

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - x

3   ARKANSAS GAME & FISH COMMISSION,   :

4                   Petitioner                   :   No. 11-597

5                   v.                               :

6   UNITED STATES                               :

7   - - - - - x

8   Washington, D.C.

9   Wednesday, October 3, 2012

10

11                   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:54 a.m.

14   APPEARANCES:

15   JAMES F. GOODHART, ESQ., Little Rock, Arkansas; on

16   behalf of Petitioner.

17   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; on behalf of

19   Respondent.

20

21

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JAMES F. GOODHART, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	EDWIN S. KNEEDLER, ESQ.	
7	On behalf of the Respondent	24
8	REBUTTAL ARGUMENT OF	
9	JAMES F. GOODHART, ESQ.	
10	On behalf of the Petitioner	53
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:54 a.m.)

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

6 Mr. Goodhart.

7 ORAL ARGUMENT OF JAMES F. GOODHART

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

24 But, Your Honor --

25 JUSTICE SCALIA: Was Sanguinetti -- had we

1 had any temporary takings cases before Sanguinetti?

2 MR. GOODHART: Justice Scalia --

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

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

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

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

1 up with zero. All right?

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

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

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

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

25 JUSTICE BREYER: Dickinson -- I got written

1 down Dickinson.

2 MR. GOODHART: Yes, Your Honor.

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

5 MR. GOODHART: Yes, Your Honor.

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

10 MR. GOODHART: Yes, Your Honor.

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

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

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

22 JUSTICE BREYER: Yes, Causby.

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

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

1 case --

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

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

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

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

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



1 extent of the duration of these floods.

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

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

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

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

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

1 with his --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 your rule makes this a manageable situation.

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

9 JUSTICE SOTOMAYOR: But that's every flood.

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

12 JUSTICE SOTOMAYOR: But that's every flood.

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

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

20 MR. GOODHART: That's --

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

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

1 to the level of a taking.

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

5 MR. GOODHART: Your Honor --

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

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

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

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

1 facts --

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

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

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

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

19 Now, in practice --

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

25 MR. GOODHART: Your Honor --



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

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

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

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

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

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

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

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

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

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

11 MR. GOODHART: Yes, Your Honor.

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

15 MR. GOODHART: Yes, Your Honor.

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

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

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

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

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

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

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

14                   MR. GOODHART:  Yes.

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

17                   MR. GOODHART:  Yes.

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

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

25                   And the -- the Corps of Engineers will

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

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

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

10                  JUSTICE BREYER:   Because?

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

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

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

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

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

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

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

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

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

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

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

1 an occupation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Thank you.

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

23 ORAL ARGUMENT OF EDWIN S. KNEEDLER

24 ON BEHALF OF THE RESPONDENT

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



1 please the Court:

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

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

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

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

1 with our position.

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

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

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

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

25 MR. KNEEDLER: No. I --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Well, I thought --

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

23 CHIEF JUSTICE ROBERTS: Right.

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

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

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

6 MR. KNEEDLER: Well --

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

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

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Okay.

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

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

1 water?

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

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

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

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



1 sometimes recover? How do we look at that?

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

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

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

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

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

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

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

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

4 MR. KNEEDLER: No.

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

8 MR. KNEEDLER: Yes. And --

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

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

15 JUSTICE SOTOMAYOR: After it's --

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

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

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

25 JUSTICE SCALIA: Well, no, not necessarily.

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

5                 MR. KNEEDLER:   Right.

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

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

11                MR. KNEEDLER:   Yes.   But that --

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

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

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

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

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

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

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

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

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

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

22 MR. KNEEDLER: Foreseeable.

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

25 MR. KNEEDLER: No, because Jackson,

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

3 CHIEF JUSTICE ROBERTS: Right.

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

6 If I could mention one other point --

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

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

18 MR. KNEEDLER: No.

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. KNEEDLER: I think what it --

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

20 (Laughter.)

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

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

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

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

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

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



1 on his property downstream.

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

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

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

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

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

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

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

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

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

7                   Is that one of the risks?

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

12                  JUSTICE SCALIA: I doubt that.

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

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

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

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

25                  JUSTICE KENNEDY: Well, the hypothetical is,

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

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

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

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

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

25                JUSTICE BREYER:  But building a Government

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

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

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

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

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

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

6 JUSTICE BREYER: What does it say?

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

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

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

13 JUSTICE BREYER: Yes.

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

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

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

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

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

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

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

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

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

7 MR. KNEEDLER: Yes. Because --

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

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

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

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

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

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

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

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



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

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

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

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

23           JUSTICE SCALIA: But that's your position.

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

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

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

14 (Laughter.)

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

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

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

3           MR. KNEEDLER:   Well --

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

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

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

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

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

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

25          JUSTICE GINSBURG:  Mr. Kneedler, does your

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

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

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

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

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

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

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

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

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

12 REBUTTAL ARGUMENT OF JAMES F. GOODHART

13 ON BEHALF OF THE PETITIONER

14 MR. GOODHART: Thank you.

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

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

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

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

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

23 And, Your Honor, I think --

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

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

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

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

13 In this situation, the evidence --

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

17 MR. GOODHART: Your Honor --

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

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

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

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

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

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

11 MR. GOODHART: And I --

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

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

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Counsel, the case is submitted.

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

24

25



A			B	
<b>able</b> 9:7 28:6,7 51:22	<b>affect</b> 39:2,2 <b>affirmance</b> 23:24 24:15 <b>ago</b> 34:10 <b>agree</b> 18:23 38:3 38:9,9 <b>aimed</b> 30:2 <b>ain't</b> 8:3 <b>air</b> 8:6,21 45:9 <b>airplanes</b> 8:10 12:20 <b>ALITO</b> 17:19 48:4 52:19 <b>ambit</b> 51:21 <b>Amendment</b> 3:12 16:18 40:7 <b>amount</b> 20:13 21:25 <b>amounting</b> 4:8 <b>analysis</b> 11:2,2 17:13 19:24 21:4 46:7 <b>analytically</b> 52:25 <b>analyze</b> 33:17 <b>analyzed</b> 33:13 <b>analyzes</b> 19:23 <b>animals</b> 32:21 <b>announced</b> 13:23 <b>answer</b> 12:7 29:15 34:18 <b>answering</b> 23:21 <b>anyway</b> 13:4 17:2 54:11 <b>apace</b> 49:12 <b>apparently</b> 45:19 <b>appeal</b> 24:1 <b>appeals</b> 25:11 <b>APPEARAN...</b> 1:14 <b>applied</b> 36:16 <b>Apply</b> 24:7 <b>appraisal</b> 54:1 <b>appraiser</b> 46:16	<b>appropriate</b> 7:16 <b>appropriation</b> 4:8 25:8 <b>April</b> 27:25 28:8 <b>arbitrary</b> 18:23 50:5 51:18,19 <b>area</b> 10:15 11:8 11:14 12:6 20:18 31:11 42:3 <b>argue</b> 6:2 <b>argued</b> 37:25 46:15 <b>arguing</b> 21:20 37:10,11 46:18 <b>argument</b> 1:12 2:2,5,8 3:3,7 4:12 13:22 24:23 37:17 52:1 53:12 56:8,14 <b>arguments</b> 13:3 37:23 38:10,14 <b>Arkansas</b> 1:3,15 3:4 <b>articulation</b> 36:12 <b>artillery</b> 12:21 <b>asked</b> 23:15,23 <b>asking</b> 15:2 19:19 24:18 <b>aspect</b> 35:25 <b>assist</b> 31:13 <b>assume</b> 46:21 <b>assumed</b> 47:24 <b>assuming</b> 13:18 34:22 <b>attempting</b> 11:21 <b>attention</b> 53:24 <b>August</b> 11:9 18:7 <b>automatic</b> 24:15 <b>award</b> 36:7 <b>a.m</b> 1:13 3:2 56:22	<b>back</b> 6:10 7:14 18:19 40:8 41:11 54:25 55:9 <b>backs</b> 32:13 <b>bad</b> 27:4 31:24 <b>Baltimore</b> 45:5 <b>bank</b> 16:23,23 <b>baseline</b> 15:3,9 16:3 17:9,19 34:17,18 42:17 54:24 <b>basic</b> 13:22 <b>basically</b> 11:9 13:13 33:5 36:13 43:14 49:6 <b>basin</b> 30:2 49:1 51:11 <b>basis</b> 42:17 <b>Bedford</b> 17:4 27:12,12 30:14 30:20 37:2 40:1 43:16 50:1,1 54:16 <b>behalf</b> 1:16,18 2:4,7,10 3:8 24:24 53:13 <b>believe</b> 30:18 40:23 45:4 <b>belong</b> 52:3 <b>belongs</b> 18:18 <b>benefit</b> 13:5 41:15 <b>benefits</b> 28:20 49:2 54:12 <b>better</b> 19:3,4,20 <b>beyond</b> 22:24 40:7 <b>big</b> 18:22 <b>boat</b> 33:10 <b>bottomland</b> 17:24 <b>Breyer</b> 5:18 6:13,25 7:3,6 7:11,22 8:4,8	18:9,12,16 19:11,15,18 20:5,10,24 32:10 33:6,14 34:1 43:25 44:22 45:6,10 45:13,17 46:1 <b>brief</b> 15:7,17 25:13 30:24 46:6 <b>bright</b> 17:12 <b>bring</b> 32:25 <b>broad</b> 51:21 <b>broader</b> 52:8 <b>brought</b> 54:1 <b>brownout</b> 11:11 <b>build</b> 44:3 <b>building</b> 7:8 20:18 36:15 43:25 <b>builds</b> 13:5 26:11 32:13,17 32:18 34:11 <b>built</b> 17:20 31:1 34:5 36:14,14 <b>bulldozer</b> 20:25 <b>burden</b> 16:16 <b>burdens</b> 28:21 <b>business</b> 39:6 42:10
				C
<b>adversary's</b> 13:3				C 2:1 3:1 <b>call</b> 13:12 <b>called</b> 7:14 21:18 30:25 <b>cannon</b> 8:21 12:20 <b>care</b> 48:8 <b>carries</b> 41:24 <b>carry</b> 15:15 <b>case</b> 3:4 4:4,16 6:14 8:1,15 10:18 11:5 12:25 13:2 15:16,24 16:5 16:5 17:4,22

