No. 05-1050

In the Supreme Court of the United States

DON ROGER NORMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners suffered a taking of property when the United States Army Corps of Engineers (Corps) granted their application for a permit to fill wetlands on their land, contingent on petitioners' agreement to create new wetlands and to preserve new and remaining wetlands through deed restrictions or a long-term funding mechanism.

2. Whether petitioners suffered an "illegal exaction," within the meaning of Tucker Act jurisprudence, resulting from the Corps' alleged violation of an appropriations law governing the expenditure of funds for fiscal year 1992.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-26A) is reported at 429 F.3d 1081. The opinions of the Court of Federal Claims (Pet. App. 27A-154A, 155A-189A) are reported at 63 Fed. Cl. 231 and 56 Fed. Cl. 255.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2005. The petition for a writ of certiorari was filed on February 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91

Stat. 1566, prohibits the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers (Corps), to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (d). The term "the waters of the United States" is defined by regulation to include wetlands adjacent to other covered waters. See 33 C.F.R. 328.3(a)(7).

2. Petitioners are real-estate developers who acquired approximately 2280 acres of land in Reno, Nevada, consisting of the former "Double Diamond Ranch" and adjacent properties. Petitioners first acquired a 470-acre portion of the former ranch property that was zoned for commercial, industrial, and retail development. In September 1988, before petitioners purchased that property, the Corps issued a delineation stating that the tract contained 17 acres of wetlands subject to federal permitting requirements. Petitioners purchased the 470-acre tract in reliance on that delineation. Pet. App. 3A-5A, 31A-33A.

After a public controversy arose, the Corps reexamined the 1988 delineation and concluded that it was scientifically unsound. The Corps revoked the 1988 delineation and conducted a new delineation under the 1989 version of the agency's Wetlands Delineation Manual. The new delineation, which was completed in 1991, identified approximately 87 acres of wetlands on petitioners' 470-acre parcel, and an additional 143 acres of wetlands

on the remainder of the former ranch property. Pet. App. 4A-5A; C.A. App. A3000-A3004.

On August 17, 1991, the President signed into law the Energy and Water Development Appropriations Act, 1992 (1992 Appropriations Act), Pub. L. No. 102-104, 105 Stat. 510. *Inter alia*, the 1992 Appropriations Act prohibited the use of fiscal year 1992 funds to "identify or delineate" any wetlands as "water[s] of the United States" under the Corps' 1989 guidance manual or "any subsequent manual not adopted in accordance with the requirements for notice and public comment * * * of the Administrative Procedure Act." See Tit. I, 105 Stat. at 518. The statute further provided, however, that the Corps could complete any "ongoing enforcement action[] [or] permit application" regarding wetlands delineated under the 1989 manual if the affected landowner elected to continue on the basis of such a delineation (in lieu of a new delineation), or if the Corps determined "after investigation and consultation with other appropriate parties, including the landowner or permit applicant, that the delineation would be substantially the same under either the 1987 or the 1989 Manual." *Ibid.*

The Corps informed petitioners by letter of the terms of the 1992 Appropriations Act. C.A. App. A4929-A4230. The letter stated the Corps' preliminary determination that the difference between the 1988 and 1991 delineations of the Double Diamond Ranch was not based on any difference between the Corps' 1987 and 1989 manuals, and that a new delineation of the relevant property under the 1987 manual would be substantially the same as the 1991 delineation. *Id.* at A4929. The Corps informed petitioners, however, that they had the right to seek a new delineation under the 1987 manual. *Id.* at A4929-A4930. The Corps explained that any such

request "should specifically identify where use of the 1987 Manual would result in substantial differences when compared to using the 1989 Manual." *Id.* at A4930. Petitioners informed the Corps that they would not seek a new delineation, stating that "a technically competent wetland delineation of the [property] completed pursuant to either manual should result in substantially similar results." *Id.* at A4934.

