

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FLORIDA,)
)
) Plaintiff,)
)
) v.) No. 142, Orig.
)
GEORGIA,)
)
) Defendant.)

Pages: 1 through 72

Place: Washington, D.C.

Date: January 8, 2018

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10 Washington, D.C.

11 Monday, January 8, 2018

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:05 a.m.

16

17 APPEARANCES:

18 GREGORY G. GARRE, Washington, D.C.; on behalf
19 of the Plaintiff.

20 CRAIG S. PRIMIS, Washington, D.C.; on
21 behalf of the Defendant.

22 EDWIN S. KNEEDLER, Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; on
24 behalf of the United States, as amicus curiae, in
25 support of overruling Florida's exception 2c.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GREGORY G. GARRE	
4	On behalf of the Plaintiff	3
5	ORAL ARGUMENT OF:	
6	CRAIG S. PRIMIS	
7	On behalf of the Defendant	35
8	ORAL ARGUMENT OF:	
9	EDWIN S. KNEEDLER	
10	On behalf of the United States, as	
11	amicus curiae, in support of overruling	
12	Florida's exception 2c	58
13	REBUTTAL ARGUMENT OF:	
14	GREGORY G. GARRE	
15	On behalf of the Plaintiff	69
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next this morning in Case 142 on our
5 original docket, Florida against Georgia.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PLAINTIFF

9 MR. GARRE: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Special Master based his
12 recommendation on two critical premises:
13 First, that Florida has suffered real harm as a
14 result of Georgia's ever-increasing consumption
15 of upstream waters; and, second, that Georgia's
16 consumption is unreasonable and largely
17 unrestrained. In fact, the Special Master
18 found that Georgia's position practically,
19 politically, and legally is that it can consume
20 as much water as it wishes without regard to
21 any of the long-term consequences for the
22 Apalachicola region.

23 The Special Master nevertheless
24 concluded that this case should be terminated
25 at the outset and that Georgia's wasteful

1 consumption be allowed to continue unabated
2 because Florida had failed to show an adequate
3 -- adequate certainty of complete relief.

4 With respect to the Special Master, we
5 believe he -- he made a legal error on this
6 discrete issue, that the case should be
7 returned to him for him to complete the work
8 that he has begun.

9 JUSTICE GINSBURG: Mr. Garre, I
10 thought that the Special Master -- this is at
11 page 63 to 65 of his report -- said that
12 Florida at the trial concentrated only on the
13 harm from the low flows in drought years and it
14 did not address the benefits of increased flow
15 during normal non-drought periods.

16 It didn't even address it, he said, no
17 -- no less showed the benefits that it would
18 gain. So he said if -- if Florida has not
19 established its case, it's Florida's fault
20 because all they did was concentrate on the
21 drought years.

22 MR. GARRE: Right. And I think, first
23 of all, the Special Master's entire report has
24 to be viewed in light of the legal standard of
25 redressability that he applied. And we believe

1 that he applied far too great of a standard.

2 Second of all, I think it is fair to
3 say that Florida's presentation was focused on
4 the harm that we suffered during drought
5 conditions in the extreme low-flow periods.
6 But two things about that are important to
7 understand.

8 There's two ways to redress that harm.
9 One is to provide more water during those
10 periods, the extreme low-flow periods, the
11 worst of the worst, and the other way is to
12 reduce the frequency and severity of those
13 drought operations.

14 And the United States, even the United
15 States in this case -- and it's at page 28 of
16 its brief -- recognizes that a decree in this
17 case limiting Georgia's consumption would
18 benefit Florida by reducing the frequency,
19 severity, and duration of drought conditions.

20 Now, we think that that benefit --

21 JUSTICE KAGAN: Where does the record
22 show that?

23 MR. GARRE: That we would benefit from
24 that? Well, what I can point you to, for
25 example, is the 2012 drought. And we've

1 explained this in the evidence cites at pages
2 48 to 49 of our brief.

3 And what that example shows is that if
4 more water had come into the system during the
5 2012 drought, which one of -- is one of the
6 worst that the region has experienced, it would
7 have meant that the Corps would not have dipped
8 into its drought operations during -- for --
9 for nine months during that period, which means
10 that the Corps would not have fallen into the
11 red zone, where all the sort of needles are at
12 the far end of the spectrum, for nine months
13 during that drought.

14 And that has to have resulted in
15 beneficial effects for Florida.

16 JUSTICE KAGAN: So here -- here's my
17 difficulty, Mr. Garre, with this argument. And
18 it's especially with respect to this exception
19 2d, I think it is.

20 MR. GARRE: Yeah.

21 JUSTICE KAGAN: Is that you have
22 common sense on your side. I mean, you say,
23 well, it has to have shortened the drought or,
24 you know, surely we would have gotten more
25 water and that would have been beneficial to

1 us.

2 But there seems to be a real dearth of
3 record evidence specifically quantifying how
4 much more water you would have gotten, exactly
5 what benefits would have followed from that.
6 It just doesn't seem as though Florida put that
7 into the record, even though you kind of want
8 to say, well, that must obviously be true.

9 MR. GARRE: Okay. Well, first of all,
10 I agree with you it obviously has to be true.
11 Second of all, let me give you some more --
12 but --

13 JUSTICE KAGAN: Well, but, you know, I
14 guess what I'm saying is that's your first
15 reaction, but there must have been some reason
16 why it didn't put that into the record.

17 MR. GARRE: Right. So let me give you
18 some more evidentiary cites. And then --
19 before I do that, let me just point you to what
20 this Court said in the Idaho II case, Idaho
21 versus Oregon II, which the Court said that
22 uncertainties about the future do not provide a
23 basis for fashioning the relief.

24 And I think, overall, that's a central
25 principle that's critical in this case, is of

1 course allowing more water flew -- through is
2 going to address this harm. This Court has
3 never had a situation where it's recognized a
4 state is being injured, it's recognized that
5 the upstream state is wasting a resource, and
6 it's recognized that -- and the evidence shows
7 that relief is possible and indeed likely and
8 the Court has said: Nope, too bad, we're going
9 home.