20:12 21:9 22:7,8,22 23:2 23:4 26:3,6 27:16,18 28:13 30:14,24,25 31:24 32:7 35:22 37:1 43:17,23 45:4 46:16 47:10 49:4,8 52:15 55:23 56:21,22 <b>cases</b> 4:18,19,20 4:22 5:1,8,13 5:19 6:2,5,22 6:23 7:15,20 7:23 11:18,19 11:20 12:18 17:14,17 18:22 20:15 21:14,14 21:16 25:3 26:15,17 27:10 27:12 37:2 43:15 50:1 52:17 54:15 <b>categorical</b> 25:14 <b>category</b> 26:17 52:3 <b>causation</b> 11:23 27:8,10 <b>Causby</b> 7:22,25 8:8,20 12:19 <b>Causby's</b> 8:6 <b>cause</b> 11:25 14:5 44:21 55:8 <b>caused</b> 22:5 23:11 31:5 33:4 54:22 55:19 <b>causes</b> 42:1 <b>certain</b> 9:7 30:16 33:18 41:25 <b>certainly</b> 10:21 14:25 15:13 18:6 21:24 22:10 55:23	<b>chain</b> 31:25 32:3 <b>change</b> 15:10 16:14,16 51:22 53:7 <b>changes</b> 16:7,11 41:7 49:13 <b>changing</b> 49:12 <b>channelled</b> 31:4 <b>character</b> 20:12 <b>chicken</b> 8:7 <b>chickens</b> 44:7 <b>Chief</b> 3:3,9 14:15,21,25 24:21,25 25:9 27:6,23 28:5 28:16 29:3,15 29:20,23 30:4 30:7 31:8,16 31:19 37:3,7 37:19 38:8 42:19 47:1,8 47:18 48:12 50:8 53:8 56:20 <b>choice</b> 33:20 50:9 <b>choked</b> 11:10 <b>chooses</b> 33:23 <b>cinders</b> 45:20,21 <b>circuit</b> 3:13 13:15 23:14,19 23:25 24:4,5 25:13 37:10,13 38:4,9,12 <b>circuit's</b> 3:24 19:8 <b>circumstance</b> 44:11 <b>circumstances</b> 49:12 50:2 51:23 <b>cite</b> 30:23 <b>cited</b> 15:16 27:11 40:1 <b>City</b> 22:22 23:1 23:3 27:15 <b>claim</b> 36:15,16	36:18 47:22 <b>claimed</b> 9:3 <b>claims</b> 8:15 12:15 23:17 24:8 27:7 30:5 37:16 47:16,23 54:6 <b>classic</b> 28:19 46:19 <b>Clause</b> 4:1 24:11 36:8 39:16 <b>Clean</b> 16:11 <b>clear</b> 27:7 35:2 56:16 <b>cleared</b> 54:11 <b>clearer</b> 19:5 21:24 <b>clearly</b> 27:16 <b>clerk</b> 5:24 <b>close</b> 29:11 <b>Coal</b> 6:22 <b>collateral</b> 44:20 44:22 <b>come</b> 5:25 32:21 43:13 50:22 <b>comes</b> 6:10 7:13 18:16,19 27:24 31:20 51:14 <b>coming</b> 12:21 47:3 <b>commendable</b> 50:17 <b>comment</b> 50:6,9 <b>commercial</b> 8:7 <b>commission</b> 1:3 3:5 12:25 21:12 24:17 46:23 49:9,14 50:19 53:20,24 <b>commission's</b> 24:10 46:4 48:2,19 54:13 <b>committee</b> 52:12 <b>compelling</b> 8:19 15:25 <b>compensate</b>	45:19 <b>compensating</b> 19:5 <b>compensation</b> 3:20 24:11,12 33:23 36:8 <b>complained</b> 53:20 <b>concepts</b> 11:22 <b>concern</b> 43:13 <b>concerns</b> 49:14 <b>conclusion</b> 38:4 <b>concurrence</b> 52:11 <b>condemn</b> 35:10 <b>condemns</b> 42:23 <b>condition</b> 4:21 25:16 42:14 55:23 <b>conditions</b> 55:16 <b>conduct</b> 26:18 43:21 <b>conflicts</b> 3:25 <b>confluence</b> 52:6 <b>confused</b> 34:2 <b>confusion</b> 25:10 37:8 <b>Congress</b> 39:5 39:19,21,23,24 40:8,11,12 42:9,9,14,15 <b>conjure</b> 48:15 <b>consecutive</b> 8:17 21:11 <b>consensus</b> 50:18 50:25 51:2 <b>consent</b> 18:10 <b>consequence</b> 27:19 30:13,17 32:9 44:13,22 48:24 49:21,25 <b>consequences</b> 3:14 12:2 26:13 30:1 32:6 38:19,24 39:1 44:20 50:3	<b>consequential</b> 26:19 27:21 38:1 39:8 46:20 52:2,4 52:15,18 53:16 53:18 <b>consider</b> 23:15 <b>considerations</b> 13:24 28:13 <b>consistent</b> 12:5 19:22 25:25 <b>consistently</b> 25:3 <b>constitute</b> 3:12 4:7 5:13 <b>construct</b> 28:22 <b>constructed</b> 27:14 33:20 <b>constructing</b> 34:24 <b>construction</b> 42:22 46:14 <b>context</b> 25:4 27:4 38:18,18 39:4 <b>contrary</b> 30:5 <b>contributed</b> 56:9 <b>control</b> 13:5 14:14 15:15,22 17:6,25 28:24 31:9,14,24 36:6 39:6,11 40:5 42:10 48:22,25 49:2 49:3 50:4 <b>controlled</b> 8:25 <b>controls</b> 15:19 <b>convened</b> 50:19 <b>Corps</b> 14:22 16:4 19:25 22:19 28:11 36:2 41:11,12 49:7,11 50:16 50:17,21 51:9 51:12,14,17,20 52:20 53:6
---	---	---	--	---

