated in light of a number of factors: the reasonable expectations of a riparian owner in the claimant's situation, the magnitude of the flooding resulting from the project relative to pre- or post-dam natural flooding, the duration of the flooding, the benefits conferred on the claimant and other landowners by the government's water management, the reasons for and extent of deviation from the dam's normal plan of operation, the nature and directness of the harm to the claimant, and so on.

At bottom, petitioner's amici's arguments for a per se taking here rest on the same sort of flawed syllogism advanced by the claimants—and rejected by this Court—in *Tahoe-Sierra*: *First English* established that a temporary taking, like a permanent taking, requires compensation; *Pumpelly* established that a permanent taking by permanent flooding always requires compensation; therefore, temporary flooding always requires compensation. Even setting aside the obvious contradiction between amici's conclusion and the holdings of the Court's flooding cases, amici's reasoning sidesteps the very question presented in this case: how to decide whether temporary flooding is a taking to begin with.

See pp. 30-32, *supra* (explaining similar error in petitioner's reasoning); Br. for Resps. at 17-18, *Tahoe-Sierra*, *supra* (No. 00-1167) (explaining the flaw in the similar syllogism advanced by the claimants there). As in *Tahoe-Sierra*, the Court should decline to apply a per se taking approach here.

2. *The circumstances of this case weigh strongly against finding a taking*

Full consideration of a range of factors, as petitioner urges, confirms that petitioner has failed to establish a taking of a flowage easement over its floodplain lands.

a. As a riparian owner of floodplain lands, petitioner could have only limited expectations about the timing and volume of water flows on the River

This Court has consistently held that a taking generally will not be found if the landowner cannot reasonably expect to use its property in the manner interfered with by the challenged governmental action. See, *e.g.*, *Penn Central*, 438 U.S. at 124 (giving substantial weight to the "extent to which the regulation has interfered with distinct investment-backed expectations"); *Lucas*, 505 U.S. at 1027-1029 (noting that "the property owner necessarily expects the uses of his property to be restricted" under, for example, "background principles of the * * * law of property and nuisance").

Here, petitioner could have had no reasonable expectation that its property would not be subject to floods like the ones it experienced in the 1990s. Petitioner's property has been subject to considerable flooding—including during the growing-season periods petitioner focuses on—before the Dam was built, after the Dam was built, before the deviations at issue here, during the deviations, and after the deviations. Pet. App. 7a, 14a-15a,

59a-60a & n.9; J.A. 435, 444, 449, 598, 687. Yet petitioner's complaint, at bottom, is merely that its property, lying in a floodplain, was flooded. Petitioner's land, like most riparian land, is subject to the vicissitudes of nature and upstream factors that may influence the volume and timing of water flows on the River. No landowner in petitioner's position has a vested property right to have its land wet on particular days of the year and dry on others, or to have its land drain on a predictable schedule after it floods. That is particularly true in a "riparian rights" water-law jurisdiction, like Arkansas, that generally recognizes no rights in riparian landowners to a flow of particular volumes of water at particular times. See, *e.g.*, *Harris* v. *Brooks*, 283 S.W.2d 129, 133 (Ark. 1955).

Nor could petitioner have had a reasonable expectation, much less a property right, that assured it of compensation for temporary flooding on the WMA. The distinction between temporary and permanent flooding was firmly established in this Court's Just Compensation Clause cases long before the Dam was built or petitioner acquired the land constituting the WMA. Nor could petitioner have had a reasonable expectation that the Corps would not operate the Dam in a way that would temporarily flood the WMA, because the Manual provides for the deviations that occurred here, Pet. App. 5a-6a; J.A. 527-530. The situation here thus contrasts with the practice of the cable television companies in *Loretto* of paying an annual royalty to landowners to whose apartment buildings their equipment was attached, and the building owners' expectation of receiving that royalty. See 458 U.S. at 423.

b. Flood control, like other government responses to forces of nature, permissibly adjusts the benefits and burdens of water to serve the public good

The operational decisions the Corps made, and that petitioner claims took its property, were in large measure intended to manage the impact of downstream flooding on the River. For example, in several years, the Corps' deviations substantially reduced injury to farmers by giving them time to harvest their crops. See Pet. App. 6a-13a. More generally, the Dam's aggregate benefits, extrapolated over its lifetime, easily rank in the hundreds of millions of dollars. See J.A. 502, 504. While the relatively small group of landowners upriver of the Dam who lost their land to backwater inundation bore a distinct and significant permanent burden, and were justly compensated (see J.A. 493), the mass of downstream landowners like petitioner are properly regarded as members of the public affected by a flood-control program designed to adjust "the benefits and burdens of [riparian] life to promote the common good." *Penn Central*, 438 U.S. at 123-124.