10 And so let me get back to the
11 evidence. Let --

12 JUSTICE GINSBURG: But in this -- but
13 in this case, Mr. Garre, the Special Master
14 said: Yeah, there was proof on that point, but
15 it was put in by Georgia, and Georgia's expert
16 said it wouldn't make enough of a difference --
17 a difference to cure Florida's problem.

18 MR. GARRE: Well -- and I'm going to
19 get back to the -- the evidentiary cites, but
20 on that, Justice Ginsburg, and just to be
21 clear, we think that one of the Special
22 Master's central error was to deal with all of
23 this on the basis of a central -- of a
24 threshold redressability inquiry and that
25 instead what this should have done is gone to

1 the equitable balancing stage of the equitable
2 apportionment proceeding, where the Special
3 Master would have to make all the findings that
4 he did not complete on the -- on the costs that
5 Georgia would incur of a decree, the full range
6 of harms that Florida has suffered. He didn't
7 conclude those findings.

8 JUSTICE KENNEDY: You do agree -- you
9 do agree that you have the burden to show
10 redressability?

11 MR. GARRE: We have the burden like
12 any plaintiff to show redressability in the
13 Article III sense, Justice Kennedy. And we
14 think that we meet redressability under any
15 conceivable standard.

16 Now, I think when you get into the
17 equitable balancing stage, I actually think
18 that the burden shifts to Georgia at that stage
19 because if we've shown, as the Special Master
20 acknowledged that we have, that we have
21 suffered real harm as a result of Georgia's
22 inequitable conduct, then at that point under
23 this Court's precedents, Colorado versus New
24 Mexico in particular, the burden shifts to
25 Georgia, but I think --

1 JUSTICE KENNEDY: You -- you would say
2 you do not have the burden, once you've shown
3 the injury, to show that a consumption cap can
4 help cure the problem.

5 MR. GARRE: Well --

6 JUSTICE KENNEDY: You do not have the
7 burden to show that?

8 MR. GARRE: I -- I think we do.
9 Certainly, we have to show that a consumption
10 cap is going to work. And the question is by
11 what standard?

12 JUSTICE SOTOMAYOR: All right.
13 Mr. Garre, but --

14 MR. GARRE: Do we have to show that a
15 mere certainty standard --

16 JUSTICE SOTOMAYOR: It is very
17 critical for me that you go through the
18 evidence of that.

19 MR. GARRE: Yes.

20 JUSTICE SOTOMAYOR: Now, just so --
21 correct me if I'm wrong, the Special Master
22 made two findings. The first one was that in
23 drought periods, you didn't prove that the
24 Corps -- the -- the Corps would release more
25 water.

1 The SG agrees with that and says,
2 under the protocols in place, during drought
3 periods you're not going to get more water by a
4 consumption cap.

5 Putting aside whether that's close to
6 the gavel -- gravel situation or not, I'm
7 really not addressing that --

8 MR. GARRE: Right.

9 JUSTICE SOTOMAYOR: -- but I do want
10 to go to the non-drought time.

11 MR. GARRE: Right.

12 JUSTICE SOTOMAYOR: And as I read his
13 report, he -- he does say there was no evidence
14 of the cap providing you with more water. And,
15 in fact, I did find plenty of evidence of that.
16 So I'm not quite sure. And he discussed some
17 evidence and rejected it as meaningful.

18 So point me to evidence he didn't
19 discuss and explain why it's meaningful.

20 MR. GARRE: Sure.

21 JUSTICE SOTOMAYOR: Alright.

22 MR. GARRE: I mean, first of all, just
23 to be clear, if Georgia's consumption is
24 limited, it's going to result in more water in
25 the system and that water is going to flow

1 through --

2 JUSTICE SOTOMAYOR: And that's Justice
3 Kagan's logic point.

4 MR. GARRE: Well, no --

5 JUSTICE SOTOMAYOR: But I'm -- I'm --

6 MR. GARRE: -- the Special Master
7 recognizes that because --

8 JUSTICE SOTOMAYOR: Yes.

9 MR. GARRE: -- for example, on pages 6
10 and 30 -- 37 of his report, he recognizes that
11 the -- the Woodruff facilities, a
12 run-of-the-river facility, water's going to go
13 through it. The United States recognizes that
14 on page 33 of its brief.

15 JUSTICE SOTOMAYOR: They -- they --
16 they agree with you.

17 MR. GARRE: That water is going to go
18 through. And so, if we're talking about the
19 non-drought periods, what I would point you to,
20 for example, is the 2016 biological opinion by
21 the Fish and Wildlife Services, JX 168 at page
22 50, where it talks about the benefits of
23 additional water coming into the system.

24 I would point you to the Hoehn direct
25 testimony at paragraph 53 where it talks about

1 the benefits of having additional water come
2 through to help reduce the salinity for the
3 mussels.

4 I would -- I would point you to the
5 Allan direct, paragraph 3-D, where it talks
6 about the benefits of even modest additions of
7 waters in helping to halt an irreversible
8 cycle.

9 I would point you to the White direct
10 testimony, paragraph 164, where it makes
11 similar claims about this. These are all
12 supporting --

13 JUSTICE SOTOMAYOR: I -- I -- I agree.

14 MR. GARRE: Okay.

15 JUSTICE SOTOMAYOR: But where do they
16 quantify it to show that the improvement would
17 be meaningful? How -- how --

18 MR. GARRE: All of those talk about
19 how adding additional water, even in
20 non-drought periods, helping the system
21 rejuvenate is going to have a meaningful,
22 beneficial effect. Do they have a precise --

23 JUSTICE SOTOMAYOR: And so your
24 argument about the standard is that you didn't
25 have to prove the exact amount, you just had to

1 prove that it was meaningful?

2 MR. GARRE: Exactly. And this Court
3 said exactly that in Colorado versus New Mexico
4 where the Court said that absolute precision is
5 not required. Instead, this is an equitable
6 proceeding governed by broad and flexible --

7 JUSTICE KAGAN: Would --

8 JUSTICE GORSUCH: Mr. Garre, you talk
9 about a burden-shifting regime. And I want to
10 -- I want to understand your -- your thought on
11 that a little bit more clearly.