54:1 <b>correct</b> 5:10 12:11,13 14:24 28:3 40:24 <b>corrected</b> 25:23 <b>counsel</b> 11:17 24:21 27:13 48:15 56:20,21 <b>counsel's</b> 32:4 <b>counted</b> 5:19 <b>country</b> 18:5 19:2 <b>counts</b> 51:5 <b>course</b> 6:21 39:15 <b>court</b> 1:1,12 3:10 4:5,17 5:11 6:14,18 6:21,23 8:15 8:15 12:15 15:25 17:13,22 19:22 20:2,11 20:15,16 21:11 23:8,16 24:8 25:1,2,11 26:5 27:5,7,20 30:5 30:25 31:6 34:7 35:16 37:16 40:2,6 40:12 42:13 43:17,18 45:9 47:9,12,13,15 47:22 49:21 52:7,16,18,20 53:2,6,17 54:6 <b>Court's</b> 4:3 14:11 26:15 27:12 30:23 33:3 35:15 36:18 38:21 39:24 43:15 49:25 <b>cover</b> 10:11 <b>covered</b> 35:15 35:19 <b>create</b> 25:16 <b>created</b> 17:7	<b>Cress</b> 20:12 35:15 43:5 <b>critical</b> 26:2 44:18 <b>crops</b> 41:9 <b>cross-appealed</b> 24:17 <b>current</b> 36:18 <b>cut</b> 20:20 33:9 40:8 <b>cutoff</b> 17:6 <b>cuts</b> 31:12 <b>cutting</b> 32:5 <hr/> <b>D</b> <b>D</b> 3:1 <b>dam</b> 13:20 16:21 17:20,23 26:7 26:13,22 28:12 28:24 29:6,12 29:22 30:1 32:13,14,17,18 33:21 34:5,11 36:4,5,13,14 45:25 47:3,10 47:24 49:7 55:1,1,3,15 <b>damage</b> 12:8,9 39:12 40:6,9 40:20 46:23 53:18 <b>damaged</b> 46:22 <b>damages</b> 9:3 20:13 22:21 24:18 26:19 36:8 39:8 42:16 46:20 53:16 <b>dams</b> 13:5 <b>dam's</b> 55:15 <b>Day</b> 53:25 <b>days</b> 46:8 <b>dealing</b> 33:4 43:17 <b>decide</b> 28:17 49:22 52:7 <b>decided</b> 34:3	37:10 53:6 <b>decides</b> 31:9 <b>deciding</b> 38:17 <b>decision</b> 3:24 13:8,25 23:16 30:23 35:15 40:1,3 47:16 51:12 52:23 <b>decisions</b> 33:3 36:5 38:6 43:24 52:9,10 <b>decrease</b> 46:17 <b>define</b> 15:3 16:3 17:10 <b>definitely</b> 22:17 <b>definition</b> 17:9 <b>degree</b> 22:19 <b>depart</b> 27:5 38:21 <b>department</b> 1:18 20:5,24 <b>depend</b> 10:18 38:11 45:3 <b>depends</b> 44:15 <b>deposited</b> 29:18 <b>Deputy</b> 1:17 <b>designers</b> 43:12 <b>despite</b> 9:11 <b>destroy</b> 11:3 23:9 <b>destroyed</b> 11:14 22:9 <b>destroys</b> 10:21 <b>destruction</b> 22:21,22,23 23:11 <b>determination</b> 22:18 <b>determinations</b> 36:2 <b>develop</b> 50:17 <b>development</b> 46:14 <b>deviation</b> 13:14 <b>deviations</b> 8:16 <b>Dickinson</b> 6:14 6:15,25 7:1,18	25:21,25 34:3 <b>dictum</b> 5:6,7 <b>difference</b> 35:21 37:9,12,20 44:18 48:5 50:24 52:20 <b>different</b> 11:22 29:9 30:12 31:24 32:20,22 37:17 45:16 49:13 <b>differently</b> 21:15 <b>difficulties</b> 19:12 <b>direct</b> 3:20 5:15 12:13,16 14:3 21:5 24:9 25:5 32:7 38:24 52:4 53:19 54:21 55:11 <b>directed</b> 56:16 <b>directly</b> 11:25 12:24 32:5 34:19 55:21 <b>director</b> 53:25 <b>dirt</b> 18:19 <b>disagree</b> 37:20 38:12 <b>disagreeing</b> 38:4 <b>discretion</b> 51:21 <b>discusses</b> 30:24 <b>discussion's</b> 47:15 <b>dispose</b> 14:7 <b>dispositive</b> 37:14 <b>dispute</b> 56:8 <b>dissipate</b> 18:3 <b>distinguish</b> 22:8 <b>distinguishes</b> 26:17 <b>districts</b> 28:15 50:20 <b>disturb</b> 23:25 <b>divorce</b> 38:17 <b>doing</b> 28:7 31:23	33:15 47:19 51:18 <b>doubt</b> 31:14 42:12 <b>downstream</b> 26:13 27:18,21 27:24 30:14 32:6 34:13,20 36:3,6,14,16 36:19 38:1,15 38:19 39:1,9 41:1 42:16,18 43:8 48:1 49:19 50:10,18 52:16 53:1,18 <b>drainage</b> 28:15 42:2 50:20 <b>dramatic</b> 30:21 <b>drawn</b> 40:12 54:15 <b>drive</b> 29:7 <b>drives</b> 20:25 <b>driving</b> 13:25 <b>dump</b> 29:8 47:5 <b>duration</b> 3:23 9:1 15:22 <b>dye</b> 12:19 <b>dying</b> 11:15 31:23 <b>D.C</b> 1:8,18 <hr/> <b>E</b> <b>E</b> 2:1 3:1,1 <b>early</b> 4:18 18:2 <b>easements</b> 20:4 26:8,8 <b>ecological</b> 31:10 <b>economic</b> 22:17 <b>EDWIN</b> 1:17 2:6 24:23 <b>effect</b> 17:25 25:7 31:2 40:18 43:22 <b>effectively</b> 6:16 6:17 11:3 <b>effects</b> 33:4 36:3 38:2 52:15
--	---	---	---	---

<b>eight</b> 15:24,24	<b>exception</b> 36:15	50:20 54:8	55:9	8:15 12:15
<b>either</b> 5:19 8:3	<b>exclude</b> 9:21	<b>favor</b> 12:10	<b>flooded</b> 6:17 8:6	15:25 20:2
11:14 13:7,16	14:6	<b>favorite</b> 21:1	9:19 17:2	23:6 54:7
<b>electricity</b> 32:20	<b>exercise</b> 13:16	<b>features</b> 43:23	21:22 26:23	<b>four</b> 53:10
44:1,5	<b>exhaustive</b>	<b>Federal</b> 3:13,24	34:6 35:13	<b>Frankly</b> 18:5
<b>elements</b> 14:3	37:17	8:15 12:15	43:3 49:17,18	<b>frequency</b> 8:25
19:24	<b>existed</b> 17:24	19:8 23:14,17	<b>flooding</b> 3:11	15:23
<b>eleven</b> 5:19,23	<b>expectation</b> 16:4	23:19,25 24:8	4:15,19,21 5:4	<b>friend</b> 53:15
6:6 18:22	<b>expectations</b>	25:13 28:21	5:12 6:15 8:21	<b>friend's</b> 25:12
<b>emergency</b>	15:4,9 42:18	37:9,13 38:3,9	9:12 13:3,5,19	<b>fundamental</b>
31:18	<b>expected</b> 44:7	38:12 47:15,22	13:21 18:4	3:25 39:22
<b>employee</b> 20:6	<b>explain</b> 28:11	54:6	19:5,9 21:21	
20:24	32:6	<b>Fifth</b> 3:12 16:18	25:3,5,5,16	<b>G</b>
<b>encompass</b>	<b>exposing</b> 51:23	40:7	26:6,15 27:12	<b>G</b> 3:1
11:21	<b>expressing</b> 5:4	<b>fighting</b> 37:15	27:19 28:23,24	<b>Game</b> 1:3 3:4
<b>ended</b> 45:21	<b>extensive</b> 10:14	37:16	31:2 35:18	<b>general</b> 1:17
48:23	18:4 35:3	<b>financial</b> 22:6	42:22 46:5,8,9	6:22 12:4,6
<b>endorse</b> 12:5	<b>extent</b> 9:1 22:20	<b>find</b> 20:25 53:17	46:10 55:2,4	41:3
<b>Engineers</b> 14:22	22:23 23:11	<b>finding</b> 16:6	55:24	<b>generally</b> 13:4
16:4 19:25	53:2	<b>findings</b> 27:7	<b>floodings</b> 9:5	41:5 47:24
28:12 50:21	<b>extra</b> 14:18	30:5 31:22	<b>floodplain</b> 46:13	<b>generations</b>
54:1		37:17 47:9	46:15	17:24
<b>enjoy</b> 14:7	<b>F</b>	<b>fine</b> 18:1,20	<b>floods</b> 9:1 34:11	<b>geographically</b>
<b>enjoyment</b> 9:23	<b>F</b> 1:15 2:3,9 3:7	50:13	39:13	20:19
10:7 22:25	53:12	<b>fire</b> 12:21	<b>flood-taking</b>	<b>getting</b> 42:14
<b>enormous</b> 49:2	<b>facilities</b> 7:4,7	<b>first</b> 3:19 39:5	4:18	50:21
<b>ensure</b> 55:15	<b>fact</b> 9:11 38:24	46:4 47:12	<b>flourished</b> 17:23	<b>Ginsburg</b> 4:3,13
<b>environmental</b>	40:1 44:11	56:4	<b>flow</b> 18:1	10:11,14,19
16:10 49:13	46:16,23 47:14	<b>Fish</b> 1:3 3:5 54:9	<b>flowage</b> 26:14	23:12 24:13
<b>eroded</b> 18:18	53:5	<b>flood</b> 4:23 5:21	<b>flowing</b> 26:8	40:14 51:25
<b>erosion</b> 17:6	<b>factors</b> 12:10	6:8,17 7:11	<b>flying</b> 7:20 8:10	<b>gives</b> 16:3
18:17 27:15	14:17 35:2	8:17,23 10:12	<b>focus</b> 26:5 45:11	<b>go</b> 14:16 16:9
<b>ESQ</b> 1:15,17 2:3	51:10 52:6	10:14,15,16,20	<b>focused</b> 45:24	19:1 24:1 30:8
2:6,9	<b>facts</b> 4:20 8:19	11:3 14:9,12	48:2	31:25,25 32:2
<b>essence</b> 13:24	10:18 11:1,19	14:14,16,17,23	<b>focusing</b> 46:1,3	43:12 47:11
<b>essential</b> 52:1	16:1 24:1 55:6	14:25 15:14	53:2	48:6,8,9 54:24
<b>essentially</b> 48:13	<b>factual</b> 31:22	18:16 20:4	<b>fold</b> 22:4	<b>goes</b> 22:13 31:12
<b>everybody</b>	47:9 56:13	22:13 27:25	<b>foreseeability</b>	34:14,16 47:21
41:16 45:20	<b>fair</b> 26:9 41:22	28:25 29:1,4	12:1	47:22 55:9
50:21	<b>fairly</b> 43:2	31:9,14,21,23	<b>foreseeable</b> 20:2	<b>going</b> 10:17 13:3
<b>evidence</b> 17:22	<b>fall</b> 20:7	32:14 39:5,6,8	30:16,19,20	13:7,8,8,10,17
17:23 55:13	<b>falls</b> 43:5	39:11,13 40:5	36:22,23	13:18,19 16:12
<b>exactly</b> 33:15	<b>far</b> 5:25 38:14	40:5 41:13	<b>forest</b> 17:24	16:16,22 21:9
<b>example</b> 17:4,22	43:2	42:10 46:20	<b>formulation</b>	22:18 27:25
25:21 28:20	<b>farm</b> 8:7 33:9	48:21,22,23,25	35:22	29:5,5,6,7,8
30:22 41:6	<b>farmers</b> 28:14	49:2 50:4,11	<b>forth</b> 32:16	30:8 31:4,20
44:5	41:8,13,16	50:11 51:14	<b>found</b> 6:14,24	32:3 33:21,22