In 1994, petitioners purchased the remainder of the former Double Diamond Ranch (which was zoned for residential development) and a few adjacent smaller properties. In 1998, petitioners filed a Section 404 permit application, seeking permission to fill wetlands throughout a 2280-acre parcel consisting of the former Double Diamond Ranch and their adjacent purchases. The Corps subsequently granted a permit allowing petitioners to fill approximately 60 acres of wetlands, contingent on their agreement to create or restore approximately 195 acres as mitigation.[1] Petitioners were also required to establish a Corps-approved funding mechanism to ensure long-term protection of the mitigation wetlands. To comply with that permit condition, petitioners chose to transfer title in 220.85 acres to the South Meadows Association, a newly-created non-profit association initially controlled by petitioners. Pet. App. 5A-7A, 40A, 43A-44A.[2]

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[1] More specifically, petitioners were required under the permit to "[c]reate 60.24 acres of wetlands"; "[c]reate 1.32 acres of waters of the United States"; "[p]reserve and maintain 17.16 acres of existing wetlands"; "[r]estore 115.7 acres of existing wetlands"; and "[c]onstruct 1.42 acres of other waters of the United States as compensatory mitigation." Pet. App. 43A-44A.

[2] The permit itself required petitioners to preserve 195.84 acres of wetlands (including newly-created wetlands) and other waters of the

3. Petitioners filed suit in the Court of Federal Claims (CFC), alleging that the conditions imposed by their Section 404 permit had effected a taking of the 220.85 acres that were transferred to the South Meadows Association. Petitioners further contended that their property had been unlawfully exacted in violation of the 1992 Appropriations Act.[3] The CFC rejected petitioners' claims and entered judgment for the government. Pet. App. 27A-154A, 155A-194A.

a. With respect to petitioners' claim of an illegal exaction, the CFC granted the government's motion for summary judgment. Pet. App. 175A-181A. The court held that, even if petitioners could show that appropriated funds for fiscal year 1992 had unlawfully been spent on a delineation conducted pursuant to the 1989 manual, petitioners had failed to show a sufficient causal nexus between that violation of law and their asserted injuries. *Id.* at 178A-181A.

United States. C.A. App. A4945. When recording deed restrictions to implement that permit condition, petitioners set aside additional upland areas (for a total of 220.85 acres) on the theory that the additional areas were required to provide surface connectivity among wetlands. *Id.* at A1622-A1623, A1629-A1631.

[3] With respect to their claim of an illegal exaction, petitioners' complaint alleged two distinct categories of harm. First, petitioners alleged that, "[b]y reason of the 1999 permit requirement, which is predicated on the 1991 redelineation * * *, in violation of [the 1992 Appropriations Act], [petitioners] were required to dedicate for public use in perpetuity 193.11 acres of [petitioners'] land." C.A. App. A193. Second, petitioners alleged that, "[a]s a proximate result of" the government's conduct, petitioners had "incurred substantial expenses, including * * * (a) nearly $2 million in fees paid to scientists * * * and other professionals whose services were required to assist the Corps in its wetland delineation; and (b) approximately $1 million for construction of mitigation projects required by the Section 404 permit." *Ibid.*

b. The CFC then conducted a trial on petitioners' takings claim and ultimately ruled in favor of the government. Pet. App. 27A-28A. The court held that petitioners could not establish a physical taking of the 220.85 acres that had been transferred to the South Meadows Association because (i) the permit did not require petitioners to transfer title or to relinquish their power to exclude others from the land, see *id.* at 56A-61A; (ii) the government itself had neither occupied the property nor authorized others to do so, see *id.* at 61A-65A; and (iii) a reasonable nexus existed between petitioners' proposal to fill some wetlands and the permit requirement that other wetlands be created and preserved, see *id.* at 65A-71A. The court also held that petitioners could not establish a "categorical" taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Pet. App. 71A-91A. The court explained that the 220.85 acres that were alleged to have been taken were part of a 2280-acre development plan, see, *e.g.*, *id.* at 84A, and that even the 220.85 acres retained economic value.[4]