12 So, once you show that there are
13 benefits, you think then what happens?

14 MR. GARRE: Well, actually, I think,
15 and this is laid out in Colorado versus New
16 Mexico, Footnote 13, I think, is first, we have
17 the burden, by clear and convincing evidence,
18 to show that we have suffered real harm as a
19 result of Georgia's upstream consumption.

20 Once we meet that burden, the Special
21 Master I think concluded that we did, or he
22 assumed we did at the very least, then the
23 burden shifts to Georgia essentially to show
24 that the costs of the decree would be so much
25 that they outweigh the injury that Florida is

1 suffering.

2 And part of that inquiry --

3 JUSTICE GORSUCH: Well, now, does the
4 burden ever shift back to you to prove your
5 case at the end of the day that the benefits
6 you seek outweigh the harms you'd cause or --

7 MR. GARRE: Well, I -- that's --

8 JUSTICE GORSUCH: -- or does the
9 burden ultimately rest with Georgia as a
10 defendant, in your view --

11 MR. GARRE: I think --

12 JUSTICE GORSUCH: -- and can that be
13 -- can that be right?

14 MR. GARRE: First of all, I think
15 whichever way you think the burden lies at the
16 end, we meet it under the correct
17 redressability standard.

18 Second of all, I think what this Court
19 has talked about is when you get to that
20 equitable balancing stage, the burden is on the
21 diverting state to show that it's -- that it --
22 it either cost too much or it's not worth it.

23 JUSTICE GORSUCH: I had thought -- I
24 had thought that the burden ultimately was for
25 the plaintiff who wishes to alter the status

1 quo to show that the benefits he wishes to
2 obtain significantly outweigh the harms that
3 the relief he seeks would cause.

4 MR. GARRE: Well --

5 JUSTICE GORSUCH: Am I wrong about
6 that?

7 MR. GARRE: Well, I think you are
8 under Colorado versus New Mexico, but -- but if
9 you are right about that, Your Honor, I would
10 say that we have met that and that the Special
11 Master's --

12 JUSTICE GORSUCH: Okay. Help me with
13 that. Assume I'm -- I'm stuck on that
14 standard.

15 MR. GARRE: Sure.

16 JUSTICE GORSUCH: How -- how do you
17 meet that high threshold seeking --

18 MR. GARRE: Okay.

19 JUSTICE GORSUCH: -- seeking this
20 Court's equitable --

21 MR. GARRE: First of all, assume no
22 change in the Corps operations. The United
23 States itself recognizes, and this is at page
24 28 of its brief, that a decree limiting
25 Georgia's consumption is going to benefit

1 Florida because it's going to reduce the
2 frequency, severity, and duration of the worst
3 possible periods, the drought conditions.
4 That's point number 1.

5 The second point is, is that the
6 United States has reckoned -- the Army Corps of
7 Engineers and the United States have recognized
8 that if this Court were to enter a decree in
9 this case, the Army Corps of Engineers would
10 review that decree and would adjust its
11 operations accordingly, so that it would --

12 JUSTICE GORSUCH: Well, let's just
13 stick with the non-drought operations. Okay?
14 Assume my standard. How do you win under the
15 non-drought years for operations?

16 MR. GARRE: I think we have to show
17 that it is a likelihood of at least partial
18 redress. And I think that we have shown that
19 because --

20 JUSTICE SOTOMAYOR: Let's assume that.
21 Let's go to the real question, which is if it's
22 your burden to prove the balance, assume that,
23 how have you shown that the benefit to you is
24 greater than the cost to them?

25 MR. GARRE: Okay.

1 JUSTICE GORSUCH: Thank you.

2 MR. GARRE: First of all, Justice
3 Sotomayor, to answer that question, you have to
4 know what the costs to them are. And there's a
5 dispute between the parties about that.

6 They argue in their brief it's going
7 to cost them \$350 million a year. In fact, our
8 witness, Mr. Sunding, put on evidence it was
9 going to be \$35 million a year, and the Special
10 Master didn't make findings on that because he
11 short circuited these proceedings --

12 JUSTICE GORSUCH: So is that your real
13 beef then, that at the end of the day that the
14 Special Master went off track on
15 redressability, with non-drought years, you
16 have redressability, and that he should have,
17 therefore, conducted a more thorough balancing
18 test in weighing the equities on the
19 non-drought years at the very least?

20 MR. GARRE: Yes, ultimately that's
21 what we think should happen next, and in that
22 proceeding what you would take into account is,
23 okay, what's the full extent of Florida's
24 injuries? The Special Master has found that
25 we've been gravely injured with respect to --

1 to oysters.

2 He didn't make findings on the
3 threatened Gulf sturgeon or the threatened
4 mussels in the Apalachicola River. He didn't
5 make those findings yet. And the --

6 JUSTICE KAGAN: But, again, this goes
7 back to my first question. Suppose the Special
8 Master thought, you know, I can't even begin to
9 do a cost/benefit analysis in the way that you
10 would have liked him to because Florida hasn't
11 shown that they're going to benefit at all. So
12 it doesn't matter what the costs are with
13 respect to Georgia. They could be fairly
14 minimal.

15 But Florida hasn't put on any evidence
16 that they're going to get enough water as a
17 result of these consumption caps going into
18 place that would improve their ecosystems,
19 improve the oyster beds or so forth, and
20 without that, I can't go forward.

21 MR. GARRE: Your Honor, there was
22 significant evidence put in through our
23 witnesses, for example, Dr. Hornberger, about
24 the -- the benefits of the water coming through
25 and --

1 JUSTICE KAGAN: Well, there are two
2 kinds of evidence that you might be talking
3 about. One is evidence saying a lot more water
4 would help our ecosystems. And I think that
5 there is a fair amount of evidence with respect
6 to that.

7 But there's a prior question, which is
8 exactly how much more water would you get --

9 MR. GARRE: Yes.

10 JUSTICE KAGAN: -- if these caps went
11 into place? And that's the place where it
12 seems to me that there's kind of a vacuum.