39:7 40:9,13 40:21 41:15 42:5,15 47:11 48:8,9 50:10 51:1 52:21,24 53:4,7 54:20 55:2,22 <b>Goodhart</b> 1:15 2:3,9 3:6,7,9 4:13 5:2,9 6:13 7:2,5,10,25 8:5 8:14 9:14,20 10:2,6,13,25 12:12 14:2,10 14:13,20,24 15:5,13 16:9 16:15,25 17:3 17:11,21 18:11 18:15 19:7,14 19:17,21 20:9 20:11 21:3,23 22:10,16 23:3 23:12,20 24:6 24:16 53:10,12 53:14 55:5,17 55:20 56:3,11 56:15 <b>gotten</b> 42:10 <b>Government</b> 4:5 11:25 12:22 13:4,7,17,25 15:10,14 16:21 18:18,20 25:14 25:15 26:9,10 26:11 27:22,24 28:5,20,21,24 29:3,10,13,14 30:8 31:1,9,20 32:3,4,12,17 32:18 33:7,20 34:11,24 35:9 39:12 40:4,21 41:2,16 42:1 42:23 43:9,25 44:9,16,16,20 47:13,14,16 48:5,7,12,16	48:17,22 <b>governmental</b> 38:25 <b>Government's</b> 3:14 12:17 13:12,13 15:17 20:12 25:10 29:25 40:18 42:5 43:10 48:18 <b>grant</b> 28:16 <b>Great</b> 39:5 <b>greater</b> 46:21 <b>group</b> 50:19 <b>groups</b> 49:9 <b>guarantee</b> 53:3 <b>guaranteeing</b> 16:18 <b>guarantees</b> 3:25 <b>guess</b> 13:1 15:2 17:11 19:9 25:19 44:10 <hr/> <b>H</b> <b>handle</b> 50:23 <b>handled</b> 49:5 <b>happen</b> 14:23 16:4 32:19,22 44:12,25 55:16 <b>happened</b> 8:23 10:23 17:20 26:23 44:8,8 55:4,6,24 <b>happening</b> 13:21 29:25 30:14 56:10 <b>happens</b> 18:8 32:18 41:18 44:17 49:14 50:5,16 <b>happenstance</b> 40:25 <b>Harbor</b> 8:21,22 <b>Harbor's</b> 12:22 <b>hard</b> 32:5 <b>hardwood</b> 17:24 <b>harm</b> 9:6,12	46:11 49:19 <b>harmed</b> 9:2 21:18 <b>harshness</b> 50:2 <b>harvesting</b> 41:10 <b>hear</b> 3:3 <b>heard</b> 21:11 34:10 <b>held</b> 5:16 25:3 39:8 41:3 42:16 <b>help</b> 13:8 23:13 33:21 <b>helpful</b> 32:24 <b>high</b> 20:23 44:1 <b>higher</b> 15:11 16:6 <b>history</b> 39:23 40:3 55:25 56:2 <b>hoc</b> 49:9 50:19 52:11,23 <b>hold</b> 5:20 6:9 13:17 <b>holding</b> 5:7,7 11:24 30:24 <b>holdings</b> 49:25 <b>Honor</b> 4:24 7:2 7:5,10,25 8:5 8:14 9:14,20 10:3,18,25 12:12 14:2,13 15:5,13 16:9 16:25 17:11,21 18:11,15 19:7 19:21 20:9 21:3,23 22:10 22:17 23:4,20 23:23 24:18 54:14,23 55:5 55:17 56:15,19 <b>Honors</b> 3:17 <b>Hotel</b> 8:22 <b>hunting</b> 46:24 <b>hurt</b> 13:9 33:21 <b>hurtful</b> 32:25	<b>hypothetical</b> 16:5 21:10 42:25 48:11 <hr/> <b>I</b> <b>idea</b> 19:12,19 <b>ignore</b> 38:23 <b>illustrates</b> 30:22 <b>impact</b> 47:25 51:11 <b>impaired</b> 9:5 <b>important</b> 26:4 39:3 40:10 42:14 <b>impossible</b> 10:22 <b>inaccurate</b> 4:17 <b>inch</b> 14:18 <b>incidental</b> 26:12 30:13,17 32:8 48:24 <b>include</b> 11:15 <b>included</b> 39:10 <b>including</b> 51:10 52:17 <b>incremental</b> 46:7 <b>increments</b> 46:22 <b>incur</b> 54:20,21 <b>indicated</b> 10:8 15:6 <b>indirect</b> 52:1 <b>individual</b> 36:1 38:6 52:10 <b>inevitably</b> 35:17 <b>injury</b> 4:8 11:25 24:9 27:21 44:21 <b>inside</b> 43:22 <b>insignia</b> 12:20 <b>insofar</b> 35:24 <b>instance</b> 55:12 <b>Insurance</b> 23:4 <b>insurer</b> 15:14,19 <b>intend</b> 25:15 48:11	<b>intended</b> 4:1 12:1 <b>intent</b> 25:18 <b>intentionality</b> 11:22 <b>interest</b> 3:22 40:11 <b>interested</b> 6:6 <b>interests</b> 5:16 13:6 <b>interfere</b> 9:23 9:25 16:17 <b>interference</b> 10:8 21:7 22:24 56:17 <b>Interior</b> 20:6 <b>intermittent</b> 18:14,14 <b>intervening</b> 42:1 <b>interwoven</b> 13:2 <b>intrinsically</b> 25:22,23 <b>intruded</b> 10:7 <b>intrudes</b> 3:21 5:16 <b>intrusion</b> 9:16 10:9,17 11:6 14:5,18 20:16 21:7 24:10 54:22 <b>intrusive</b> 21:25 <b>invasion</b> 3:20,23 4:7,16 5:15 6:17 12:13 14:4 21:12 23:5,7 26:16 <b>invasions</b> 4:23 8:17,23 9:22 21:25 55:21 <b>inventoried</b> 11:16 <b>inventory</b> 11:12 <b>investigation</b> 41:4 <b>invited</b> 28:21 <b>issue</b> 3:11 8:13 11:23 12:1
--	--	--	--	---