Finally, the CFC reviewed the record evidence at length and held that the permit conditions did not effect a regulatory taking under the multi-factor analysis described in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). Pet. App. 91A-154A. The CFC noted that the permit allowed petitioners to fill all but 4.07 acres of the approximately 70 acres of wetlands on the original 470-acre tract that were

[4] With respect to the latter point, the CFC stated: "The evidence reflects that these 220.85 acres continue to serve as part of [petitioners'] flood control and flood detention facilities with respect to the 2280-acre Development, and have been incorporated into open space requirements, parks, and biking paths." Pet. App. 85A.

redelineated in 1991 after petitioners had purchased the land. *Id.* at 105A-107A. The CFC further observed that petitioners had acquired 1800 additional acres in 1994, with knowledge of the 1991 delineation, see *id.* at 107A-109A, and that the newly-created wetlands required by the permit were situated on land that petitioners had designated for storm drainage and could not develop in any event, see *id.* at 109A-111A. In light of the minimal interference with investment-backed expectations and minimal economic impact on the development value of the parcel as a whole, the CFC determined that no compensable taking had occurred. *Id.* at 153A-154A.

4. The court of appeals affirmed. Pet. App. 1A-26A.

a. The court of appeals observed that petitioners' takings claims depended upon the premise that the terms of their Section 404 permit resulted directly from the 1991 delineation of wetlands on the original 470-acre tract. See Pet. App. 9A-10A. The court rejected that premise, noting that, at the time of the 1991 delineation, petitioners did not yet own most of the 220.85 acres that were ultimately conveyed to the South Meadows Association. *Id.* at 10A. The court concluded that "[t]he causal relationship between the revocation of the 1988 Delineation and [petitioners'] alleged loss is simply too attenuated to support the weight [petitioners] place upon it." *Ibid.*

b. The court of appeals rejected petitioners' contention that the 1999 permit had effected a physical taking of the 220.85 acres that were reserved for mitigation of wetlands losses. Pet. App. 10A-14A. The court explained that the transfer of title was not required by the permit, but was simply one among many available methods of ensuring that adequate funds would be available to preserve the wetland areas. *Id.* at 11A. The court

further observed that petitioners had identified no basis for concluding that the permit would result in a physical intrusion on the property by either the government or the public. *Id.* at 12A. The court additionally concluded that, even if the relevant permit condition were viewed as a physical invasion, the permit did not effect a compensable taking because the requirement that certain wetlands be created and preserved was directly related to petitioners' plan to dredge and fill other wetlands. *Id.* at 13A-14A.

c. The court of appeals held that petitioners could not establish a "categorical" regulatory taking because the 1999 permit did not deprive the 2280-acre parcel of all beneficial use. Pet. App. 14A-16A. The court observed that petitioners "themselves regarded the 2280-acre parcel as a single economic unit," *id.* at 15A, as evidenced by the fact that petitioners' "own permit application related to the entire 2280-acre parcel, and not to any subdivision thereof," *id.* at 15A n.4. The court noted as well that petitioners had waived any challenge to the CFC's parcel-as-a-whole analysis by failing to present it in their opening brief on appeal, and that even in their reply brief petitioners had "ma[d]e no effort to provide a sustained and coherent argument for a different parcel as a whole." *Id.* at 16A n.5.

d. The court of appeals held that petitioners could not establish a regulatory taking under *Penn Central* analysis. Pet. App. 16A-21A. With respect to petitioners' "reasonable investment-backed expectations" in particular, the court relied on the CFC's finding that, "of the 220.85 acres set aside for mitigation, only 4.07 acres constituted property that [petitioners] intended and reasonably expected to be able to develop." *Id.* at 19A-20A. The remainder of those 220.85 acres, the court

explained, "either had been designated as wetlands in the original 1988 Delineation (of which [petitioners] were fully aware when they purchased the 470-acre parcel), or was outside the 470-acre parcel (and thus was purchased by [petitioners] only after it had been designated as wetlands in 1991), or was never intended for development (because it was intended to be used for storm run-off and flood control)." *Id.* at 19A.