13 MR. GARRE: Well, I don't think so.
14 And, you know, what I would point you to, for
15 example, is the United States' post-trial
16 brief.

17 If you look at page 19 of that brief,
18 I think, it recognizes that during low flow
19 periods, not the extreme low flows but the low
20 flows bumping up on the worst possible harm,
21 during that period, additional water coming in
22 would go through to Georgia.

23 And the example that it has is if you
24 had a flow rate at the border of 6,000 cfs and
25 additional water coming through of 2,000 cfs,

1 that you then have 8,000 going through. That's
2 -- that's a lot of water.

3 And our -- our witnesses
4 overwhelmingly show that that kind of water was
5 going to have a significant impact on the
6 Apalachicola River.

7 And I -- and I think, again, going
8 back to the -- stepping -- taking a step back
9 in terms of what we have to show in this
10 proceeding, this Court has always made clear in
11 this setting that uncertainties about the
12 future are not a basis to provide a brief, a
13 decree, that absolute precision is not
14 required. And that's because this Court is in
15 the realm of equity.

16 This Court has never had a situation
17 where it's found harm, it's found inequitable
18 conduct, and it's found that relief is
19 possible. I think you have to conclude on this
20 record that relief is possible.

21 And the Special Master, the error that
22 he committed, and I would agree with Justice
23 Gorsuch on this, is he got off track on this
24 threshold redressability ruling, that instead
25 he should have continued the good work that he

1 had done, made all the findings in terms of all
2 the harm that Florida suffers, the costs that
3 Georgia is going to incur -- incur from a
4 decree, and then determine whether or not a
5 decree, an equitable apportionment, should be
6 entered.

7 Now, if I could go to the-- the Army
8 Corps of Engineers because I do think that this
9 is a separate basis for finding redressability.
10 And to be fair to the Special Master, he didn't
11 have the benefit of this. And that's the
12 record of the decision that was issued about
13 six weeks after the Special Master made his
14 recommendation here, where the Army Corps of
15 Engineers said if this Court enters a decree in
16 this case, it would review that decree and
17 adjust its operations accordingly.

18 CHIEF JUSTICE ROBERTS: Is that the
19 March 30 decree?

20 MR. GARRE: Yes, Your Honor.

21 CHIEF JUSTICE ROBERTS: Okay.

22 MR. GARRE: And I think if -- that's
23 on page 18 of that document.

24 And the United States importantly
25 recognizes that, in its brief, at page 30 of

1 its brief, that that -- that a decree in this
2 case would form a part of the constellation of
3 laws that the Army Corps of Engineers would
4 have to look to in order to decide how to
5 respond to that.

6 We don't know what the Army Corps of
7 Engineers is going to do, but I think common
8 sense would tell you that any good government
9 actor would look at a decision by this Court
10 and seek to adjust its operations in a way that
11 would facilitate that decree. And you can just
12 take the Army Corps of Engineers' word for it.

13 At page 4 of that document, the record
14 of decision, the Army Corps of Engineers says
15 that it has continually -- continually
16 asserted its preparedness to implement an
17 agreed upon formula by the states. And that's
18 certainly consistent with the Army Corps of
19 Engineers' statements over time.

20 And then it also goes on to say that
21 the same formula could be instituted by
22 Congress or by the Court. Now, the Army Corps
23 of Engineers, again, it has continually
24 asserted its preparedness to implement a
25 decree.

1 And that makes sense because, as the
2 government has recognized in this case, a
3 decree equitably apportioning the waters is
4 only going to result in more water in the
5 system and make it easier for the Army Corps of
6 Engineers to accomplish its objectives.

7 So then the question is what would the
8 Army Corps of Engineers do with that water?
9 Would it somehow stash it away or just send it
10 to Georgia or would it look at the decision, a
11 decision by this Court in this case and seek to
12 facilitate that decision rather than frustrate
13 it?

14 I think everything would tell you,
15 including the words that I just quoted from the
16 Army Corps of Engineers' own decision, that it
17 would seek to facilitate the decision. And
18 that in itself should provide redressability.
19 The only way that it wouldn't provide
20 redressability is if we have to show a
21 certainty of complete relief today.

22 This Court has never required that.
23 If you look at your redressability cases like
24 Bennett versus Spear and Utah versus Evans,
25 this Court has treated situations where even

1 though the government wouldn't be formally
2 bound by a decision by this Court, it's
3 recognized that where that decision would
4 change the laws under which the agency would
5 have to operate, as was true in Bennett versus
6 Spears, that that was sufficient to establish
7 redressability because that made redress
8 likely.

9 And I think -- I've pointed you,
10 Justice Kagan, to -- to evidence in the record.
11 I would encourage you to read Mr. Hornberger's
12 testimony and other testimonies about the
13 benefits of additional water. But I think --

14 JUSTICE SOTOMAYOR: You haven't
15 answered Justice Kagan's question, though. We
16 -- I accept there's plenty of evidence on the
17 benefits of additional water.

18 MR. GARRE: Right.

19 JUSTICE SOTOMAYOR: She seems to be
20 saying the link that you haven't proven is
21 that, by putting in the consumption limit, that
22 that water would actually reach Florida.

23 MR. GARRE: Oh, okay. Well --

24 JUSTICE SOTOMAYOR: That -- that I
25 think is her question. That's mine too.

1 MR. GARRE: Okay. I mean, first of
2 all, I don't think the Special Master disagreed
3 with the notion that the water is going to go
4 flew -- through. I -- I think that he accepted
5 that. And I think if you look at pages 6 and
6 --

7 JUSTICE KAGAN: Have you at all
8 quantified how much water you were going to get
9 as a result of these consumption caps?

10 MR. GARRE: And -- and I think --
11 again, I think we did. I think if you look at
12 the testimony, the Hornberger testimony in
13 particular, other testimony in that the amount
14 of water -- there certainly was a -- a dispute
15 between the parties.