34:1 41:14 49:5 <b>issues</b> 23:18,24 24:14,17	39:15,18 40:14 41:14,21 42:4 42:12,19,25 43:7,25 44:22 45:6,10,13,17 46:1,9 47:1,8 47:18 48:4,12 49:16,23 50:8 50:24 51:4,13 51:19,25 52:19 53:8 54:14,24 54:25 55:14,18 56:1,7,12,20	37:18,24 38:16 39:17,21 40:15 40:23 41:20,23 42:8,13,21 43:4,14 44:15 45:3,7,11,14 45:24 46:3,12 47:7,12,21 48:10 49:20,24 50:15 51:3,7 51:17,20,25 52:5,25 53:9 <b>knew</b> 12:20 30:8 47:10,13 52:13 53:23 54:5 55:7	44:23 46:2,4,4 46:5,12,12,14 46:18,22,23,24 47:5 48:2,14 48:16,17,19,24 49:17 53:17,23 55:9 56:6 <b>Landing</b> 8:22 <b>landowner</b> 6:19 9:15 16:16 17:7 23:10 25:22,24 26:22 27:24 30:3 40:25 41:18 54:18 55:7,10 55:12,22	43:6 48:22 <b>Life</b> 22:22 23:3 <b>limbs</b> 20:7 <b>limiting</b> 52:13 <b>line</b> 17:12 40:12 47:4 48:1 54:15 <b>Lionel</b> 52:17 <b>list</b> 6:6 <b>litigation</b> 13:11 <b>little</b> 1:15 25:10 <b>live</b> 33:7 49:1 50:3 <b>living</b> 41:23 <b>load</b> 29:6 <b>long</b> 8:11 20:14 49:4 <b>look</b> 12:19 22:16 22:20 24:7 33:1 <b>looked</b> 18:10 20:15 <b>looking</b> 19:24 22:24 31:21 35:25 <b>Loretto</b> 20:16 25:4 26:14 27:11 43:17 52:7 <b>Loretto's</b> 20:18 <b>lose</b> 41:19 51:7 51:16 55:4,16 55:19 <b>loses</b> 51:6,13 <b>loss</b> 13:18 22:6 <b>lot</b> 9:4,4 11:21 19:16 22:8 32:19 37:16 <b>lots</b> 14:17 <b>low</b> 54:9 <b>Lynah</b> 4:18
<b>J</b> <b>Jackson</b> 30:25 36:25 <b>James</b> 1:15 2:3 2:9 3:7 40:2 42:13 53:12 <b>Jones's</b> 20:6 21:1 <b>Judge</b> 40:15 <b>July</b> 11:9 18:7 <b>June</b> 11:9 18:7 <b>jurisprudence</b> 12:6 <b>Justice</b> 1:18 3:3 3:9 4:3,13,25 5:2,3,9,18 6:13 6:25 7:3,6,11 7:20,22,23 8:2 8:4,8 9:2,18,24 10:4,11,13,19 11:17 13:1 14:9,12,15,21 14:25 15:2,6 16:2,13,20 17:1,8,19 18:9 18:12,16 19:11 19:15,18 20:5 20:10,24 21:14 22:2,12 23:1 23:12 24:3,13 24:21,25 25:9 26:3,20 27:1,6 27:23 28:5,16 29:3,15,20,23 30:4,7,16 31:8 31:16,19 32:10 33:6,14 34:1,2 34:5,9,15,17 34:19,25 35:6 35:12,21 36:10 36:20,23 37:3 37:7,19 38:8	<b>justification</b> 31:18 <b>K</b> <b>Kansas</b> 22:22 23:1,3 <b>keep</b> 49:12 <b>Kennedy</b> 15:2,6 16:2,13,20 17:1,8 24:3 35:21 42:25 43:7 54:15 <b>Kennedy's</b> 26:3 34:19 54:25 <b>kept</b> 31:4 <b>kill</b> 10:15 44:7 <b>killed</b> 40:19 <b>Kimball</b> 6:23 7:3,3,15,19 <b>kind</b> 55:4 <b>kinds</b> 32:22 <b>Kneedler</b> 1:17 2:6 24:22,23 24:25 25:18 26:25 27:3,9 28:4,10,19 29:9,17,21,24 30:6,10,18 31:15,17 32:2 33:2,12,18 34:4,8,13,16 34:22 35:5,11 35:14,24 36:17 36:22,25 37:4	<b>knocking</b> 21:1 <b>know</b> 6:7 7:8,14 9:3 13:23 14:18,19 15:24 19:7,11,12 20:1,4 21:6 22:13 23:13 28:18 31:10,10 31:21,22 32:24 38:8 43:12 48:11 50:3 51:15 54:14 <b>knows</b> 48:7 <b>Kress</b> 4:19 <b>L</b> <b>lake</b> 11:4 <b>land</b> 4:7 7:12 9:8 12:22 15:12 17:1,23 18:20 20:3,6 21:1,18,21 22:13 26:10,22 27:19 28:6,17 29:19,24 30:11 31:6,12,21 32:14 33:9 34:7 35:8,10 38:25 42:23,24 43:1,21,22 44:2,7,12,17	<b>landowners</b> 16:12 36:7 50:9 54:12 <b>landowner's</b> 3:21 26:18 29:19 <b>lands</b> 16:7 <b>language</b> 4:15 <b>late</b> 18:2,2 <b>Laughter</b> 39:20 50:14 <b>laundry</b> 6:23 7:3 7:4,4,6,15,19 <b>law</b> 5:24 16:10 24:7 49:6 <b>lawsuit</b> 32:25 <b>leading</b> 52:17 <b>left</b> 16:23 23:14 <b>legal</b> 11:2 22:18 32:10 <b>legislative</b> 39:23 <b>legitimate</b> 16:3 <b>let's</b> 19:1 44:1 <b>levee</b> 31:1,1 41:6 <b>level</b> 15:1 34:6 <b>liability</b> 39:25 42:11 51:24 54:20,21 <b>liable</b> 35:17,20 39:8,12,19 40:9 42:16	<b>M</b> <b>main</b> 43:2 <b>making</b> 36:4 51:11 <b>manageable</b>

14:1 <b>management</b> 10:15 11:8 <b>managing</b> 51:21 <b>manifestly</b> 4:2 <b>manner</b> 15:20 15:21 <b>manual</b> 36:6 49:10 <b>manuals</b> 49:11 <b>March</b> 27:25 28:8 <b>marginally</b> 54:9 <b>marina</b> 28:14 50:21 <b>massive</b> 11:11 39:6 51:24 <b>matter</b> 1:11 22:19 23:17 36:20 45:16 56:23 <b>mean</b> 5:23 9:3 32:11 39:18 40:24 41:14 43:15 44:5 46:10 48:11 52:6 <b>melt-off</b> 35:1 <b>mention</b> 6:4 37:6 <b>mentioned</b> 12:10 19:16 24:14 52:6 <b>merely</b> 4:8 <b>miles</b> 27:18 32:6 32:23 33:7 42:2,2 44:23 48:1 <b>million</b> 31:13 54:4 <b>mimicked</b> 18:1 <b>minutes</b> 34:10 53:10 <b>Mississippi</b> 17:5 23:6 27:14 39:5 <b>Missouri</b> 23:5	<b>Missouri-Ark...</b> 47:25 <b>mode</b> 3:22 <b>modern</b> 43:17 <b>modification</b> 25:22 <b>modify</b> 4:10 25:19 <b>months</b> 18:17 28:3,7 35:3 <b>moral</b> 43:11 <b>morning</b> 3:4 <b>Motor</b> 6:22 <b>Motors</b> 6:22 <b>multifaceted</b> 12:3 <b>multiple</b> 11:19 28:13 <hr/> <b>N</b> <b>N</b> 2:1,1 3:1 <b>narrow</b> 8:3 <b>National</b> 16:10 <b>natural</b> 12:16 15:21 17:6 18:1 53:19 55:16,22 <b>naturally</b> 13:4 55:10 56:9,16 <b>nature</b> 41:20,23 52:8,12 54:19 56:18 <b>necessarily</b> 10:13 22:14 34:25 <b>necessary</b> 4:6 49:25 <b>need</b> 20:1 24:19 <b>negligence</b> 54:20 <b>NEPA</b> 50:7 53:7 <b>never</b> 3:13 12:7 17:20 18:8 19:8 25:15 32:25 34:20 55:24 <b>Newman's</b>	40:15 <b>nice</b> 39:18 50:25 <b>note</b> 14:21 <b>notice</b> 50:6,8 <b>nuisance</b> 13:16 <b>number</b> 50:11 50:12 51:1 <hr/> <b>O</b> <b>O</b> 2:1 3:1 <b>objective</b> 25:20 <b>occasion</b> 5:11 <b>occupation</b> 20:17 21:18,19 21:22,24 22:1 27:21 38:25 43:18 <b>occupations</b> 21:15 <b>occupy</b> 20:20 <b>occupying</b> 26:10 44:16 <b>occur</b> 13:4,18,19 55:2 <b>occurred</b> 6:19 <b>occurring</b> 56:9 <b>occurs</b> 25:4 <b>October</b> 1:9 <b>odd</b> 44:6 <b>office</b> 54:2 <b>Ohio</b> 45:5 <b>okay</b> 5:22 19:1 31:16 32:17 47:8 49:17 51:19 <b>old</b> 43:11 <b>once</b> 10:24 11:12 36:13,14 43:3 45:1,2 <b>ones</b> 5:18,25 6:7 6:11 <b>one-time</b> 10:12 10:14 21:10 <b>ongoing</b> 52:13 <b>open</b> 23:18 56:8 <b>opened</b> 47:10 <b>operable</b> 17:9	<b>operate</b> 36:5 <b>operated</b> 56:4 <b>operating</b> 28:12 29:14 30:1,1 41:3,12 49:7 <b>operation</b> 45:25 48:25 <b>operations</b> 47:24 <b>operators</b> 28:14 <b>opposite</b> 5:25 31:3 <b>oral</b> 1:11 2:2,5 3:7 24:23 <b>order</b> 17:10 51:15 <b>ordinary</b> 49:6 <b>ought</b> 38:13 <b>outright</b> 23:16 <b>outset</b> 16:21 <b>outside</b> 26:18 33:4 43:21 <b>outtakes</b> 48:19 <b>overflights</b> 8:20 <b>overflow</b> 4:7 18:7 31:5 <b>overland</b> 7:21 7:24 <b>overrule</b> 4:14 39:16 <b>overruled</b> 5:8 <b>owe</b> 23:10 <b>owned</b> 26:22 <b>owner</b> 36:14,16 41:4 <b>ownership</b> 41:24 <b>oxygen</b> 11:10 <hr/> <b>P</b> <b>P</b> 3:1 <b>PAGE</b> 2:2 <b>parallels</b> 33:19 <b>park</b> 21:17 <b>part</b> 11:24 13:2 13:18 18:6,18 22:17 28:2	37:8 40:11 45:18 51:1 52:13 <b>participated</b> 49:9 <b>participation</b> 36:9 49:8 <b>particular</b> 3:22 30:2 40:25 41:18 <b>particularly</b> 27:4 41:22 48:6,8 52:14 <b>paths</b> 20:7 <b>pay</b> 16:12 33:23 41:15,17 42:6 <b>paying</b> 16:14 <b>pays</b> 41:17 <b>people</b> 19:2 32:23 34:12 39:2 42:11,18 49:1 51:11 54:2 <b>percolate</b> 31:11 <b>percolating</b> 23:5 <b>perfect</b> 19:1 <b>period</b> 9:7 21:22 27:17 46:24 <b>periods</b> 8:18,24 <b>permanence</b> 38:22 <b>permanency</b> 8:12 51:5,5 <b>permanent</b> 3:14 3:16 4:7,15,20 4:21 5:22 11:18 12:8,9 18:13 20:17 25:6,16,22,24 26:16 27:18 30:15 32:15 34:22 35:18,23 36:21 37:5,13 37:15 38:23 40:16,17,20 43:20 45:1 46:17 53:7
---	--	--	---	--