Adjustments to such a program to optimize its effects may somewhat shift the benefits and burdens of the program among some downstream property owners. But such adjustments do not benefit the government itself (compare *Loretto*, 458 U.S. at 432 n.9), and they are ordinarily modest. Here, for example, the Corps' deviations shifted the River's stage at Corning by at most a few feet, on a few days, during a few months, in certain years. See J.A. 655-662 (plots comparing observed river stage at Corning with computer-model prediction of river stage at Corning in the absence of deviations); J.A. 607-611 (explaining plots). Such adjustments are ordinary and beneficial acts of government, and should not be held to constitute a taking, for "[g]overnment hardly could go

on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922); accord *Lingle*, 544 U.S. at 538.

Flood control in general, and the Corps' operational decisions here in particular, belong to a class of government activities designed to mount the best possible response to the sometimes-unfriendly forces of nature. Such responses, so long as they are reasonable, do not effect a taking. See, *e.g.*, *Lucas*, 505 U.S. at 1029 n.16 (noting that "destruction [by the government] of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others" is not a taking) (quoting *Bowditch* v. *Boston*, 101 U.S. 16, 18-19 (1880); citing *United States* v. *Pacific R.R.*, 120 U.S. 227, 238-239 (1887)).

In *Miller* v. *Schoene*, 276 U.S. 272 (1928)—a case of more direct and dramatic injury to trees than that at issue here—this Court held that Virginia did not take the claimant's cedar trees when it enacted a statute resulting in an order to cut them down to prevent the spread of a plant disease that threatened nearby apple orchards. The Court reasoned that when "the [government] [i]s under the necessity of making a choice between the preservation of one class of property and that of the other," it "does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another." *Id.* at 279. *A fortiori*, if one assumes (as petitioner does) that the Corps' deviations were (1) in response to farmers' need not to have their fields flooded before their crops were harvested, and (2) made with an awareness that petitioner might suffer some incremental adverse consequences, then the Corps' deviations simply reflect a decision to preserve some benefit for one class

of property (the farmers') while adversely affecting another (petitioner's) in releasing the massive volume of water impounded behind the Dam.

Moreover, the Court explained that in *Miller*, "[i]t would have been none the less a choice if, instead of enacting the * * * statute, the state, by doing nothing, had permitted serious injury to the apple orchards." 276 U.S. at 279. That principle applies here with even greater force because, with the Dam in place, the Corps could not have stood idle and allowed nature to take its course (as Virginia might have in *Miller*); every day since the Dam was built, the Corps has had to decide whether and how much water should be released from the Lake. The fact that its decisions were different for some months in the 1990s than they had been before, with consequences for the benefits and burdens on downstream riparian landowners, does not transform the Corps' operational adjustments into a taking.

c. The operation of the Dam resulted in, at most, incrementally longer flooding on petitioner's lands

This Court has long held that, outside of per se takings, deciding when to recognize a taking presents "a question of degree." *Pennsylvania Coal*, 260 U.S. at 416. With respect to flooding in particular, the Court has recognized that flooding of any kind must be sufficiently substantial to warrant treatment as a taking. See, *e.g.*, *Danforth* v. *United States*, 308 U.S. 271, 286-287 (1939) (rejecting a takings claim based on the construction of a levee that channeled additional floodwaters onto the claimant's floodplain lands because it did not create "a burden, actually experienced, of caring for floods greater than it bore prior to the construction," and explaining that "the retention of water from unusual floods for a somewhat longer period or its increase in depth or de-

structiveness by reason of the set-back levee" is not a taking); *Bedford*, 192 U.S. at 224-225 (holding that, even if increased flooding resulted from a revetment constructed by the government to slow down erosion of the river bank, the flooding on the claimant's property was at most "an incidental consequence," not a taking). And, of course, to be a taking, the flood must be actually and proximately caused by the government and properly attributable to it. See, *e.g.*, *Sanguinetti*, 264 U.S. at 149-150. Here, the CFC seriously erred in analyzing the critical factual questions of whether and to what extent the Corps' actions increased the burden of flooding on petitioner's lands.

i. There are pervasive flaws in the Court of Federal Claims' analysis of the causation evidence

The WMA begins 115 miles downriver of the Dam. A thousand square miles of watershed drain into the River below the Dam and above the WMA—a larger area than all of the watershed above the Dam. See p. 4, *supra*. That separation, and the resulting opportunity for intervening causes and effects, coupled with the fact that the WMA has always experienced extensive growing-season flooding (see p. 5, *supra*), makes it far from "simpl[e]" (Pet. Br. 30) to say what effect particular operations at the Dam had on flooding on the WMA.