e. The court of appeals also rejected petitioners' claim of an "illegal exaction." Pet. App. 21A-26A. The court noted that, to the extent the alleged "exaction" was simply an uncompensated taking, petitioners' claim had been considered and rejected on the merits. *Id.* at 22A. The court stated as well that the asserted causal nexus between the 1991 delineation and the conditions ultimately imposed in the 1999 permit was too attenuated to support petitioners' claim. *Id.* at 23A-25A. The court further concluded that the 1992 Appropriations Act "does not, by its terms or by necessary implication, provide a cause of action with a monetary remedy for its violation." *Id.* at 26A.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 10-21) that the court of appeals' decision in this case is inconsistent with this Court's rulings in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Petitioners' reliance on *Nollan* and *Dolan* is misplaced.

a. In both *Nollan* and *Dolan*, land-use agencies issued development permits that were conditioned upon

the landowners' agreement to allow members of the public a permanent right of access to portions of the relevant tracts. In *Nollan*, the challenged permit condition required coastal landowners to dedicate an easement that would allow the public to use the landowners' property to gain access to a public beach. See *Nollan*, 483 U.S. at 828. The condition at issue in *Dolan* required an owner of commercial property to dedicate land for "greenway," which included a pedestrian and bicycle path. See *Dolan*, 512 U.S. at 379-380.

In each of those cases, "the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Lingle* v. *Chevron USA, Inc.*, 125 S. Ct. 2074, 2086 (2005); see *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384. The disputed question in each case "was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." *Lingle*, 125 S. Ct. at 2086. The Court in *Nollan* held that, if the government could deny a landowner's permit application altogether without effecting a compensable taking, it may condition a permit on the grant of a public easement if the easement "serves the same legitimate police-power purpose as a refusal to issue the permit." 483 U.S. at 836; see *id.* at 836-837. In *Dolan*, the Court clarified the applicable standard as a requirement of "rough proportionality": a land-use agency may condition a development permit on dedication of a public right-of-way if the agency makes an "individualized determination that the required dedication is related both in nature and extent to

the impact of the proposed development." *Dolan*, 512 U.S. at 391.

b. As the court of appeals correctly held (Pet. App. 10A-12A), the analytic framework set forth in *Nollan* and *Dolan* is inapplicable to this case. Although the 1999 permit required petitioners to record use restrictions on the mitigation wetlands, the permit did not require petitioners to allow their property to be occupied by either the government or the public. Rather, the permit simply required petitioners to establish a funding mechanism that would ensure the long-term preservation of the mitigation wetlands. Petitioners could have satisfied that requirement through measures (*e.g.*, the establishment of an endowment trust, see C.A. App. A2060-A2062) that did not involve a transfer of title to a third party. See Pet. App. 11A.[5] The South Meadows

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[5] The court of appeals explained:

> Neither the 1999 Permit nor the Deed of Restrictions contained any requirement that title to the affected acreage be transferred; testimony offered at trial indicated that the funding mechanism requirement may be satisfied by several methods, and that although conveyance of title to a conservation group or nonprofit was one such method, the Corps did not require it.

Pet. App. 11A. Later in its opinion, the court stated: "To the extent that [petitioners'] claim of loss of possession is predicated on the transfer of title, we have already concluded that that transfer was voluntary and therefore not a proper basis on which to premise a takings claim." *Id.* at 12A. Contrary to petitioners' contention (Pet. 20), the court of appeals' characterization of the transfer of title as "voluntary" did not rest on the fact that petitioners could have avoided the transfer "by simply foregoing use of the 470-acre parcel of land." Rather, the court's use of the word "voluntary" referred to the fact, discussed earlier in the court's opinion, that petitioners could have complied with the mitigation condition through measures other than a transfer of title. See Pet. App. 11A ("[T]he record is clear that the title

Association, moreover, was established as an entity to be controlled by petitioners and by their successors in title to the relevant land. See C.A. App. A4822; Pet. App. 60A. Thus, neither the permit requirement itself nor the specific means of compliance chosen by petitioners entailed a physical occupation of the land by independent third parties or deprived petitioners of their right to exclude others from the property.

