2009-5121, 2010-5029

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ARKANSAS GAME & FISH COMMISSION,

Plaintiff – Cross-Appellant,

v.

UNITED STATES,

Defendant – Appellant.

Appeal from the United States Court of Federal Claims
in 05-CV-318, Judge Charles F. Lettow.

SUPPLEMENTAL BRIEF ON REMAND OF PLAINTIFF – CROSS APPELLANT ARKANSAS GAME & FISH COMMISSION

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March 25, 2013

CERTIFICATE OF INTEREST

Counsel for Plaintiff – Appellee / Cross-Appellant Arkansas Game & Fish Commission certifies the following:

1. The full name of every party or amicus represented by me is:

   Arkansas Game & Fish Commission

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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STATEMENT OF THE CASE

The Commission sought a writ of certiorari, arguing that this Court erred by categorically excepting temporary floods from the Fifth Amendment Takings Clause. Granting certiorari on that issue, Supp. A22, the Supreme Court reversed. It ruled that "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection," and remanded to consider preserved issues. Supp. A17 (No. 11-597, slip op. at 4 (2012)).

STATEMENT OF FACTS

The Dave Donaldson Black River Wildlife Management Area ("Management Area"), owned and managed by the Arkansas Game and Fish Commission ("Commission"), consists of approximately 23,000 acres of bottomland hardwood forested wetlands along the Black River in northeast Arkansas. A8 (87 Fed. Cl. 594, 600 (2009)); A13747 (PX500). Beginning in 1951 and primarily into the 1960s, the Commission bought acreage from several lumber companies to establish the Management Area as a wildlife and hunting preserve. A9 (87 Fed. Cl. at 601); A13766 (PX500); A1907 (Tr. 1224:5-15 (Hausman)). Historically, these lands were part of a larger forest that dominated the region. A13763-64 (PX500). With widespread cutting and clearing, bottomland hardwood forest disappeared at an alarming rate. Supp. A104 (PX37). The Management

Area now represents 38% of all bottomland hardwood forest remaining in the region. A13765 (PX500).

With the Management Area, the Commission seeks to "(1) protect and sustain a functional bottomland hardwood ecosystem, (2) support populations of endemic plant, fish, and wildlife species, and (3) provide public use opportunities, especially waterfowl hunting." A13747 (PX500). It provides critical food and shelter for "neotropical migrant bird species of concern" and for migratory waterfowl that pass through in the late fall and early winter on the Mississippi River flyway. A1674 (Tr. 39:13-17 (Zachary)); A13747, 13760-61 (PX500). The Commission's objective is to optimize wildlife habitat on a sustainable basis. A9 (87 Fed. Cl. at 601); Supp. A49 (Tr. 47:1-6 (Zachary)). For example, trees are selectively harvested "to stimulate the growth of new timber, to provide a diverse habitat type and to remove unhealthy or unproductive trees from the forest." Supp. A106 (PX37); *see* A10 (87 Fed. Cl. at 602); A8905, 13769-70 (PX80, 500); A1893 (Tr. 1169:14-1170:13 (Hausman)); Supp. A50 (Tr. 130:5-9, 14-25 (Zachary)).

In 1948, the United States Army Corps of Engineers ("Corps") completed construction of Clearwater Dam upstream from the Management Area in southeast Missouri. A9 (87 Fed. Cl. at 601); A1380 (Joint Stip. ¶9); A9864 (DX285). In 1953, the Corps approved a water release plan that mimicked natural flood patterns. A10-11 (87 Fed. Cl. at 602-03); A1380-81 (Joint Stip. ¶11-12); A2109

(Tr. 2340:2-2341:5 (Baker)); A8905, 13766 (PX80, 500); A9865 (DX285). As a result of the plan, water was regularly released in short-duration, high-discharge pulses in late winter and spring, causing short pulses of overbank flooding along the lower Black River in southern Missouri and northeast Arkansas. A13747, 13765-66 (PX500). Releases were reduced in early summer, and the Management Area typically dried by late May. A13747 (PX500).