16 JUSTICE SOTOMAYOR: If you have those
17 cites, mention them. You've mentioned
18 Hornberger --

19 MR. GARRE: And I think, again, I
20 mean, all that the Special Master -- the lens
21 that he was looking at the record in was
22 whether we had shown that there was a guarantee
23 that the Corps would exercise its discretion in
24 a particular way, and he concluded that we
25 haven't shown to certainty that the water would

1 get through. And --

2 JUSTICE SOTOMAYOR: Do you have
3 another cite besides the one you've mentioned,
4 Hornberger?

5 MR. GARRE: Well, in terms of the --
6 the water that would go through?

7 JUSTICE SOTOMAYOR: Yes.

8 MR. GARRE: I mean, I also would point
9 you to the government's brief, that recognizes
10 on page 33 --

11 JUSTICE SOTOMAYOR: It doesn't
12 quantify it, though.

13 MR. GARRE: It -- well, we're talking
14 about -- our case was focused on showing that a
15 consumption cap would result in anywhere from
16 2,000 to 1,000 additional cfs flowing through
17 and that -- the limits we put in place. And I
18 think the evidence is very specific, when you
19 get into it, about that water flowing through.

20 JUSTICE SOTOMAYOR: I see.

21 MR. GARRE: And --

22 JUSTICE SOTOMAYOR: So you're saying
23 that the drought information holds true at
24 minimum for the non-drought one? So a certain
25 amount --

1 MR. GARRE: Well, that holds flew --
2 true for the water going through. And then
3 there are two questions. Then the question
4 becomes: When is that water going to go
5 through?

6 And -- and on that, I think first you
7 have to take as a given that water going
8 through, even outside of those drought periods,
9 is going to reduce the frequency and severity
10 of the drought periods. And that in itself is
11 relief. It's meaningful relief. And the
12 government recognizes that at page 28.

13 On the question of water going through
14 in drought operations, we put in evidence --
15 substantial evidence about how the Corps has
16 released -- made discretionary releases of
17 water at the Woodruff Dam even in drought
18 operations, going back decades.

19 And it also gets to this question of
20 how would the Corps respond to a decree in this
21 case? And in a sense, I mean, the Court is in
22 an unusual situation here where there's sort of
23 a chicken and the egg problem; you know that
24 you have a serious problem here. The
25 Apalachicola region has suffered serious harm.

1 Not only have its oysters been decimated but
2 really a way of life is threatened here --

3 JUSTICE SOTOMAYOR: So really what the
4 issue is -- let me see if I understand it.

5 MR. GARRE: Sure.

6 JUSTICE SOTOMAYOR: You claim that --
7 I have to go back to the report and read it now
8 to find this -- that the Special Master
9 accepted that a consumption cap of 1- to 2,000
10 at minimum would flow through, drought and
11 non-drought years.

12 MR. GARRE: Well, I think -- let me --

13 JUSTICE SOTOMAYOR: Or I --

14 MR. GARRE: -- let me say it this way:
15 I think the Special Master did find that we
16 didn't prove to a certainty, a certainty, there
17 was no guarantee, that's what he said on page
18 69, that the Corps would allow additional water
19 through during drought periods.

20 JUSTICE SOTOMAYOR: That I know it's
21 what it said.

22 MR. GARRE: Right.

23 JUSTICE SOTOMAYOR: I don't care about
24 what happens with the Corps. I'm saying did he
25 find that the consumption cap would release a

1 certain minimum amount of water that would get
2 to the Corps?

3 MR. GARRE: He -- he didn't -- he
4 certainly didn't frame it this way -- that way,
5 Your Honor, in terms of you can't say that I
6 found that X amount is going on to go through.
7 I don't think he was quart -- he felt himself
8 --

9 JUSTICE KAGAN: Is your view,
10 Mr. Garre -- talk about non-drought
11 operations --

12 MR. GARRE: Sure.

13 JUSTICE KAGAN: -- all right? Is your
14 view that if a consumption cap saves -- you
15 know, saves 2,000 cubic feet of water, that all
16 of that necessarily gets through to Florida?

17 MR. GARRE: Yes. I mean, that's the
18 way nature --

19 JUSTICE KAGAN: Just by physics?

20 MR. GARRE: By physics, exactly. And
21 eventually it's going to get through. The
22 United States says it right in page 33 of its
23 brief where it says it's timing.

24 JUSTICE BREYER: I mean, that's true,
25 but the question -- the mystery to me -- and I

1 have only one question, which I could ask all
2 three groups of lawyers, is why isn't the
3 United States in this case? I mean, they --
4 they have -- they give mystical answers. I
5 mean, the -- I don't understand it.

6 As I -- maybe I don't -- look, as I
7 understand the whole thing, imagine that I'm
8 standing south of the Woodruff in that
9 Apalachicola Bay or the river, I'm standing
10 there in the south, okay? And suppose about
11 2,000 cubic feet comes from the Flint River.
12 And now what the Corps will do with the other
13 river, which is the Chattahoochee, it'll make
14 certain it gets up to 4500, so they put in
15 2500.

16 Now, if one day instead of 2,000 in
17 this drought period comes down to Flint, 3,000
18 comes down the Flint, why in heaven's name
19 doesn't the Corps send a little less and a
20 little more? In other words, what they're
21 thinking is, well, if 2,000 comes down, then
22 the Corps will reduce that part that it sends
23 down the Chattahoochee by 2,000.

24 That's a pretty tough position.
25 Wouldn't they be a little grateful? Wouldn't

1 they think anything of the oysters? Wouldn't
2 they say let's at least give them a
3 teaspoonful? We've saved 2,000 cubic feet of
4 water. So let's give them a little bit of it.

5 Now, the obvious people to answer that
6 question is the Corps. And whereas the other
7 case wants to get rid of them, in your case,
8 you don't want them. But I would like them
9 here --

10 (Laughter.)

11 MR. GARRE: I -- I --

12 JUSTICE BREYER: -- so I could ask
13 them that. You're not even going to give them
14 a teaspoon, what? And that's in the drought
15 years. And in the non-drought years, we know
16 there's a lot of extra water stuffed up
17 there -- you don't even have to get down into
18 Zone 3 -- because so much is flowing down the
19 Flint.