Because the challenged permit condition in this case did not require a physical occupation of petitioners' land, it does not trigger the concerns addressed in *Nollan* and *Dolan*. This Court has made clear that, "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle*, 125 S. Ct. at 2081; see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The nexus requirement announced in *Nollan* and refined in *Dolan* serves to prevent the government from circumventing that rule by using permitting conditions to effect a permanent physical occupation of land without compensating the owner. See *Nollan*, 483 U.S. at 837. Where (as here) government-imposed conditions on the right to develop property do not involve a permanent physical occupation of the land, any claim for just compensation is governed by the regulatory-takings principles set forth in *Lucas* and *Penn Central*, not by the rules announced in *Nollan* and *Dolan*.

c. The court of appeals was also correct in concluding that, even if the constitutional standard announced in *Nollan* and *Dolan* were applicable here, that standard

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transfer was voluntary, and not a condition required under the 1999 Permit.").

was satisfied because an "appropriate nexus" exists between the mitigation requirement imposed by the 1999 permit and the loss of wetlands that petitioners' proposed development activities would entail. See Pet. App. 14A. Petitioners appear to acknowledge (see Pet. 12) that, if the 1991 wetlands delineation is taken as correct, the 1999 permit's mitigation requirement is roughly proportional to the wetland impacts of their proposed development. And while petitioners assert (*ibid.*) that the 1988 delineation provides the "proper benchmark" for takings analysis, they do not explicitly contest the Corps' considered determination that the 1991 delineation more accurately identified the wetlands on petitioners' property.[6] Rather, petitioners appear to contend that the 1988 delineation must be treated as correct because petitioners relied upon it in making their initial 470-acre purchase.

That argument lacks merit. Contrary to petitioners' contention (Pet. 12), the court of appeals did not "act[] as though the 1988 delineation was never issued." Rather, in its discussion of petitioners' *Penn Central* claim, the court of appeals noted with apparent approval that the CFC had "measure[d] [petitioners'] expectations with respect to the 470 acres as of the date they purchased that land, and found that [petitioners] had reasonable investment-backed expectations in a few of those acres." Pet. App. 18A. Based on careful analysis of the relevant evidence and the CFC's opinion, however, the court of appeals upheld the CFC's rejection of petitioners' *Penn Central* claim (see *id.* at 16A-21A), and

[6] Because petitioners have never challenged the 1991 delineation either administratively or in court, that delineation must be presumed correct. See *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893, 905 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987))

petitioners do not challenge that holding in this Court. Unlike the multi-factor analysis described in *Penn Central*, the legal tests announced in *Nollan* and *Dolan* do not make reference to the presence or absence of "reasonable investment-backed expectations" on the part of the landowner. There is consequently no sound basis for a constitutional rule requiring the responsible agency and reviewing court, in determining whether the burdens imposed by a permit exaction are roughly proportional to the impacts of proposed development, to *decline* to use the best and most current scientific information available.[7]

2. Petitioners contend (Pet. 21-23) that the court of appeals erred in treating the 2280-acre site of petition-

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[7] In rejecting petitioners' claim under *Penn Central*, the court of appeals relied in part on the fact that petitioners had acquired the large majority of the 2280-acre parcel after the issuance of the 1991 delineation. See Pet. App. 18A-19A. Although petitioners do not challenge the court's ultimate disposition of their *Penn Central* claim, they contend, relying on *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 629 (2001), that "it should not have mattered that Petitioners purchased much of [the] property they sought to develop * * * after 1991." Pet. 16. Petitioners' reliance on *Palazzolo* is misplaced. Although *Palazzolo* makes clear that one who purchases land with notice of pre-existing limitations on its use is not *wholly foreclosed* from asserting a takings claim, see 533 U.S. at 626-628, the Court did not suggest that the understandings in effect at the time of purchase are *irrelevant* to the takings inquiry, see *id.* at 628-629; *id.* at 632-633 (O'Connor, J., concurring). Indeed, petitioners' own takings claim rests almost entirely on the fact that petitioners bought a 470-acre tract during the narrow window of time between the 1988 delineation and its replacement by a corrected delineation in 1991. If petitioners' initial reliance on the inaccurate 1988 delineation can properly be treated as a factor supporting their takings claim, the fact that petitioners' later (and much larger) purchases were made with notice of the more accurate 1991 delineation cannot be dismissed as irrelevant.