18:14 35:17,20 43:6 45:2 49:17,18 <b>person's</b> 29:7,24 31:12 45:15,22 <b>Petitioner</b> 1:4 1:16 2:4,10 3:8 32:8 53:13 <b>petitioner's</b> 34:6 46:7 48:15 <b>Petty</b> 6:22 <b>Pewee</b> 6:22 <b>physical</b> 3:20 11:1 14:3 17:14 19:23 20:17 21:15,18 21:19,21 24:7 24:9 43:18 <b>physically</b> 6:9 <b>picking</b> 42:8 <b>picnic</b> 9:9,25 <b>picnics</b> 10:22 <b>piece</b> 26:2 44:23 <b>pipe</b> 29:22 45:14 45:15 47:3 <b>pipes</b> 45:22 <b>place</b> 13:20 20:3 39:13 47:20 48:6 <b>placed</b> 54:3 <b>plan</b> 17:25 28:2 52:20 55:15 <b>planning</b> 49:9 50:6 52:14 <b>plant</b> 9:8 41:9 44:1,9 <b>pleading</b> 54:5 <b>please</b> 3:10 25:1 54:4 <b>plow</b> 9:24 <b>point</b> 13:7 25:19 27:10 30:22 33:25 37:6 38:21 39:4,22 43:20,21 45:18 <b>pointed</b> 25:2 27:13 32:8	40:2 44:18 46:6 <b>points</b> 26:15 43:19 <b>policy</b> 13:24 16:7,10 54:18 <b>population</b> 49:13 <b>Portsmouth</b> 8:20,22 12:22 <b>position</b> 10:23 23:14,18 25:10 26:1 33:22 40:16 43:7 49:23 <b>possibly</b> 55:3,18 <b>potentially</b> 13:9 <b>practice</b> 16:19 <b>precedence</b> 36:18 39:25 <b>precedent</b> 4:4 <b>predictable</b> 20:1 21:5 <b>present</b> 37:17 <b>presenting</b> 38:10 <b>preserve</b> 4:1 <b>preserved</b> 37:22 <b>pretty</b> 27:7 <b>prevails</b> 4:12 <b>pre-dam</b> 56:1,3 <b>principles</b> 49:6 <b>prior</b> 5:10 30:24 <b>priority</b> 15:11 16:7 <b>private</b> 16:12 <b>probable</b> 12:16 53:19 <b>probably</b> 19:2 54:10 56:17 <b>problem</b> 7:11 13:1 19:6 36:11 46:10 49:4 50:23 <b>problematic</b> 27:4 <b>Procedure</b> 51:8	<b>process</b> 11:15 50:6,12 52:14 53:5,7 <b>project</b> 26:7,9 26:11 41:3 42:22 44:1,13 48:23,25 49:2 50:4 <b>projects</b> 28:22 40:5 <b>proof</b> 11:1 <b>property</b> 3:22 4:9 5:16 6:15 6:16 7:16 9:16 10:10,17 14:6 15:4,23 16:17 20:20,21 21:8 22:21 23:5,7,9 24:10 25:7 26:18,19 28:1 29:8 31:3 32:4 33:5 35:17 39:13 40:6 41:1,4 44:5 45:15,22 47:4 54:9,13 <b>proposal</b> 40:4 <b>proposition</b> 5:20 <b>protect</b> 27:15 41:8 <b>protected</b> 3:21 9:16 10:17 14:6 15:3 36:7 41:10 <b>protecting</b> 15:12 42:6 <b>protection</b> 42:11 55:9 <b>protested</b> 53:20 <b>prove</b> 12:23 55:11 <b>provide</b> 3:19 54:11 <b>public</b> 36:9 49:8 50:11 <b>pull</b> 29:6 <b>Pumpelly</b> 4:18	<b>purchase</b> 20:4 <b>purchases</b> 42:24 <b>purpose</b> 31:13 <b>purposes</b> 31:9 <b>put</b> 16:22,22 17:25 29:22 33:22 <b>puts</b> 18:19 28:24 <b>putting</b> 29:11 32:12 <hr/> <b>Q</b> <hr/> <b>question</b> 8:9 12:8 13:9,19 16:2 23:21 24:3 27:8,9 34:19 43:4,18 47:2 50:10 54:25 <b>questions</b> 26:3 <b>quite</b> 6:4 7:17 30:12 44:23 <b>quoting</b> 25:12 <hr/> <b>R</b> <hr/> <b>R</b> 3:1 <b>Railroad</b> 45:5 <b>rainfall</b> 56:9 <b>raised</b> 24:16 34:6 <b>range</b> 39:2 <b>ranger</b> 21:17 <b>rationale</b> 43:15 <b>reach</b> 50:25 <b>read</b> 6:3 11:18 11:19 <b>reading</b> 18:21 <b>reaffirmed</b> 25:3 43:16 <b>really</b> 43:10 <b>reason</b> 45:18 <b>reasons</b> 3:18 36:2 38:7 53:1 <b>REBUTTAL</b> 2:8 53:12 <b>recedes</b> 14:19 18:3	<b>reclaimed</b> 6:15 6:16 <b>reclamation</b> 6:20 <b>recognized</b> 39:23,24 <b>recognizes</b> 42:24 <b>recommenda...</b> 52:11 <b>recompense</b> 34:7 <b>record</b> 53:22 54:10 56:16 <b>recorded</b> 55:25 56:2 <b>recounts</b> 40:3 <b>recover</b> 33:1 55:12 <b>recurring</b> 8:17 35:17 <b>redwood</b> 21:1 <b>referring</b> 23:2 <b>refuge</b> 43:11 <b>regardless</b> 3:22 6:19 <b>regeneration</b> 24:18 <b>regular</b> 41:12 <b>regulation</b> 33:16 <b>regulations</b> 49:11 <b>regulatory</b> 19:24 33:11,13 33:17 <b>related</b> 50:1 <b>release</b> 28:25 29:1,4 32:19 41:7 48:23 52:21,24 <b>released</b> 15:22 49:3,5 <b>releases</b> 15:20 18:3 33:21 53:19 <b>releasing</b> 36:3 41:5 45:8,9
--	---	--	---	--