20 Well, that's -- that's pretty good,
21 isn't it, because if you have a lot more in
22 Zone 3 up there on the Chattahoochee, then you
23 have more water to send down once the drought
24 begins. And won't you do it? What reason is
25 there for thinking you won't? Okay?

1 Now, that's as I understand this case,
2 which I expect you to say you're way off base
3 because I'd love to agree with you but I don't,
4 or you might say, yeah, you're on base, that's
5 the point. I wonder.

6 MR. GARRE: Well, Justice Breyer, I
7 mean, I think -- I think one way to think about
8 the Corps' position in this case, which has
9 evolved a bit --

10 JUSTICE BREYER: Am I basically on
11 base?

12 MR. GARRE: I think you're on base to
13 think that life would be a lot easier if the
14 Corps had intervened --

15 JUSTICE BREYER: No, but I haven't got
16 this right as the -- as --

17 MR. GARRE: But I think --

18 JUSTICE BREYER: What?

19 MR. GARRE: -- I think one question is
20 -- is the light -- what the Corps has said to
21 you in its brief and the ultimate --

22 JUSTICE BREYER: Well, what the Corps
23 has said to me at the moment, I'm assuming, is
24 sort of vague. My question is whether my
25 question was a good question?

1 MR. GARRE: Well --

2 (Laughter.)

3 MR. GARRE: Yes. Without --
4 absolutely, Justice Breyer. But -- but I think
5 what the Corps has said to you in its brief
6 today, and I think that this in itself compels
7 that you not accept the Special Master's
8 recommendation, is that, first, Florida would
9 be benefitted by a decree insofar as it would
10 reduce the frequency, severity, and duration of
11 drought operations. That's on page 28.

12 Second, they stand by the Corps'
13 statement in its record of decision that they
14 will review a decree by this Court and adjust
15 its operations accordingly.

16 And, third, they recognize that that
17 decree would form a part of the constellation
18 of laws by which the Corps would have to
19 operate.

20 So there's every reason to believe
21 that a decision in this Court imposing the
22 decree that equity would demand would result in
23 meaningful relief for Florida and we were not
24 required to show anything more than that to
25 allow this action to proceed.

1 If I may reserve the remainder of my
2 time.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. GARRE: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Primis.

7 ORAL ARGUMENT OF CRAIG S. PRIMIS

8 ON BEHALF OF THE DEFENDANT

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

11 Florida has premised this entire case
12 on the proposition that a cap on Georgia's
13 water consumption alone would result in a
14 material increase in water to Florida during
15 drought without any change to Army Corps
16 operations.

17 After two years of discovery and a
18 five-week trial, Florida failed to prove that
19 case.

20 CHIEF JUSTICE ROBERTS: Well, but I
21 don't think they've premised it entirely on
22 that. They've premised it on the fact that the
23 Corps may change how it allocates water.
24 That's what they say in the March decision.
25 "Should the Supreme Court issue a decree

1 appportioning the waters of the ACF basin, the
2 Corps would take those developments into
3 account and adjust its operations accordingly."

4 So, I mean, the -- the decree granting
5 Florida greater claims to the water will at the
6 very least change the facts on the ground and,
7 according to the Corps itself, cause them to
8 adjust its operations accordingly.

9 MR. PRIMIS: Mr. Chief Justice, we --
10 we do need to distinguish between drought
11 periods and non-drought periods. The entire
12 trial was over drought periods and what the
13 Corps would do.

14 The Corps just finished a 10-year
15 process of creating a Water Control Manual that
16 determined that during times of drought,
17 Florida is entitled to 5,000 cubic feet per
18 second. That was blessed by the United States
19 Fish and Wildlife Service, which studied the
20 region and said that would be adequate to
21 protect endangered -- endangered species.

22 And so what the Corps said in the
23 record of decision and clarified in its brief
24 in this Court is that, of course, it would
25 review and consider a decree or an order of

1 this Court, but it also said explicitly that it
2 is not bound by an order of this Court and that
3 it may --

4 CHIEF JUSTICE ROBERTS: Right.

5 MR. PRIMIS: -- may not do anything.

6 CHIEF JUSTICE ROBERTS: Right. And it
7 reminds me of sort of the contract bidding
8 discrimination cases where you have someone was
9 discriminated against during the bid process.

10 We don't require that person to show,
11 well, if I hadn't been, I would have gotten the
12 contract. We just say if you show you were
13 discriminated against in the process, you get a
14 fair shot like everybody else.

15 It seems to me it's asking an awful
16 lot for Florida to have to say: We know that
17 the Corps is going to change things the way it
18 benefits us.

19 MR. PRIMIS: Well --

20 CHIEF JUSTICE ROBERTS: Instead they
21 just want to say, well, look, they're going to
22 make a different decision if they've got more
23 water to allocate.

24 MR. PRIMIS: Your -- Your Honor --

25 CHIEF JUSTICE ROBERTS: You'll be able

1 to argue that. And right now they can't even
2 argue that.

3 MR. PRIMIS: Well, Florida can
4 certainly argue that, but the Corps has issued
5 its Water Control Manual. There is an APA
6 challenge that has been brought to that manual.
7 That case is proceeding in the district court
8 of District of Columbia.

9 Florida has not joined that suit. I
10 suspect it's because the arguments that it
11 would have to make in that suit would confirm
12 that the Corps is, in fact, necessary to solve
13 the problem.

14 And so there has been a lengthy
15 administrative process where Florida has made
16 all the same arguments it makes in this Court
17 and it chose not to challenge the Water Control
18 Manual in district court.

19 JUSTICE BREYER: What did they say,
20 look, I have in front of me this slightly
21 incomprehensible chart, and -- and what I --
22 what I derive -- what I derive from it is that,
23 imagine now, nothing is coming down the Flint
24 River.

25 And then tomorrow, because they

1 convince the mayor of Atlanta, whatever, to
2 drink more Pepsi or something, or whatever they
3 drink, Coca-Cola, I imagine, and -- and --

4 (Laughter.)