ers' proposed development project as the "relevant parcel" for purposes of regulatory-takings analysis. That claim lacks merit and does not warrant this Court's review.

a. This Court has repeatedly held that regulatory-takings analysis must consider the effect of land-use regulation on the relevant "parcel as a whole." See, *e.g.*, *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330-331 (2002); *Penn Central*, 438 U.S. at 130-131. In the present case, petitioners sought a permit for wetlands impacts in relation to a planned 2280-acre development. The Corps granted the 1999 permit subject to conditions designed to mitigate wetlands impacts from the entire project.[8] Before the issuance of the 1999 permit, the acreage ultimately designated for mitigation wetlands did not exist as a distinct parcel or combination of parcels on any plat map, deed, or planning document. Under this Court's settled precedents, the impacts of the regulatory restrictions in these circumstances are properly evaluated by reference to the property as a whole rather than to the specific portions of the property to which the use restrictions pertain.

b. Even if this Court's review were otherwise warranted to clarify the applicable standards in this area,

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[8] See Pet. App. 15A n.4 (court of appeals observes that petitioners' "own permit application related to the entire 2280-acre parcel, and not to any subdivision thereof"); *id.* at 84A (CFC explains that "[t]o parse out the 220.85 acres of mitigation and preservation wetlands is to ignore the fact that the 1999 Permit was issued with respect to the entire 2280-acre area"); *Forest Props. Inc.* v. *United States*, 177 F.3d 1360, 1365 (Fed. Cir.) (If a "developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel."), cert. denied, 528 U.S. 951 (1999).

the instant case would be an unsuitable vehicle for consideration of the "relevant parcel" issue. As the court of appeals explained, petitioners' challenge to the CFC's "parcel as a whole" analysis was limited to "a few cursory sentences" in petitioners' Federal Circuit reply brief, and petitioners "ma[d]e no effort to provide a sustained and coherent argument for a different parcel as a whole." Pet. App. 16A n.5. Indeed, even in this Court, petitioners identify no sensible alternative to the conclusion of the courts below that the entire 2280-acre tract for which petitioners requested a Section 404 permit was the "relevant parcel" for purposes of takings analysis.[9] Because the "relevant parcel" issue was not meaningfully controverted in the court of appeals, and because the petition for a writ of certiorari does not explain how petitioners believe the analysis ought to have been conducted, this Court's review is not warranted.

3. Petitioners contend that their "land was taken from them in violation of" the 1992 Appropriations Act and that the court of appeals erred in declining to exercise jurisdiction over that claim. Pet. 27; see Pet. 24-28. As petitioners explain (Pet. 24), non-contractual claims brought under the Tucker Act (28 U.S.C. 1491) gener-

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[9] Petitioners obliquely suggest (Pet. 22) that the "relevant parcel" might be the 4.07 acres that petitioners had a reasonable expectation of developing based on the 1988 delineation but that were ultimately designated for mitigation wetlands under the 1999 permit. See Pet. App. 19A-20A; pp. 6-7, *supra*. Treatment of those 4.07 acres as the "relevant parcel" would be an extreme form of the approach that this Court has repeatedly disapproved. See, *e.g.*, *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (explaining the Court's holding in *Penn Central* that "a claimant's property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable").