<b>relevant</b> 3:15	<b>result</b> 4:17	37:19 38:8	54:10	<b>sides</b> 54:2
<b>reliance</b> 40:11	10:16 21:6	42:19 47:1,8	<b>Scalia</b> 4:25 5:2,3	<b>significant</b>
<b>relied</b> 19:2	24:9 25:5	47:18 50:8	5:9 7:20,23 8:2	36:11 47:25
<b>relying</b> 11:20	26:13 31:22	53:8 56:20	9:2,18,24 10:4	<b>simple</b> 12:7
<b>remain</b> 19:22	<b>resulted</b> 8:16	<b>Rock</b> 1:15	21:14 22:2,12	13:13
<b>remainder</b>	27:18	<b>rocket</b> 43:12	23:1 26:20	<b>simply</b> 5:5
23:22	<b>resulting</b> 20:13	<b>rockets</b> 43:12	27:1 30:16	<b>sits</b> 11:4
<b>remaining</b> 53:11	39:13	<b>rooftop</b> 20:17	34:25 35:6,12	<b>situation</b> 14:1
<b>remand</b> 23:15	<b>results</b> 12:16	<b>roomful</b> 54:2	39:15,18 41:14	21:10 27:13
23:19 24:5,6	25:6 46:7	<b>roots</b> 11:10	41:21 42:4,12	29:10 31:1
24:19	<b>retroactive</b> 36:7	<b>route</b> 13:6	46:9 49:16,23	35:16 48:5,7
<b>renewed</b> 53:4	<b>revealed</b> 11:13	<b>row</b> 22:14	51:13,19	52:22 55:13
<b>reoccurring</b>	<b>reversal</b> 23:16	<b>rubric</b> 32:10	<b>scheme</b> 41:12	<b>situations</b> 13:10
36:21	<b>revetment</b> 17:5	<b>rule</b> 3:18 5:4	<b>se</b> 33:5	<b>six</b> 10:24 15:7
<b>repetition</b> 51:5	27:13,14 37:1	13:12,13,23	<b>second</b> 3:24	21:11
<b>report</b> 54:3	<b>revived</b> 40:20	14:1,3 18:24	<b>Section</b> 39:10	<b>slow</b> 36:11
<b>representatives</b>	<b>right</b> 6:1,4 7:24	19:3,5,8 24:7	<b>see</b> 5:24 12:19	<b>small</b> 20:18,19
50:20	9:21 14:6,7,7	25:14 33:5,8,8	22:7	<b>Smith</b> 33:7
<b>require</b> 40:8	16:14,23 17:2	38:21	<b>seen</b> 12:2	<b>smoke</b> 45:8
44:2	18:21,22,25	<b>ruling</b> 3:13	<b>seizure</b> 6:21	<b>solely</b> 3:15
<b>required</b> 51:9	27:8 29:23	<b>run</b> 44:3,4,6,11	<b>self</b> 52:12	<b>Solicitor</b> 1:17
<b>requirement</b>	30:8,9 31:14	<b>runs</b> 14:10 44:9	<b>self-actuating</b>	12:4
4:22 22:5	33:11 35:5		24:11	<b>somebody</b> 42:6
<b>requirements</b>	37:3,13 45:17	<b>S</b>	<b>self-limiting</b>	52:23
36:9 49:8	47:4 49:19	<b>S</b> 1:17 2:1,6 3:1	53:3	<b>somebody's</b>
<b>requires</b> 51:21	51:16	24:23	<b>send</b> 7:12 33:16	32:14 44:6
<b>reserve</b> 23:21	<b>rights</b> 9:17	<b>Sanguinetti</b> 4:4	<b>sending</b> 6:10	47:4,5
<b>reservoir</b> 26:7	10:10,17 14:6	4:14,25 5:1,4	<b>sense</b> 8:3 33:19	<b>someone's</b> 20:21
29:12 34:14,20	16:17 20:20	5:11,14 17:18	<b>separate</b> 17:14	<b>someplace</b> 16:22
34:23 35:2,8	21:8	54:16	21:4	<b>somewhat</b> 18:23
39:1 42:23	<b>Riparian</b> 41:24	<b>Sanguinetti's</b>	<b>series</b> 36:1,4	18:23 46:21
43:3 48:14	<b>rising</b> 14:25	11:24	38:5 43:9,24	<b>sorry</b> 14:22
<b>residence</b> 8:7	<b>risks</b> 41:25 42:5	<b>sat</b> 11:8	<b>serious</b> 28:23	41:18
<b>resolve</b> 23:19	42:7	<b>save</b> 51:15	<b>Service</b> 54:10	<b>sort</b> 32:8 38:24
<b>respect</b> 33:19	<b>river</b> 17:5 18:4	<b>saw</b> 31:25 32:3	<b>seven</b> 15:8 35:22	39:1 46:13
40:11	23:6 27:15	<b>saying</b> 5:5 10:5	35:25	<b>SOTOMAYOR</b>
<b>Respectfully</b>	28:15,23 29:7	10:6 11:1	<b>shift</b> 41:11	11:17 13:1
3:17	31:2,3,5 41:24	14:22 16:13	<b>shooting</b> 7:23,24	14:9,12 34:2,5
<b>Respondent</b>	50:3,4 51:21	26:21,21 27:2	<b>shortcut</b> 20:25	34:9,15,17
1:19 2:7 24:24	<b>rivers</b> 18:7	27:3 36:13	<b>shots</b> 8:21	36:10,20,23
<b>responsibility</b>	<b>ROBERTS</b> 3:3	48:4,16 51:4	<b>show</b> 9:16,21	50:24 51:4
4:6	14:15,21 24:21	<b>says</b> 15:18 16:21	10:7 17:7	54:24 55:14,18
<b>responsible</b>	25:9 27:6,23	25:13 26:16	54:18	56:1,7,12
13:17 40:4	28:5,16 29:3	28:6 29:4	<b>shown</b> 27:16	<b>sounds</b> 50:13
<b>responsibly</b>	29:15,20,23	31:20 39:11	<b>shows</b> 39:23	<b>southern</b> 18:6
49:15	30:4,7 31:8,16	45:7 48:22	40:10	<b>special</b> 5:4
<b>rest</b> 35:4	31:19 37:3,7	51:14 52:18,21	<b>side</b> 31:2,3,4,6	<b>specific</b> 8:24

<b>specifically</b> 29:18 33:3 51:10	<b>substantial</b> 9:16 10:9,16 14:5 14:18 20:14,16 20:18,22 21:8 22:4,5,6,11,18 23:7 24:9 54:22	<b>taken</b> 23:8 <b>takes</b> 15:19 44:4 55:9	32:19,22 <b>think</b> 6:7,8 8:12 12:5 15:6 18:13,13 21:3 23:13 25:18,20 26:4,9 27:1,9 28:4 29:9,11 29:13,17 30:4 30:12,22 31:15 32:5 33:2,5 36:17 37:8,20 37:24 38:16,23 39:17 40:10 41:2 42:4 44:18 45:3 48:10,14 49:20 49:24 52:25 54:6,23 56:12 56:15	<b>train</b> 45:8,21 <b>trampling</b> 20:6 <b>transmitting</b> 48:13 <b>treat</b> 21:15 <b>trees</b> 10:15,21 11:10,13 20:7 22:9 31:13,23 32:5 33:9 40:19 41:19 46:11,18,22 53:16 56:10
<b>Spokenbarger</b> 37:1	<b>substantially</b> 3:21 5:15 11:7	<b>takings</b> 3:25 5:1 5:8,10 11:1 17:14,15 19:23 33:3 39:16,25 43:17 52:3	6:17 37:8,20 37:24 38:16,23 39:17 40:10 41:2 42:4 44:18 45:3 48:10,14 49:20 49:24 52:25 54:6,23 56:12 56:15	<b>trespass</b> 5:21 6:12 8:10 13:16 19:6 20:8 44:25
<b>Sponenbarger</b> 15:17 30:23 37:1 43:16 54:16	<b>substitute</b> 19:20 19:21	<b>talked</b> 8:4 <b>talking</b> 28:11 34:13	54:6,23 56:12 56:15	<b>trespasses</b> 20:6
<b>spring</b> 18:2 35:1	<b>suffering</b> 45:20	<b>target</b> 40:17	<b>thinking</b> 18:13	<b>trespassing</b> 18:20
<b>square</b> 42:2,2	<b>suggest</b> 18:9,10 19:4	<b>targeted</b> 30:11	<b>thinks</b> 15:10	<b>trial</b> 47:9
<b>stagnated</b> 11:9	<b>suggestion</b> 30:11	<b>taxes</b> 41:17	<b>thought</b> 29:20 32:11 34:10 37:13 44:12 47:8	<b>tried</b> 5:24
<b>stand</b> 18:23	<b>suitable</b> 46:13	<b>tell</b> 12:23 13:25 18:12 24:4 34:17	<b>thousand</b> 42:2	<b>troubles</b> 22:3
<b>standard</b> 25:21	<b>summary</b> 4:17	<b>tells</b> 27:24	<b>three</b> 6:2 14:16 18:16 22:14	<b>trucks</b> 29:5
<b>state</b> 5:19	<b>summer</b> 11:8 52:22,23 55:3	<b>temporarily</b> 26:23 35:13	<b>tie</b> 36:3	<b>true</b> 45:25
<b>statement</b> 4:11 25:17	<b>summertime</b> 8:18 18:4 55:24	<b>temporary</b> 3:11 4:23 5:1,6,8,10 5:12,15,17,21 6:11,12 11:18 11:21 13:14,16 19:9 25:14 26:16 35:7,25 37:12,14 38:5 38:6,17 40:16 40:17 43:20,24 52:8,12 53:2	<b>timber</b> 9:3,4 11:3,12 54:4 56:6	<b>truth</b> 18:12
<b>States</b> 1:1,6,12 3:5,19 8:6,25 12:14,24 14:4 14:14 15:17,18 17:16,17 18:6 21:6 23:8 24:2 24:16 51:23 54:17 55:8,8 55:11,21 56:6	<b>summing</b> 26:14 27:11	<b>tempted</b> 18:25	<b>times</b> 10:24	<b>try</b> 50:22,25
<b>stop</b> 53:24 54:4	<b>superinduced</b> 9:22	<b>tension</b> 44:1	<b>time</b> 8:11,18,24 9:7 16:24 23:22 27:17 33:23 46:9,11 46:25 51:22	<b>trying</b> 12:4 17:5 20:25 48:15 50:17
<b>storage</b> 20:3 48:16,17	<b>super-induced</b> 55:21	<b>term</b> 11:21 32:4	<b>timber</b> 9:3,4 11:3,12 54:4 56:6	<b>turn</b> 21:12 40:24 52:1
<b>store</b> 15:23 53:23 54:13	<b>support</b> 5:20 6:8 6:11	<b>termed</b> 11:11	<b>today</b> 36:11	<b>turned</b> 4:16
<b>storms</b> 15:21 54:19	<b>suppose</b> 9:6,6 16:20 33:6 35:1 43:1,1	<b>test</b> 12:4 36:12 43:5	<b>tort</b> 44:19	<b>turning</b> 10:23
<b>strikes</b> 47:1	<b>supposed</b> 44:25	<b>Thank</b> 24:20,21 53:8,14 56:19 56:20	<b>torts</b> 17:14 21:4	<b>two</b> 3:18 14:2 22:13 26:15 27:10 34:9 43:19 52:5
<b>structure</b> 25:6 54:17	<b>Supreme</b> 1:1,12	<b>theory</b> 34:3 42:20	<b>totally</b> 34:2 44:24	<b>type</b> 10:8 55:24
<b>stuff</b> 7:12,13 19:3	<b>sure</b> 31:19,19 56:7	<b>thing</b> 6:10 7:9 12:18 15:18 33:15,24 35:18 44:6 47:19	<b>touched</b> 26:4	<b>typically</b> 29:12
<b>subject</b> 13:10 46:5	<b>suspect</b> 7:16	<b>things</b> 25:20		
<b>submissions</b> 52:5	<b>sustained</b> 8:24			
<b>submitted</b> 56:21 56:23	<hr/> <b>T</b> <hr/>			<hr/> <b>U</b> <hr/>
<b>subsequently</b> 11:16	<b>T</b> 2:1,1			<b>unaware</b> 47:14 47:16
	<b>take</b> 7:12 16:12 28:12,17 29:2 30:21 43:12 51:9			<b>uncertainties</b> 41:25
				<b>underflow</b> 23:4
				<b>understand</b>