In particular, petitioner needed to show at trial that the Corps' deviations at the Dam caused an incremental increase in the number of days each year that the affected parts of the WMA were inundated, relative to the situation that would have obtained had the Corps adhered to the normal regulation flows provided in the Manual. That is a challenging showing to make because the deviations and normal regulation flows were, of course, not described in terms of their effect on the

WMA, nor even in terms of their effect on the River anywhere near the WMA (*e.g.*, at the Corning gauge). Rather, the operational targets for the Dam were described in terms of the stage of the River at the Poplar Bluff gauge, some 83 miles upriver of the WMA.

Petitioner's and the CFC's analysis of the connection between deviations at Poplar Bluff and flooding on the WMA was fundamentally flawed. The CFC relied on petitioner's expert witnesses, who based their opinions on comparisons between historical measurements of the River's stage at the Corning gauge in 1981-1992 (before the deviations) and measurements in 1993-2000 (during the deviations). See Pet. App. 60a-62a; see also J.A. 460-463. Those witnesses reasoned that because the Corning gauge registered five feet or higher—a level at which water would enter the WMA—on more days during the deviation years than during the preceding decade, the deviations must have caused flooding. That oversimplified and limited analysis mistakes correlation for causation because it fails to control for other variables affecting the River. The most obvious ignored variable is precipitation. The 1000 square miles of natural runoff that the River collects below the Dam significantly affects the River's stage at the Corning gauge. J.A. 238-239, 243-247, 582-583. A five-foot stage at Corning on a given day in July could be the result of releases from the Dam, but it could equally be the result of rain falling in the watershed downstream of the Dam.[8]

[8] Petitioner states that its experts found "no statistical difference in precipitation data between the pre- and post-deviation periods." Pet. Br. 12; see J.A. 124, 179. But petitioner's experts made no effort to analyze the *timing* of the rain or account for variability in rain *distribution* across the 1900 square miles of watershed. Those are important matters because, for example, a single heavy storm could raise the River's stage sharply and flood the WMA, with water draining

Worse yet, simply inventorying the number of days the River is above a certain stage (as petitioner's experts did) does not answer the question of when the relevant areas of the WMA were inundated, because riparian land takes time to drain after a river crests; consequently, a small number of evenly spaced high-water days may leave land continuously inundated in a way that a cluster of high-water days may not. J.A. 300-303, 444, 611-615. The correct approach would be to ask what would have happened to the River's stage near the WMA had the deviations not occurred (while keeping other factors from the 1993-2000 period constant), and then to translate river stages into duration of inundation, taking into account drainage rates. The government offered expert testimony on the first step through a computer simulation of what would have happened in terms of river stages between 1993 and 2000 absent the deviations. Pet. App. 62a-63a; J.A. 191-222, 230-236, 604-611. Then for the second step, the government adopted petitioner's experts' assumptions about drainage time in the WMA to translate the simulated river stages into duration of inundation. See Pet. App. 111a-112a; J.A. 250-251, 265-281, 604-611, 620-622, 640-642. The government's experts' conclusion was that "there would have been significant periods of timber inundation even in the absence of the Corps' deviations." Pet. App. 112a (quotation marks omitted); J.A. 260-284, 333-336, 604-611, 620-623, 640-642.

The CFC nonetheless accepted petitioner's experts' testimony. The court concluded that the "River experienced more high water during the growing seasons from

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and moving downstream quickly, while a series of smaller storms could keep the River at a moderately high stage and the WMA inundated for an extended period.