5 JUSTICE BREYER: -- and whatever
6 reason that is they --

7 MR. PRIMIS: Yes, it would be -- it
8 would be Coca-Cola, Justice Breyer.

9 JUSTICE BREYER: Yeah, I know that.
10 The -- the -- the -- the 3,000 cubic feet comes
11 down to Flint. Okay? So now the Corps doesn't
12 have to give 5,000. It can only -- it need
13 only give 2,000. See?

14 So it has 3,000 more. Am I right so
15 far? So far?

16 MR. PRIMIS: I would quarrel with the
17 hypothetical because there's no possibility of
18 that much water being generated for
19 consumption.

20 JUSTICE BREYER: Well, I'm just using
21 it as a big example, but it's some amount.
22 It's some amount. I'm just using it as a big
23 example. Okay.

24 MR. PRIMIS: I accept the amount.

25 JUSTICE BREYER: Okay. So fine. Now,

1 they have a lot more water, say in my
2 hypothetical, 3,000 cubic feet. Now, what
3 reason is there to think that they won't give a
4 teaspoonful, they won't give a little bit at
5 least, of that extra water they never thought
6 they had to help the mussels and the oysters
7 and the others down in Florida? What reason?
8 It doesn't say in the chart what they'll do in
9 that situation.

10 All it says is that they guarantee
11 5,000 feet. They've got their 5,000. It
12 happens that 3,000 is coming from Flint. And
13 now what will they do with that extra? And --
14 and the answer, I think, is we don't know.
15 They won't say. But you'd think if we're being
16 equitable here, it would be equitable to give
17 at least a little bit to Florida.

18 Now, what's wrong with that?

19 MR. PRIMIS: Justice Breyer, the Corps
20 is governed by a panoply of federal statutes,
21 congressional dictates and mandates, as to how
22 to control the water in this basin.

23 And it is not as simple as if extra
24 water comes in, then you just pass it through
25 to Florida because they have articulated one

1 concern. There are multiple interests in the
2 basin, there are multiple stakeholders, and
3 multiple congressionally-defined purposes.

4 Having studied this basin for a
5 decade, the Corps has determined that in
6 periods of drought and under its drought
7 operations, when the reservoirs get to a
8 critically low level, the Corps will release
9 5,000 cubic feet per second.

10 And that's not just an accidental
11 number. That number was chosen because that
12 number allows the Corps to protect the
13 endangered species downstream, as the Fish and
14 Wildlife Services said, but also to protect
15 water quality, water supply in Atlanta,
16 navigation, flood control, hydropower. There's
17 a multitude of reasons.

18 And --

19 JUSTICE GINSBURG: Can we --

20 CHIEF JUSTICE ROBERTS: Well, but
21 there --

22 JUSTICE GINSBURG: -- can we agree --
23 can we agree that a cap at the very least would
24 prevent -- would prevent the situation in
25 Florida from getting worse? That is, that if

1 we do nothing, then the situation in Florida
2 can get worse, even worse than it is now.

3 If there is a cap, then Florida is
4 protected at least to that extent. It won't
5 get worse. Is that not so?

6 MR. PRIMIS: That's not correct,
7 Justice Ginsburg. In periods of drought, the
8 Corps answered the question that it will
9 continue to pass 5,000 cfs and store the
10 remainder of the water saved by that cap in its
11 reservoirs upstream until the drought --

12 JUSTICE SOTOMAYOR: So, what do we do
13 with their non-drought statement in their brief
14 where they say the U.S. does not mean to
15 suggest that a consumption cap would provide no
16 benefit to the Corps' operation in the basin or
17 to Florida?

18 And they say: "As explained to the
19 Special Master, increased basin inflows would
20 generally benefit the ACF system by delaying
21 the onset of drought operations, by allowing
22 the Corps to meet the 5,000 cfs minimum flow
23 during longer -- flow longer during extended
24 drought, and by quickening the resumption of
25 normal operations after drought."

1 And, in fact, your adversary points to
2 a lot of history showing that when there's
3 increased water, the Corps gives increased
4 water under its own protocol. The Corps says
5 under its own protocols, when there's increased
6 water during non-drought situations, more water
7 flows to Florida.

8 Isn't that their case?

9 MR. PRIMIS: Justice Sotomayor, the
10 Special Master at page 65 found, unequivocally,
11 that Florida presented no evidence assessing
12 the impact of a consumption cap on shortening
13 the Corps' drought operations or on increased
14 pass-through flows during --

15 JUSTICE SOTOMAYOR: Well, if I
16 disagree, if I can point to, and your colleague
17 has suggested, to a lot of record evidence, not
18 just the SG's statement, but statements from
19 Dr. Allan, Dr. Glibert, Dr. Greenblatt, and
20 from other experts showing that, would the --
21 would we just say the Special Master was wrong
22 or that he didn't explain why that evidence was
23 inadequate?

24 MR. PRIMIS: Well, he wasn't wrong.
25 He was absolutely correct. All of the

1 individuals that Your Honor just mentioned are
2 biologists or deal with issues like salinity.

3 The -- the people who -- that Florida
4 hired to assess whether water would pass
5 through in these non-drought, shortened drought
6 operations periods were Dr. Hornberger and
7 Dr. Shanahan. Neither of them provided any
8 testimony on this case because --

9 JUSTICE KAGAN: Well, Mr. Primis, how
10 is it possible that it wouldn't pass through?
11 I mean, if I understand what Mr. Garre said,
12 it's something like this: If Georgia consumes
13 2,000 feet less of water, just as a matter of
14 physics, it's all going to get to Florida.

15 So -- and now there does seem, as you
16 suggest, to be not all that much in the record
17 showing that that's true. But it seems as
18 though it should be true.