ally fall into two classes: (1) claims asserting the right to the return of money paid over to the Government as the result of a mistake or illegal exaction, and (2) claims asserting the right to money damages under a statutory or constitutional provision that mandates a damages remedy. See, *e.g.*, *Ontario Power Generation, Inc.* v. *United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004). Petitioners contend (Pet. 25) that "[t]his case involves the first category of claims"—*i.e.*, a claim of an "illegal exaction." Petitioners' illegal-exaction claim lacks merit and does not warrant this Court's review.

a. Even assuming that a coerced dedication of property in violation of the principles announced in *Nollan* and *Dolan* could properly be characterized as an "illegal exaction" as that term has been understood in Tucker act jurisprudence, the courts below did not decline to exercise jurisdiction over petitioners' claim that a taking of that sort had occurred. Rather, the CFC and the court of appeals considered and rejected petitioners' *Nollan/Dolan* claim on the merits. That aspect of the court of appeals' analysis is correct for the reasons stated above. See pp. 9-14, *supra*. Insofar as petitioners' assertion that their land was "taken from them" (Pet. 27) is intended to invoke the *Nollan/Dolan* standards, characterizing the alleged coerced dedication as an "illegal exaction" adds nothing to petitioners' constitutional claim. See Pet. App. 22A.

b. Petitioners appear to argue that, even if the mitigation conditions imposed in the 1999 permit did not effect a taking under applicable *constitutional* standards, those conditions were nevertheless unlawful because they were ultimately traceable to a breach of the 1992 Appropriations Act. As the courts below correctly held (see Pet. App. 10A, 23A-26A, 179A-180A), that

claim fails because petitioners cannot establish the requisite causal nexus between any violation of the 1992 Appropriations Act and the permit conditions that the Corps imposed under the CWA.

Nearly a year before the 1992 Appropriations Act was enacted, the Corps revoked the 1988 delineation and informed petitioners that a new delineation was necessary. See Pet. App. 37A. The Corps collected data from the ranch property in April 1991 and then prepared a new delineation using the 1989 manual. See *ibid.* Nothing in the 1992 Appropriations Act suggested that the Corps should reinstate the 1988 delineation that the agency had previously determined to be inaccurate. Rather, the only issue created by the 1992 Appropriations Act was whether the Corps could lawfully finalize the delineation prepared under the 1989 manual, or whether it was instead required to conduct a new delineation under the 1987 manual (or another manual prepared after public notice and comment).

Even if petitioners could demonstrate that the Corps violated the 1992 Appropriations Act by finalizing the delineation prepared under the 1989 manual, they could not show that the violation affected the terms of the 1999 permit. When the 1992 Appropriations Act was brought to their attention, petitioners elected to proceed under the 1991 delineation, *agreeing* with the Corps' preliminary determination that a new delineation under the 1987 manual would produce substantially similar results. C.A. App. A4934; see pp. 3-4, *supra*.[10] Because

[10] For essentially the same reason, petitioners cannot establish that the Corps' decision to finalize the 1991 delineation violated the 1992 Appropriations Act. The 1992 Appropriations Act's general prohibition on the use of appropriated funds to delineate wetlands under the 1989 manual was subject to an exception for "ongoing enforcement actions

the Corps clearly would not have breached the 1992 Appropriations Act if it had conducted a new delineation under the 1987 manual, there is no basis for concluding that any breach of the statute affected the substance of the delineation or the mitigation conditions ultimately imposed in the 1999 permit. Petitioners' argument on causation is further weakened by the fact that most of the acreage ultimately reserved for mitigation wetlands under the 1999 permit was purchased by petitioners *after* the 1991 delineation was finalized.[11]

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and permit applications involving lands which the Corps * * * has delineated as waters of the United States under the 1989 Manual, and which have not yet been completed on the date of enactment of this Act." Pub. L. No. 102-104, Tit. I, 105 Stat. 518. With respect to such ongoing actions, the statute provided that

> the landowner or permit applicant shall have the option to elect a new delineation under the Corps 1987 Wetland Delineation Manual, or completion of the permit process or enforcement action based on the 1989 Manual delineation, unless the Corps of Engineers determines, after investigation and consultation with other appropriate parties, including the landowner or permit applicant, that the delineation would be substantially the same under either the 1987 or the 1989 Manual.