From 1953 until 1993, the Corps' operations did not hinder the Commission's ability to maintain the Management Area as critical wildlife habitat, and the bottomland hardwood ecosystem thrived. A39 (87 Fed. Cl. at 631); A1679, 1898-99 (Tr. 60:18-61:4 (Zachary); 1190:6-1191:20, 1193:8-17 (Hausman)); A8905 (PX80); *see also* A8904 (PX80) (noting that most trees were 80-105 years old). One Commission forest manager described the Management Area in the early 1990s as "the most beautiful intact bottomland hardwood forest" that he had ever seen. A1793 (Tr. 613:20-23 (Blaney)).

Starting in 1993, the Corps implemented "an unbroken string of annual deviations" from the water control plan's approved release schedule. Supp. A6 (slip op. at 3); *see* A11, 30-31 (87 Fed. Cl. at 603, 622-23). Nearly all of the deviations were for considerable time periods and largely extended the deviating

throughout eight consecutive years.[1] Written authorizations for some of the "interim operating plans" indicate that the Corps used them to "monitor the effectiveness" of the continued deviations to help it develop a permanent revision to the water control plan. *Cf.* Supp. A63, 69, 71, 80, 83 (JX210, 215, 218, 236, 239). The primary reason for the deviations—requested by several members of Congress—was to benefit farmers who were planting low-lying acreage below Clearwater Dam. A11 (87 Fed. Cl. at 603 n.6); A9796, 9827-28 (PX575, 632); A2387 (JX6); Supp. A84-86 (JX240, 241); Supp. A110-11 (PX66). The U.S. Fish and Wildlife Service opposed the Corps' plan to permanently revise the water control plan and expressed concern that it was being modified to provide flood control to low-lying lands cleared during dry conditions in the 1970s "that should have never been cleared to begin with." A8724-24 (PX66).

The deviations collectively resulted in slower but more sustained water releases that raised the level of the Black River downstream at the Management Area and prolonged flooding during the timber growing season. A13747-48 (PX500). The United States' own expert testified that the deviations caused

[1] *See* Supp. A69-62 (JX204-07) (Sept. 27, 1993 through Dec. 15, 1993); Supp. A63-68 (JX210-13) (April 15, 1994 through April 15, 1995); Supp. A69-70 (JX215-16) (April 15, 1995 through April 15, 1996); Supp. A71-76 (JX218-22) (April 15, 1996 through April 14, 1997); Supp. A77-79 (JX232-34) (April 15, 1997 through "end of FY 97"); Supp. A80-90 (JX236-37, 239-44) (April 15, 1998 through Dec. 1, 1998); Supp. A91-93 (JX246-47) (Dec. 1, 1998 through Dec. 31, 1999); Supp. A94-103 (JX248-53) (May 15, 2000 through Dec. 1, 2000).

"substantial additional flooding" on the Management Area, and the Corps admitted that "the flooding is more extensive than our modeling predicted and the duration is probably more." A2342 (Tr. 3367:10-17 (King)); A9827 (PX632).

The Commission repeatedly warned the Corps that its deviations would be detrimental to the biological integrity of the area because sustained growing season flooding is extremely harmful to bottomland hardwood timber. A11-13, 30-31 (87 Fed. Cl. at 602-04, 622-23); *see* A1684-85 (Tr. 81:1-84:22 (Zachary)); A9106-09, 9143-50, 9827-28 (PX90, 632, 262, 266, 268); Supp. A113-14 (PX66); Supp. A84-86 (JX240, 241). The Corps continued deviating and, in 1999, began a formal process to permanently adopt a release plan like under the deviations. A12 (87 Fed. Cl. at 604); A1684 (Tr. 80:13-22 (Zachary)); A2447 (JX14). The Corps only abandoned its deviations in 2001 after—at the Commission's insistence—it performed water stage testing near the Management Area that confirmed the "clear potential for damage." A14 (87 Fed. Cl. at 606); A9802 (PX576).