1993 to 1999, *i.e.*, the period of [deviations], than it experienced during previous time periods." Pet. App. 107a. But that observation, standing alone, says nothing about whether (or to what extent) the Corps' deviations actually *caused* the high water. By contrast, the government's experts' computer model addressed that factual question, which was key to petitioner's takings theory. Yet the CFC rejected that evidence without offering a sound reason for doing so. The court's apparent rationale for rejecting the model—that it "should [not] be employed to displace actual observations" of high water in the WMA in the 1990s, *id.* at 113a—misunderstands that the very purpose of the model was to supply a scientifically grounded prediction for what could *not* be observed, that is, what the river stages in the 1990s would have been in the absence of the Corps' deviations.

ii. Even accepting the Court of Federal Claims' erroneous findings, the additional flooding caused by the Corps was slight

Even accepting (as the CFC apparently did) petitioner's account of the increased flooding on the WMA, the additional number of days of flooding during the growing season was too insubstantial to support the CFC's determination that a flowage easement was taken here. All agree that the River regularly flooded land along its banks before the Dam was completed in 1948, and that the WMA has long been (and continues to be) subject to flooding at various times of the year. Pet. App. 7a, 14a-15a, 59a-60a, 106a; J.A. 435, 444, 449, 598, 687. Petitioner's claim therefore depends on the proposition that any *incremental* flooding was a taking. Even accepting petitioner's experts' approach, the increment here was slight. That weighs sharply against finding a taking.

The CFC found that the WMA flooded when the River reached 4.5 to 6 feet at Corning, and the CFC used 5 feet as the threshold level. Pet. App. 60a-61a. The CFC noted that the trees' full growing season was April 4 to October 11, Pet. App. 60a, and petitioner's expert testified that the most "critical months" of that season for the trees on the WMA were June, July, and August, J.A. 122. Using those parameters to apply petitioner's experts' analytical approach to data from the Corning gauge, the most that can be said is that, on average, the WMA was flooded in any event a dozen or so days each month, and adjustments to the Dam's operation increased that flooding by a few days per month. See pp. 9-10, *supra*; App., 1a-3a, *infra*; J.A. 449, 463.

Petitioner nonetheless claims that these data show that the flooding "was a very significant and unique change." Br. 11. But even if the flooding turned out to be a "significant * * * change" insofar as it affected the metabolism of the trees on the WMA's floodplain lands (see Pet. Br. 10-13), what matters under the Just Compensation Clause is that the few additional days of flooding are merely a "somewhat longer period" of flooding, *Danforth*, 308 U.S. at 286, than petitioner's land already experienced, and hence did not work a material change in the basic character of the property that could support a takings claim.[9]

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[9] Petitioner asserts, without explanation, that the flooding "preempted [its] use and enjoyment of its property." Pet. Br. 45. There is no evidence in the record to that effect. Petitioner continued to conduct timber sales. J.A. 567-573; see J.A. 79-81, 92-94. And there is no evidence that the flooding preempted (or even affected) the use of the WMA for fall and winter duck hunting, undertaken on land that petitioner intentionally floods every winter. Pet. App. 42a, 44a. Nor is there evidence that flooding affected the presence of wildlife (which would not, in any case, be a protected property interest). Although the

d. The effect of the deviations on petitioner's lands was limited in time, highly indirect, and reflected only consequential damage

The effect the CFC found the deviations had on petitioner's floodplain lands bears the hallmarks of consequential injuries that this Court has consistently recognized do not rise to the level of a taking. The deviations were temporary, irregular, limited to particular times of the year, and occurred separately over a span of only six years. Even if the temporal features of flooding are not dispositive in the flooding context, they are surely relevant to whether a taking has occurred. Cf. *Lingle*, 544 U.S. at 538-539 (explaining that a "permanent physical invasion" is a taking, but lesser invasions are examined under the multi-factor standards set forth in *Penn Central*); *Tahoe-Sierra*, 535 U.S. at 342 ("[T]he duration of [a temporary land-use] restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim.").

Moreover, any resulting flooding was the indirect and incidental consequence of the deviations. The Corps' operational decisions in no way targeted petitioner or its lands; water released from the Dam during the deviations traveled 115 miles, over six or more days, before it (and water from other sources) reached petitioner's

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CFC stated that the flooding prevented petitioner from using "certain regions" of the WMA for the purpose of "providing habitat for wildlife," Pet. App. 92a; see Pet. Br. 15-16, the CFC based that finding on nothing but petitioner's expert report ascribing a dollar value to timber losses, Pet. App. 92a (citing J.A. 390-392), and petitioner in turn cites only the CFC's opinion. Of course, it is possible that "extended inundation could result in adverse impacts to species composition and habitat deterioration," J.A. 719, but a bare assertion without evidence that habitat consequences affected particular uses of petitioner's property does not prove a taking.

property, potentially affecting any riparian property along the River. Pet. App. 3a; J.A. 239-240. Some landowners were benefitted (Pet. App. 6a-13a) while others may have been disadvantaged, but petitioner was not forced to bear a unique burden. See *Palazzolo*, 533 U.S. at 617-618; *Penn Central*, 438 U.S. at 124.