Ibid. In the instant case, petitioners agreed with the Corps' preliminary determination that a new delineation under the 1987 manual would be substantially the same as the delineation performed under the 1989 manual, and they expressly "waiv[ed] [their] right to request a redelineation under the 1987 manual." C.A. App. A4934.

[11] In their amended complaint, petitioners further alleged that they had incurred approximately $2 million in service fees and $1 million in construction costs as a result of the government's conduct, and they alleged that "[s]uch amounts are also illegal exactions." C.A. App. A193; see Pet. App. 22A. Because there is no reason to believe that those expenditures would have been avoided if the Corps had conducted a new delineation under the 1987 manual rather than finalizing the delineation under the 1989 manual, petitioners cannot demonstrate that

c. Moreover, petitioners make no meaningful effort to explain how the mitigation conditions imposed by the 1999 permit could constitute "illegal exactions" as that term is understood in Tucker Act jurisprudence. Rather, petitioners seek this Court's review based on the generalized assertion that the Federal Circuit, in this and other recent decisions, has improperly limited the CFC's jurisdiction over "illegal exaction" claims to claims based on "money-mandating" statutes. Pet. 27. In the instant case, the court of appeals stated that, "[t]o invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by necessary implication, that the remedy for its violation entails a return of money unlawfully exacted." Pet. App. 23A (internal quotation marks omitted). Petitioners contend (Pet. 24-28) that this limitation on Tucker Act jurisdiction is inconsistent with this Court's decision in *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915), and with various Federal Circuit and Court of Claims decisions.

Any tension between these lines of authority is more apparent than real. The paradigmatic example of an "illegal exaction" claim is a suit for the return of taxes erroneously paid or improperly withheld. Even when a statute authorizing the government to collect taxes does not provide an express cause of action for the return of the funds that allegedly were unlawfully exacted, a suit to recover such funds is deemed to be "founded upon"

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any violation of the 1992 Appropriations Act caused those expenditures to be made. In any event, incidental expenditures or consequential damages of that nature are not properly regarded as illegal exactions. In this Court, petitioners do not appear to contest the dismissal of their claims for those sums.

the revenue laws. See *Emery, Bird, Thayer Realty*, 237 U.S. at 31-32. The court of appeals' opinion in the instant case is not inconsistent with that principle, since the court recognized that an "illegal exaction" claim may be brought under the Tucker Act if the statute under which the exaction is effected provides a monetary remedy "either expressly *or by necessary implication*." Pet. App. 23A (emphasis added; internal quotation marks omitted). Nothing in the court's opinion suggests disapproval of the principle that statutory authorization for the collection of taxes or similar exactions will ordinarily be understood to imply a Tucker Act remedy when money is erroneously collected under the statute.

In any event, petitioners themselves have no colorable "illegal exaction" claim, and this case therefore would provide an unsuitable vehicle for clarification of the legal principles that govern in this area. Imposition of mitigation conditions as part of a CWA permit is far afield from the compelled payments of money to the government that "illegal exaction" cases have typically involved. Furthermore, because petitioners consented to use of the 1989 manual and waived any right to insist that the new delineation be based on the 1987 manual, they waived any right to claim that the permit conditions based in part on that delineation were "illegal" or true "exactions" due to the version of the manual on which the Corps relied. And while the court of appeals noted that the 1992 Appropriations Act did not "by its terms or by necessary implication" provide a monetary remedy for its violation, Pet. App. 26A, that observation was offered "[i]n addition" to the court's principal holding that the alleged violation of the Act "did not directly result in an exaction," *id.* at 25A-26A. Petitioners have made no effort to demonstrate that the court of appeals'

causation holding was wrong, and that fact-bound aspect of the court's decision raises no issue of recurring importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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