No. 99-859

In the Supreme Court of the United States

CENTRAL GREEN CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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Pursuant to Rule 15.8 of the Rules of the Court, the Solicitor General respectfully files this supplemental brief to bring to the Court's attention new matter.

In its reply brief, petitioner asserts that the United States has been "seriously disingenuous" (Pet. Reply 1, 5) in not properly acknowledging the procedural posture in which the case comes to this Court, and has made representations that are "false" (*id.* at 9). Petitioner is mistaken.

1. With respect to the procedural posture of the case, on page 2 of the brief in opposition we noted that "[t]he United States moved for judgment on the pleadings," which is exactly what the government did.

See C.A. R.E. 138.[*] Under Federal Rule of Civil Procedure 12(c), any party may move for judgment on the pleadings. On page 3 of our opposition, we note that "[t]he district court granted the government's motion for judgment on the pleadings."

Petitioner is mistaken for two reasons in asserting that in view of that procedural posture "the allegations of the complaint [that no flood waters were involved in causing the damage to petitioner's property] must be accepted as true." Pet. Reply 1. First, the complaint does not contain any such allegation. While petitioner asserts that the "Complaint alleges that the Madera Canal serves *only* irrigation purposes," *id.* at 2 (emphasis added), the Complaint in fact alleges that the Madera Canal "is used to convey irrigation water to various lands in the San Joaquin Valley" (¶ 7); it does not allege that the waters were not also flood waters, C.A. R.E. 2. Indeed, the allegations of the Complaint are wholly consistent with our view that the presence of the water in the canal served both flood control and irrigation purposes.

Second, the characterization of waters in this case as "flood waters" for purposes of the Flood Control Act of 1928, 33 U.S.C. 702c, is not a "fact" as to which the plaintiff's allegations must be taken as true for purposes of a Rule 12(c) motion. As our motion for judgment on the pleadings itself noted, "a court need not 'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" C.A. R.E. 143 (quoting *Western Mining Council* v. *Watt*, 643 F.2d 618, 624 (9th Cir.) (citations omitted), cert. denied,

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[*] References to C.A. R.E. are to Central Green's Excerpts of Record filed by petitioner in the court of appeals. For the convenience of the Court, we have lodged copies of it with the Clerk.

454 U.S. 1031 (1981)). Thus, even if the Complaint *had* alleged that the waters that caused the damage to petitioner's property were irrigation waters *and therefore not flood waters*, such an allegation would be just such a legal conclusion cast as a factual allegation. In any event, the district court expressly concluded that "[t]he parties do not dispute that one of the purposes of the Madera Canal is flood control." C.A. R.E. 124-125.

Moreover, there is no basis for petitioner's contention that the brief in opposition "fails to advise the Court that Petitioner repeatedly sought to present its evidence on this factual question in the lower courts, but Respondent successfully asserted that the allegations of the complaint should be accepted as true and the case dismissed as a matter of law." Pet. Reply 1. The district court filings in this case do not support petitioner's assertion of having "repeatedly sought to present its evidence." *Ibid.* See C.A. R.E. (collecting court submissions). In the district court, petitioner never offered such evidence but only argued that the United States had the burden to prove that the waters were "flood waters" and that the government had failed to carry its burden. See C.A. R.E. 93. Petitioner has not identified any evidence that it attempted to present but was precluded from presenting. Our position then and now was that the Complaint should be dismissed assuming its allegations were true.

2. The government's longstanding position has been that waters carried in a multi-purpose project (of which flood control is one purpose) do not cause the government to lose immunity under the Flood Control Act simply because the principal purpose of a part of the multi-purpose project may be something (like irrigation) other than flood control. As for the Central Valley Project (CVP), of which the Madera Canal and

Friant Dam are a part, the law has been well-settled in the Ninth Circuit that the CVP "flood control function and the relationship of that function to the project as a whole have been described." Br. in Opp. 7 (citing cases). The government's reliance on those cases in the district court and court of appeals is completely proper advocacy. The fact that the government explained to the district court in this case that it need not conduct fact-finding on whether the waters that caused property damage to petitioner's property were "flood waters" simply reflected that well-established case law.

Indeed, contrary to petitioner's assertion (Pet. Reply 2) that the United States is making an argument in this Court inconsistent with its position in the district court and court of appeals, the government's motion for judgment on the pleadings makes precisely the same argument. That motion states: "Accepting plaintiff's allegations as true, this Court should hold plaintiff's claims barred by section 702c because the Madera Canal is part of a federal flood control project, plaintiff's alleged injury was not wholly unrelated to the [Central Valley] Project's operation, and an alleged cause of the injury was floods or flood waters." C.A. R.E. 144-145. The government's motion goes on to aver that "the Madera Canal's conceded status as part of the Central Valley Project establishes the requisite flood control nexus." *Id.* at 145. Our motion for judgment on the pleadings cites the uniform line of cases that have taken judicial notice of the fact that the CVP "has a federal flood control purpose" (*id.* at 146) and thus that property damage caused by flooding from CVP components qualifies for immunity under the Flood Control Act. *Ibid.*

Our brief in opposition in this Court is consistent with that view, and we dispute the contention in the

petition reply (at 5) that we have been in any way "disingenuous." Because the settled understanding of the Ninth Circuit as to the flood control functions of the CVP has no controlling weight in this Court, we recited Congress's purpose in establishing the CVP, with citations to the Department of the Interior report, to support our position that the "irrigation waters" in the Madera Canal are simply released "flood waters" made available from time to time by discharges from the Friant Dam. "The inherent nexus between flood control and damage caused by waters escaping from the integrated multi-purpose CVP" (Br. in Opp. 8) is not a "newfound factual assertion" (Pet. Reply 5), but rather our longstanding legal position.