From 1993 to 1998, the Management Area experienced six consecutive years of prolonged growing season flooding that had "never happened prior, and has never happened since." A2201-02 (Tr. 2775:15-2780:20 (Heitmeyer)); *see also* A34 (87 Fed. Cl. at 626); A8911, 13756, 13771 (PX80, 500). "Those six years consecutively, in every one of those years the river was at or above a five-foot level for at least 63 days. . . . That had never happened prior to 1993." A2203

(Tr. 2781:12-20 (Heitmeyer)). The most substantial flooding occurred from 1994 to 1998, followed by moderate drought in 1999 and 2000. *See* A2122, 2342-43 (Tr. 2351:13-21 (Baker); 3369:4-3371-14 (King)).

Actual observed data measured at a gauge on the Black River near Corning, Arkansas—just upstream from the Management Area—demonstrate how "flooding caused by the deviations contrasted markedly with historical flooding patterns." Supp. A7 (slip op. at 4); *see* A8305-8550 (JX266); A13755 (PX500); *see also* A16 (87 Fed. Cl. at 608); A2343 (Tr. 3370:15-19 (King)) (conceding that the flood period was "extreme"); Supp. A126 (PX506). Even including the 1999 dry year, the number of days that the river reached a level of six feet increased more than 40 percent over the historic average. *See* Supp. A7-8 (slip op. at 4-5); *see also* A16 (87 Fed. Cl. at 608). The deviated flows concentrated additional flooding on the Management Area in the growing season months; for example, they increased flooding by 34.2% in May, 40.8% in June, and 25.5% in July. A2176 (Tr. 2673:1-2674:11 (Overton)); Supp. A119-20, 126 (PX506); A13771 (PX500). If 1999 is excluded, the number of days that exceeded 5 feet each year increased to 90% of May and June and 67% of July. A13771 (PX500). Importantly, most of this flooding occurred at the 8 to 10.5 feet level on the Corning gauge. A13772 (PX500); *see also* Supp. A126 (PX506).

These gauge levels are significant because the Management Area begins to flood when the Corning gauge reaches 4.5 to 5 feet, and there is extensive flooding at 6 feet. A35 (87 Fed. Cl. at 627); A1683, 2214 (Tr. 74:1-3 (Zachary); 2825:21-2826:7 (Heitmeyer)); A9337, 9372 (PX436) (photos of flooding at 5.03 feet); *see also* A2264 (Tr. 3056:9-13 (Nutter)). Dr. Mickey Heitmeyer, an expert bottomland hardwood ecologist who lived on the Management Area for over 100 days, testified that when the Corning gauge reached five feet, more than 30% of the nuttall oaks were inundated. At six feet, more than 50% were inundated. A2209 (Tr. 2805:6-9 (Heitmeyer)); A13772 (PX500); *see also* A16, 27 (87 Fed. Cl. at 608, 619). At 8 to 10.5 feet, all bottomland hardwood is flooded except for the highest ridge and natural levee elevations. A13772 (PX500).

"The repeated annual flooding for six years altered the character of the property to a much greater extent than would have been shown if the harm caused by one year of flooding were simply multiplied by six." Supp. A8 (slip op. at 5); *see* A40 (87 Fed. Cl. at 632). The de-oxygenation that occurs in floodwaters during hot summer months reduces root mass over time and leads to increased timber mortality. A2122 (Tr. 2392:9-2393:17 (Baker)). Nuttall oaks may survive flooding in one growing season, but not three consecutive growing seasons. A2122-23 (Tr. 2393:18-2394:3 (Baker)); *see also* A2336 (Tr. 3343:8-3345:20

(King)). Overcup oaks similarly cannot tolerate four or five years of growing season flooding. A2123 (Tr. 2394:4-10 (Baker)).

The Commission's trees suffered such extensive root damage that they could not survive the 1999 and 2000 moderate droughts as they otherwise would have. Supp. A8 (slip op. at 5); A40 (87 Fed. Cl. at 632); A2135, 2340 (Tr. 2443:19-2444:14 (Baker); 3359:25-3360:3 (King)). The result was "catastrophic mortality." A40 (87 Fed. Cl. at 632); *compare* A9768-85 (PX562) (1983 aerial photos) *with* A8704-18 (PX53) (2000 aerial photos); *see also* A13687-88 (PX246, 247). More than 18 million board feet of bottomland hardwood timber were permanently destroyed or degraded, leaving the Management Area "in a state of collapse." A2124 (Tr. 2400:2-3 (Baker)); A9608 (PX485); *see also* Supp. A8 (slip op. at 5); A46-48 (87 Fed. Cl. at 638-40); A8909 (PX80) (reporting 15-60% mortality in oaks and gums outside control stands and severe crown-die back in 30-40% of the remaining trees).