The ultimate effect on petitioner was still more indirect because petitioner's true quarrel with the Corps' operational decisions is not that they substantially affected some intrinsic attribute of the land itself (which was already subject to periodic flooding) but rather that they harmed petitioner's trees. See, *e.g.*, Pet. App. 2a (noting that CFC awarded damages based on value of timber). As even petitioner's abbreviated discussion (Br. 10-15) of biology and silvaculture illustrates, that harm further depends on the long-term effects that particular delays in flood drainage at particular times in the growing season had on particular species of trees at particular elevations. Even if operational decisions at the Dam in 1993 had an effect the following decade on trees over 100 miles away, that effect can only be described as "in its nature indirect and consequential," *Sanguinetti*, 264 U.S. at 150, and therefore is not compensable as a taking.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Table 3. Flooding characteristics of the Black River near Corning, Arkansas 1939-2004.

	1939-48	1949-92	1993-99	2000-04
Flooding >6'				
Days in growing season	50.60	64.70	91.14	55.60
Days in dormant season	54.80	77.80	100.43	65.80
# Pulses	6.00	5.20	5.43	7.40
$\bar{x}$ Days/pulse	18.70	31.70	35.29	17.20
Number years	10.00	44.00	7.00	5.00
Flooding >5'	1939-48	1949-92	1993-99	2000-04
Days in growing season	54.30	68.45	97.43	58.80
Days in dormant season	61.10	82.86	108.86	70.00
# Pulses	6.30	5.64	5.00	7.20
$\bar{x}$ Days/pulse	18.32	26.85	41.26	17.89
Number years	10.00	44.00	7.00	5.00

Table from J.A. 449

Monthly average (over 6.25 month growing season) of orange highlighted entry is 11.0 days

Monthly average (over 6.25 month growing season) of blue highlighted entry is 15.6 days

(1a)

Table 6. Average days at various Black River gauge heights at Corning, Arkansas.

Year	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
5-6 Feet								
81-92	4.25	2.33	2.25	5.25	1.58	1.33	2.92	1.17
93-99	1.43	2.86	3.14	3.14	0.43	0.29	1.29	0.67
6-8 feet								
81-92	5.00	3.25	4.08	4.75	4.92	4.58	3.58	4.42
93-99	4.57	4.00	6.00	4.43	2.29	4.00	5.43	2.67
8-10.5 feet								
81-92	7.00	7.17	8.83	0.92	0.00	0.08	0.58	5.08
93-99	11.00	12.43	14.14	6.00	1.29	0.43	1.29	5.00
10.5-11.5 feet								
81-92	8.17	7.00	1.67	0.00	0.00	0.00	0.42	1.33
93-99	8.29	6.57	0.43	0.14	0.71	0.00	0.00	1.67
11.5 feet								
81-92	2.50	1.33	0.00	0.00	0.00	0.00	0.33	0.92
93-99	2.71	2.43	0.00	0.00	0.57	0.14	0.29	1.67

Table from J.A. 463

Monthly average of orange highlighted entries is 11.4 days

Monthly average of blue highlighted entries is 14.2 days

Table 6. Average days at various Black River gauge heights at Corning, Arkansas.

Year	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
5-6 Feet								
81-92	4.25	2.33	2.25	5.25	1.58	1.33	2.92	1.17
93-99	1.43	2.86	3.14	3.14	0.43	0.29	1.29	0.67
6-8 feet								
81-92	5.00	3.25	4.08	4.75	4.92	4.58	3.58	4.42
93-99	4.57	4.00	6.00	4.43	2.29	4.00	5.43	2.67
8-10.5 feet								
81-92	7.00	7.17	8.83	0.92	0.00	0.08	0.58	5.08
93-99	11.00	12.43	14.14	6.00	1.29	0.43	1.29	5.00
10.5-11.5 feet								
81-92	8.17	7.00	1.67	0.00	0.00	0.00	0.42	1.33
93-99	8.29	6.57	0.43	0.14	0.71	0.00	0.00	1.67
11.5 feet								
81-92	2.50	1.33	0.00	0.00	0.00	0.00	0.33	0.92
93-99	2.71	2.43	0.00	0.00	0.57	0.14	0.29	1.67

Table from J.A. 463

Monthly average of orange highlighted entries is 14.7 days
Monthly average of blue highlighted entries is 17.3 days