In our view, the fact that the Madera Canal is principally used for irrigation does not change the analysis under the Flood Control Act. The release of flood waters from the Friant Dam in part contributes to making irrigation from the Madera Canal possible. Such releases do not irrevocably transform those waters into something that would deny the government immunity under the Flood Control Act. Contrary to petitioner's assertion (Pet. Reply 5-6 & n.1), none of the Supreme Court cases cited holds that irrigation is the *only* purpose of the Madera Irrigation District. See *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950); *City of Fresno* v. *California*, 372 U.S. 627, 630 (1963); *Dugan* v. *Rank*, 372 U.S. 609, 613 (1963).

3. The petition reply (at 7 n.2) asserts that we raise a new argument in the brief in opposition to defend the judgment below—that "immunity applies to *all* waters 'that [flood control] projects cannot control' "—and that the government is not believed ever before to have taken that position. Pet. Reply 7 n.2. Again petitioner is mistaken. First, the government's briefing for judg-

ment on the pleadings made the very same argument. See C.A. R.E. 76 (arguing, in the alternative, that "the leaking canal waters are 'waters that such projects cannot control' under *James*"). Second, contrary to petitioner's statement that this argument has not been raised "in any other case so far as we are aware" (Pet. Reply 7 n.2), the record excerpts filed by petitioner in the court of appeals disprove the assertion it is now making. The appendix to the United States' motion for judgment on the pleadings *in this case* contains an order in an analogous case (*Johnston* v. *United States*, No. CIV F 96-5484 (E.D. Cal. Dec. 31, 1996)), in which the district court had accepted the very same argument. See C.A. R.E. 157 ("The record demonstrates that the damage to Plaintiff's lands was caused by waters which could not be controlled by the ponding basin adjacent to the San Luis Canal.").

4. The petition reply (at 8) is also mistaken in asserting that we have changed positions from the argument we made in successfully opposing certiorari in *East Columbia Basin Irrigation District* v. *United States*, 522 U.S. 948 (1997) (No. 96-2054). The only material difference between the petition in that case and the one in this case is that petitioner's counsel in *East Columbia Basin*—a distinguished law professor at Emory University—did not contend (as does petitioner in this case) that the result would have come out differently in the other circuits asserted as conflicting in the *Central Green* petition. As we noted in *East Columbia Basin*, petitioner there did not "argue that [the] case would have been decided differently under any other circuit's approach." 96-2054 Br. in Opp. at 10. The apparent difference in views among the petitioners in *East Columbia Basin* and in this case does not support the conclusion that the *government* has

changed its position. Had petitioner in *East Columbia Basin* argued that the cases invoked for an alleged conflict in fact did conflict, we would have taken the position expressed in our brief in opposition in this case, that "no court of appeals has disagreed with the holding of the court below: that the federal government is immune from suit for property damages caused when flood waters escape from a multi-purpose project with flood-control as one of its purposes." Br. in Opp. at 4. Furthermore, petitioner offers no support for the assertion in its reply brief (at 9) that "at the time certiorari was denied in *East Columbia*, there was some prospect that Congress would resolve the circuit conflict as suggested by Justice Stevens, *see Hierche* v. *United States*, 503 U.S. 923 (1992)." This Court denied certiorari in *East Columbia* only slightly over two years ago (and five years after *Hiersche*), and there has been no intervening legal development to warrant a different outcome here.

We take very seriously the statements in petitioner's reply that representations made by the United States are "false" (Pet. Reply 9) and "seriously disingenuous" (*id.* at 1, 5). It appears that petitioner has been led by disagreement with us on a question of law to the mistaken view that we have misrepresented and failed to disclose facts to the Court. The United States has argued, and the district court and court of appeals have agreed, that even if irrigation is the principal purpose of the Madera Canal, its waters have the relationship to flood control or flood waters required by the Flood Control Act, because flood waters are held by the Friant Dam until discharged into the Madera Canal, the discharge is at times necessary for flood control purposes, and the discharge enables the irrigation function of the canal to proceed. Petitioner apparently disagrees with

that view of the statutory term "flood waters," contending that if waters serve an irrigation function they are by virtue of that fact not flood waters. That difference of opinion should not be transformed into a charge of misrepresentation or disingenuousness.

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For the foregoing reasons, and those stated in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MARCH 2000