ARGUMENT

I. The Supreme Court Reinforced Its Long-Standing Takings Precedents In Holding That Temporary Floods Can Take Property.

After the Court of Federal Claims awarded the Commission $5.6 million as just compensation for a taking of its timber and habitat, and $176,428.34 of the approximately $5.7 million in habitat regeneration costs the Commission sought, the United States appealed. Its first argument to this Court was that its floods were

not factually foreseeable and were not bad enough to be a taking. With the Supreme Court's clarification that the government can take property for public use through temporary floods, this Court should apply the long-established takings analysis and reject the United States' first point. The United States' other two points were unaffected by the Supreme Court's ruling and should be rejected for the reasons expressed in the first briefing. The Commission's cross-appeal for the remaining habitat regeneration costs, also fully briefed, should be granted.

A. The Supreme Court held that temporary floods do not escape Takings Clause inspection.

The Supreme Court clarified that "[n]o decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case." Supp. A12 (slip op. at 9). Holding, "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection," the Supreme Court blew the dust off a well-curated catalog of precedents. Supp. A17 (slip op. at 14).

Starting with the keystone principle articulated in *Armstrong* that the Takings Clause is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,'" the decision illuminates the reach and meaning of Takings Clause protections. Supp. A9 (slip op. at 6) (quoting *Armstrong v. United States*,

364 U.S. 40, 49 (1960)). Those protections are buttressed by historic cases like *Pumpelly v. United States*, which rejected the government's "crabbed reading of the Takings Clause" that backwater flooding "was merely 'a consequential result' of the dam's construction," and *Causby v. United States*, which ruled that "[a] temporary takings claim could be maintained as well when government action occurring outside the property gave rise to 'a direct and immediate interference with the enjoyment and use of the land.'" *See* Supp. A10-11 (slip op. at 7-8) (describing 80 U.S. (13 Wall.) 166 (1872) and quoting 328 U.S. 256, 266 (1946)). Those protections apply here too. *See* Supp. A14 (slip op. at 11) ("There is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property.").

B. The Supreme Court reaffirmed its long-established physical takings analysis under which the Court of Federal Claims awarded just compensation.

The Takings Clause invariably commands just compensation when the government substantially intrudes by direct invasion on another's property interest. *E.g.*, *United States v. Cress*, 243 U.S. 316, 327-28 (1917) (awarding just compensation for intermittent flood invasions, for it was "settled" that "overflowing lands by permanent backwater is a direct invasion, amounting to a taking," and neither complete nor "almost complete destruction" was necessary because "it is the character of the invasion, not the amount of damage resulting

from it, so long as the damage is substantial, that determines the question whether it is a taking"); *see also Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003) (describing the takings analysis for flood invasions as applying the Federal Circuit's foreseeability analysis and then considering "whether the government's interference with any property rights of Ridge Line was substantial and frequent enough to rise to the level of a taking").

The Supreme Court reiterated four parts of the inquiry: (i) the character of the land and the owner's investment-backed expectations, (ii) foreseeability, (iii) severity of the interference, and (iv) duration. *See* Supp. A17-18 (slip op. at 14-15). This analysis for physical takings itself strikes the balance; it requires no balancing of factors. The Court of Federal Claims considered ample evidence relevant to each part.

1. *Investment-backed expectations*

The question of "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use," Supp. A17 (slip op. at 14), goes to whether the Commission has an interest in being free of the floods here. Ordinarily, the owner's investment-backed expectations are not questioned in physical takings. *See, e.g.*, *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1362-63 (Fed. Cir. 2000). They might arguably be relevant when the land was previously subjected to the same kind of invasion. *Cf. Ridge*

Line, 346 F.3d at 1358 (noting that state law might give up-gradient owner some leeway to increase run-off to down-gradient owners). But at trial and the first appeal, the United States always conceded the Commission's right to be free of the floods alleged. *See infra* at 19-20.