10:19 19:12 26:21 <b>understanding</b> 25:17 54:7 <b>understood</b> 47:2 56:13 <b>unexpectedly</b> 44:24 <b>uniformly</b> 29:13 <b>uninhabitable</b> 44:13,24 <b>United</b> 1:1,6,12 3:5,19 8:6,24 12:14,24 14:4 14:14 15:17,18 17:16,17 18:6 21:6 23:8 24:1 24:16 51:23 54:17 55:8,8 55:11,21 56:5 <b>unjust</b> 4:2 <b>unnatural</b> 8:18 <b>unpredictably</b> 55:3 <b>unwilling</b> 39:7 <b>update</b> 51:22 <b>updated</b> 49:10 49:12 <b>upstream</b> 42:19 43:2 <b>urgent</b> 15:11 16:6 <b>use</b> 9:8,23 10:7 10:10 14:7 15:23 17:9 19:23 21:4 22:25 23:9 28:1,6 32:4 41:6 48:19 49:18 54:12 <b>users</b> 50:18 <b>uses</b> 49:13 <b>Usually</b> 21:9 <b>U.S</b> 54:9	<b>Valentine's</b> 53:25 <b>valuable</b> 9:5 20:20 22:8 54:4 56:6 <b>valuation</b> 46:17 47:2 <b>various</b> 51:10 <b>versus</b> 11:18 40:16,17 43:20 <b>Vicksburg</b> 27:16 <b>viewed</b> 37:14 <b>vote</b> 40:21	29:1,4 39:8,14 46:21 48:21,23 <b>way</b> 6:3 28:2 31:10 32:12 39:6 40:7 44:4 44:8,11 48:2 49:4 50:22 52:16 <b>weather</b> 41:25 <b>Wednesday</b> 1:9 <b>went</b> 7:8 8:11 40:7 45:21 46:22 47:4,20 <b>weren't</b> 40:20 48:18 <b>we'll</b> 3:3 46:21 <b>we're</b> 13:17 14:22 15:2 16:22 28:11 29:5,5,6,7,8 31:20,23 35:24 52:21,24 <b>we've</b> 5:25 16:21 29:4 <b>Wildlife</b> 54:10 <b>willing</b> 19:15 <b>winter</b> 18:2 <b>wires</b> 44:2 <b>wish</b> 23:23 <b>withdraw</b> 4:10 <b>wonderful</b> 41:15 <b>word</b> 22:5 <b>words</b> 5:3 <b>worked</b> 17:17 18:1 <b>working</b> 50:16 50:19 <b>worth</b> 31:13 54:4 <b>wouldn't</b> 22:12 44:13 46:11 <b>written</b> 6:25 <b>wrong</b> 34:3 40:15	<b>Y</b> <b>yards</b> 32:23 <b>year</b> 8:24 15:7 18:17,17 35:3 35:4 40:22,22 43:3 46:10 52:22,22,23 <b>years</b> 7:7 8:11 8:16,17 11:7 15:8,24 21:11 22:14,14 27:17 35:23 36:1 37:21 45:2,2 47:18 49:11 53:21 56:4	2 28:3,7 45:2,2 50:11 51:1,15 <b>200</b> 32:23,23,24 <b>2000</b> 11:6 54:3 <b>2001</b> 54:1 <b>2012</b> 1:9 <b>24</b> 2:7 <b>25</b> 8:11	<b>3</b> <b>3</b> 1:9 2:4 7:7 46:8 50:12 51:15	<b>4</b> <b>4</b> 44:23 46:8,8 <b>40</b> 56:4	<b>5</b> <b>5</b> 46:8 <b>50</b> 37:21 49:10 <b>53</b> 2:10	<b>6</b> <b>6</b> 8:16 11:7 27:17,18 47:18 <b>6,990-acre</b> 11:14	<b>7</b> <b>702(c)</b> 39:10	<b>8</b> <b>8</b> 8:16 11:6	<b>9</b> <b>95a</b> 47:15 <b>99a</b> 47:15
<b>V</b> <b>v</b> 1:5 3:5 15:17	<b>W</b> <b>walk</b> 33:10 <b>walking</b> 21:17 <b>want</b> 17:8 19:11 24:4,6 26:2 28:17 39:19 <b>wanting</b> 54:11 <b>wants</b> 28:17 48:6 <b>war</b> 6:3,21 <b>Washington</b> 1:8 1:18 <b>wasn't</b> 35:25 44:7 48:18 <b>water</b> 7:14 8:2 9:22 11:8,9 12:18,19,23 14:19 15:19,20 15:23 16:11,22 18:3 20:3 21:12 23:5 29:5,8,11 30:8 31:11 32:1,13 32:14,19 33:16 34:6 36:4,6 41:5 43:10 47:5,11,19 48:6,13,18,20 49:3 50:18 52:21,24 53:23 54:13 <b>waters</b> 28:25	<b>X</b> <b>x</b> 1:2,7	<b>Z</b> <b>zero</b> 6:1	<b>\$</b> <b>\$4</b> 54:3 <b>\$5</b> 31:12	<b>1</b> <b>1</b> 50:12 51:15 <b>10</b> 50:9,12 51:15 <b>10:54</b> 1:13 3:2 <b>100,000</b> 11:13 <b>11,000</b> 11:16 <b>11-597</b> 1:4 3:4 <b>11:55</b> 56:22 <b>110</b> 32:6 48:1 <b>150</b> 33:7 <b>1700</b> 23:7 <b>19</b> 47:23 <b>1904</b> 17:4 <b>1927</b> 39:5 <b>1928</b> 39:4,11 <b>1947</b> 6:14 <b>1950</b> 22:23 23:4 <b>1953</b> 17:25 <b>1993</b> 11:6 47:17 47:22 <b>1996</b> 47:23 <b>1998</b> 47:22 <b>1999</b> 11:11	<b>2</b>					