The government can, as here, take property by increasing overflows on lands already subject to seasonal flooding. *See Jacobs v. United States*, 290 U.S. 13, 15 (1933); *see also Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987). In *Jacobs*, the United States built a dam that increased already-occurring overflows and the Court observed that "[a] servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes." 290 U.S. at 16. The government "contemplated the flowage of the lands, that damage would result therefrom, and that compensation would be payable." *Id.*

Here, experts for both the Commission and the United States testified that the deviations imposed substantial additional flooding. The period 1993-1998, which was followed by two drought years, was unlike anything else before or after Clearwater Dam was built in 1948. *See* A34 (87 Fed. Cl. at 626); Supp. A17 (slip op. at 14); A2202-01, 2342 (Tr. 2775:15-2780:20 (Heitmeyer); 3367:10-3368:2 (King)); A13754-55 (PX500). On these facts, where the 1993-1998 floods "so profoundly disrupted" the Commission's intended uses of the Management Area, including for habitat preservation and timber harvest (*see* A28 (87 Fed. Cl. at

620)), the United States sensibly waived any argument challenging the Commission's expectations. *See infra* at 18-20.

2. *Foreseeability*

Once settled that the floods constitute physical invasions and that the government caused them, foreseeability is the most important element. It determines whether an invasion is direct or consequential. This fact issue matters because the government is held to use another's property when its invasion is direct. *See, e.g.*, *Causby*, 328 U.S. at 264-65. This Court holds an invasion direct when the facts show it is foreseeable as "the direct, natural, or probable result of the [government's act], rather than merely an incidental or consequential injury." *Ridge Line*, 346 F.3d at 1356; *see also Cary v. United States*, 552 F.3d 1373, 1379 (Fed. Cir. 2009); *Moden v. United States*, 404 F.3d 1335, 1345 (Fed. Cir. 2005).

Here, the Court of Federal Claims found the government's actions in altering its releases led to longer discharges that resulted directly, naturally, and probably in longer growing season floods that inflicted "catastrophic mortality." A31, 35, 40 (87 Fed. Cl. at 623, 627, 632); *see also* A26-28, 30-32, 34-41 (87 Fed. Cl. at 618-20, 622-24, 626-33); Supp. A7-9 (slip op. at 4-6). A simple test release finally convinced the Corps that its deviations created a "clear potential for damage" on the Management Area. A14 (87 Fed. Cl. at 606, 633); *see* A8756, 9797, 9827, 9829-30 (PX76, 575, 632, 637). The Corps had the capability to foresee this

"using readily available resources and hydrologic skills." *See* A31, 40 (87 Fed. Cl. at 623, 632); *see also* A36 (87 Fed. Cl. at 628).

Even the United States' own hydrological model would have confirmed damaging impacts. A31 (87 Fed. Cl. at 623). But that modeling was only mobilized for trial and suffered a host of inherent flaws leading it to underestimate river levels; it was "far from unassailable." A31, 36 (87 Fed. Cl. at 623, 628); Supp. A54 (Tr. 2957:23-2959:3 (Raible); 2977:13-2980:8 (Court)). For example:

- Data inputs were from the Poplar Bluff, Missouri, gauge and above, and the model was never calibrated to actual observed data at the Corning, Arkansas, gauge. A36 (87 Fed. Cl. at 628); *see* Supp. A53 (Tr. 2956:7-22 (Raible)); Supp. A113 (PX66). Corning data showed that the river exceeded five feet on numerous days not predicted by the government's model. A2178 (Tr. 2682:9-17 (Overton)); A9623-68 (PX492).
- The modeling "engage[d] in faulty assumption" as to when drainage begins relative to Corning gauge measurements. A36 (87 Fed. Cl. at 628). Flooding and drainage began at 4.5 to 5 feet, not 3 feet (the comparison made by the United States' model). A36 (87 Fed. Cl. at 627-28); *see also* A1682 (Tr. 73:16-22 (Zachary)).

Even with its flaws, the government's model shows two things. One, the United States had a computerized modeling system that could have predicted

damaging impacts to the Management Area. Two, faced with political pressure to continue, the United States refused to look at what was happening and drove on despite warnings and objections. *See supra* at 5. It never modeled its deviations until litigation began and waited until the Management Area was collapsing to conduct a simple test release.

3. *Severity*

When the government is found to have directly invaded, the question is whether that intrudes enough to trigger takings liability. *E.g.*, Supp. A17-18 (slip op. at 14-15); *Ridge Line*, 346 F.3d at 1357. Even though all direct invasions are torts, not every direct invasion is compensable under the Takings Clause. While every physical invasion necessarily displaces an owner's fundamental property rights to exclude and to use and enjoy its property, takings law strikes some balance between owners' fundamental property rights and the government's need to operate without paying for every minor incursion like a driver parking for lunch or a regulator's inspection. *Compare Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 438, 441 (1982), *Causby*, 328 U.S. at 265, *General Motors Corp. v. United States*, 323 U.S. 373, 380 (1945), *and Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991), *with Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

Outside the direct invasions that are always substantial enough to require just compensation—such as the permanent occupation of even a small space in *Loretto*—the severity question turns on the facts. *E.g.*, *Ridge Line*, 346 F.3d at 1357; *see also Loretto*, 458 U.S. at 433-34. Given how noxious direct physical invasions are to the Takings Clause, only brief invasions that intrude slightly escape compensation. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). Nothing like destruction or total occupation is necessary to trigger just compensation. *E.g.*, *Causby*, 328 U.S. at 262, 266; *Ridge Line*, 346 F.3d at 1356. If the United States could not use the Commission's property without substantially damaging the timber and habitat, it takes those interests. *See United States v. Dickinson*, 331 U.S. 745, 750 (1947); *General Motors*, 323 U.S. at 384; *Cooper*, 827 F.2d at 763.

Here, the United States substantially intruded on the Commission's property interests when it shifted waters from particular farms to the Commission's land. That permanently damaged 18 million board feet of bottomland hardwood timber "essential to the Area's character as a habitat for migratory birds and as a venue for recreation and hunting" and "altered the character of the Management Area." Supp. A5, 8 (slip op. at 2, 5). Like *Causby*'s example of an orchard to a vegetable patch, the floods here changed the bottomland hardwood ecosystem into a "headwater swamp" and "so profoundly disrupted certain regions of the

Management Area that the Commission could no longer use those regions for their intended purposes, *i.e.*, providing habitat for wildlife and timber for harvest." *Causby*, 328 U.S. at 262; A18, 28 (87 Fed. Cl. at 610, 620).

4. *Duration*

Duration goes to severity. A single invasion may cause minimal harm. But "'while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking.] Every successive trespass adds to the force of the evidence.'" Supp. A17-18 (slip op. at 14-15) (quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-330 (1922)). And when the government invades temporarily, the inherent uncertainty of when the invasion will end and what will be left can be worse than if the government just paid for the whole property. *E.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 15 (1949); *see also Cooper*, 827 F.2d at 763.

The Management Area might have endured one year of flooding here. *E.g.*, A20 (87 Fed. Cl. at 612); A2122-23 (Tr. 2393:18-2394:3 (Baker)). But "repeated annual flooding for six years altered the character of the property *to a much greater extent* than would have been shown if the harm caused by one year of flooding were simply multiplied by six." Supp. A8 (slip op. at 5) (emphasis added); A20, 40 (87 Fed. Cl. at 612, 632). To benefit a chosen group, the United

States drove on until the Management Area collapsed, leaving the Commission to pick up the pieces. This is the picture of a taking.

II. The United States Cannot Now Argue That Downstream Floods Are Categorically Exempt From Takings Clause Inspection.

Evidently going for broke at the merits stage before the Supreme Court, the United States advanced a new categorical exception to the Takings Clause for downstream flooding. The Supreme Court declined to consider it. Supp. A16 (slip op. at 13). The United States might raise it on remand, but cannot because it is waived. *E.g.*, *HTC Corp. v. IPCom GmbH & Co., KG*, 667 F.3d 1270, 1281-82 (Fed. Cir. 2012); *see also Seal-Flex, Inc. v. Athletic Track & Court Const.*, 172 F.3d 836, 852 (Fed. Cir. 1999) (Bryson, J., concurring) ("But parties waive legal issues as well as factual questions whenever they fail to preserve them for appeal or to raise them before the appellate court."); *United States v. Glover*, 149 F. Supp. 2d 371, 378 (N.D. Ill. 2001) (ruling that an issue the United States raised for the first time at the Supreme Court was waived on remand).

At the Supreme Court, the United States advanced two new arguments for a *per se* downstream exception: (1) that the United States merely adjusts the benefits and burdens of life along a river when it conducts upstream flood control activities and cannot direct where the water will go so downstream owners must bear whatever changes it makes; and (2) that Arkansas's water rights law denies the

Commission any expectation of being free of any change in flooding regimes caused by upstream dams. *See* Supp. A16 (slip op. at 13).

The United States never raised either argument at the Court of Federal Claims, and never appealed that court's ruling that the Commission *does* have a property interest in being free of the floods imposed here. *See* A25-26 (87 Fed. Cl. at 617-18). It waived any argument that it had a *right* to flood the Commission. It chose, instead, to argue at trial and on appeal that its floods were not foreseeable on these facts or just not bad enough to take the Commission's property. *See, e.g.*, A26 (87 Fed. Cl. at 618). It did that by shifting attention to itself, violating the "long settled principle that a taking is not affected by the extent of the benefit to the Government, but solely by the amount of injury to the landowner." *Nat'l By-Prods., Inc. v. United States*, 405 F.2d 1256, 1275 (Ct. Cl. 1969). It also relied on marginalizing the facts and applying undefined, self-serving labels.

For example, the United States characterized the deviations as independent and unrelated decisions. That skirts the facts supporting the Court of Federal Claims' findings that the floods were not "isolated invasions" and that their cumulative impact was devastating. *See* A27, 40-41 (87 Fed. Cl. at 619, 632-33); *see also* Supp. A6, 7-9 (slip op. at 3, 4-6); *supra* at 4-8. The United States also repeatedly described the floods as "marginal," when that term does not appear anywhere in the trial opinion and is not supported by the evidence. As the Court of

Federal Claims found, expert testimony admitted at trial establishes that the United States' deviations caused *substantial* and unprecedented Management Area flooding. Supp. A35-37, 41 (87 Fed. Cl. 627-29, 633); *see also supra* at 5-7.

The United States never argued until Supreme Court briefing that Arkansas law somehow limits the Commission's expectations to be free of these floods and to continue using its property as critical bottomland hardwood habitat for wildlife, as a timber resource, and to provide public recreation. And even then it was as the kind of categorical, *per se* exception that the Supreme Court's opinion rejected. Neither Arkansas law nor the Takings Clause recognizes such absolute limits on the Commission's fundamental property rights. *See, e.g.*, *De Vore Farms v. Butler Hunting Club*, 286 S.W.2d 491, 494 (Ark. 1956).

This case shows why a downstream exception cannot stand. When the United States can, in fact, foresee increased flooding on one owner's property as the direct, natural, or probable result of its actions to reduce flooding on other owners, allowing it to continue to the point of destruction would permit it to do for free what *Armstrong* says the Takings Clause was designed to prevent. But this Court need not consider it. The United States waived the issue long ago.

CONCLUSION

The Court should affirm on direct appeal and reverse on cross-appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Supplemental Brief of Plaintiff-Appellee/Cross-Appellant Arkansas Game & Fish Commission

1. complies with the type-volume limitation of 20 pages pursuant to this Court's Order dated January 29, 2013. This brief contains 4,664 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). Microsoft Word 2003 was used to calculate the word count; and
2. complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type style.

Dated: March 25, 2013

Respectfully submitted,

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Julie DeWoody Greathouse

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2013, and unless otherwise indicated, two copies of the foregoing Supplemental Brief of Plaintiff-Appellee/Cross-Appellant Arkansas Game & Fish Commission were served by Federal Express, next business day delivery on the following:

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I also certify that this same day the original and 11 copies have been filed by third party commercial carrier for next business day delivery to: Office of the Clerk, United States Court of Appeals for the Federal Circuit, 717 Madison Place NW, Washington, DC 20439.

Dated: March 25, 2013

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Julie DeWoody Greathouse