19 Do you think it's not true?

20 MR. PRIMIS: With regard --

21 JUSTICE KAGAN: That all of that saved
22 water will eventually go south?

23 MR. PRIMIS: The water -- it is a
24 question of timing and when the water will go
25 south. During a drought we know, the Corps has

1 answered that question, and all the evidence at
2 trial showed --

3 JUSTICE KAGAN: No, but I was talking
4 about non-drought.

5 MR. PRIMIS: Correct. So let me --
6 let me address that directly.

7 With regard to shortened drought
8 operations, the evidence -- Georgia did present
9 evidence on this. Florida did not.

10 And there's a reason, because I think,
11 Your Honor, one of -- Justice Breyer or you
12 maybe used the word, "common sense." There's
13 nothing common sense about the operations of
14 this basin. It is incredibly complicated.

15 There are five reservoirs. They're
16 subjected to different rules by the Army Corps.
17 They have different hydrologic conditions.
18 They serve different purposes.

19 That's why we create, or the Corps
20 creates, complicated computer models,
21 incredibly complicated, and both sides hired
22 experts to evaluate the situation, your
23 question under those models.

24 JUSTICE KAGAN: Well, can you give me
25 an example of how it would be that an

1 additional 2,000 units saved in Georgia would
2 not benefit Florida to the same amount? How
3 would that be possible?

4 MR. PRIMIS: Certainly. The -- the --
5 the -- the problem is with the hypothetical
6 because, as I said before, you cannot get 2,000
7 cubic feet per second. Georgia consumes a much
8 smaller amount of water, and this is just in
9 the agricultural part of the state --

10 JUSTICE GORSUCH: Counsel --

11 JUSTICE KAGAN: You're -- you're --

12 JUSTICE GORSUCH: -- with respect, I
13 think you're --

14 MR. PRIMIS: Yes?

15 JUSTICE GORSUCH: -- fighting the
16 hypothetical --

17 MR. PRIMIS: Okay.

18 JUSTICE GORSUCH: -- and maybe --
19 maybe you can direct your attention to the --
20 the Corps' own statement --

21 MR. PRIMIS: Sure.

22 JUSTICE GORSUCH: -- and the SG's
23 statement, which Justice Sotomayor read, maybe
24 that'll help move us along --

25 MR. PRIMIS: But --

1 JUSTICE GORSUCH: -- which suggests
2 that in non-drought operations, there will be
3 more water going to Florida --

4 MR. PRIMIS: Well --

5 JUSTICE GORSUCH: -- the government,
6 the federal government says, and that that will
7 reduce the onset of drought operations.

8 I would have thought, and maybe this
9 is just where we're all stuck, is that's
10 redressability at least. And then you have to
11 go weigh benefits and harms, which didn't seem
12 to take place here.

13 MR. PRIMIS: Justice Gorsuch, the
14 United States says explicitly in its brief at
15 17 that those are hypotheticals. And they say
16 also, this is a quote, "not attempts to
17 precisely quantify any particular effect on
18 flows" --

19 JUSTICE GORSUCH: No, there is no
20 precise quantification, but on page 28, they
21 say that it -- I'm not going to repeat it all
22 again, but pretty darn clearly that they
23 anticipate that non-drought operations, there
24 will be more water going through --

25 MR. PRIMIS: Well --

1 JUSTICE GORSUCH: -- and that that
2 will help diminish drought operations.

3 MR. PRIMIS: Well, Georgia did
4 quantify this. We ran the Corps' computer
5 model, and we determined that as you add the
6 water that could be saved, and Georgia didn't
7 skimp, we modeled a 30 percent reduction in
8 water use on the Georgia side of the line, and
9 the truth is that the amount of water that that
10 generates just does not move the period in
11 which Florida goes -- I'm sorry, when the Corps
12 goes into drought operations. It's just not
13 enough water given passive systems --

14 JUSTICE KAGAN: No, but when you're in
15 -- when you're in non-drought operations, how
16 is it possible for the amount of water saved in
17 Georgia not to benefit Florida?

18 MR. PRIMIS: Okay. Well, that -- let
19 me -- that's, I think, a different question.

20 When there is plenty of water in the
21 system, when there's rain, we're not in
22 drought, Florida has not claimed it needs
23 additional water. It gets plenty of water just
24 through gravity and -- and meteorology. That
25 -- and they've said in their papers --

1 JUSTICE KAGAN: Well, there must be a
2 set of months that are dry, so that Florida
3 wants more water, but not drought.

4 MR. PRIMIS: And the Corps' operations
5 account for that, when -- and that's baked into
6 the chart that the Special Master included in
7 his -- his report.

8 But the important point is Florida,
9 it's not a mistake that Florida didn't present
10 this evidence. And I do understand the Court's
11 statements that it seems common sense that it
12 would shorten drought operations or make it
13 fewer and farther between.

14 Florida didn't present its modeling
15 because when Florida's expert, Dr. Hornberger,
16 ran the ResSim model that the Corps uses, he
17 tried a 50 percent cap, and it still didn't
18 move drought operations.

19 JUSTICE BREYER: I have some kind of
20 --

21 MR. PRIMIS: It still started in
22 August.

23 JUSTICE BREYER: -- I have some kind
24 in front of me, a Bedient Demo 13, do you know
25 what I'm talking about, this thing?

1 MR. PRIMIS: Yes.

2 JUSTICE BREYER: Okay. That seemed to
3 be Georgia. And they say 71 days in 2007
4 Florida would receive more water flow from a
5 cap on Georgia's water consumption, so that's
6 71 days they get more water.

7 Seventy-one days they get more water,
8 that means the Corps has to reduce less water.

9 If the Corps has -- and, you know, the
10 Court can -- the Corps can save water on its
11 side in the Chattahoochee, right? And so, if
12 they have more water saved up there in whatever
13 those zones are, 1, 2, and 3, they are going to
14 get into 3 later. And so, if they get into 3
15 later, they have more water to give out later.
16 Is that right?

17 MR. PRIMIS: No, Justice Breyer.

18 JUSTICE BREYER: No, okay.

19 MR. PRIMIS: What I'm trying to tell
20 you is that Dr. Bedient --

21 JUSTICE BREYER: Yeah.

22 MR. PRIMIS: -- is the expert that the
23 Special Master credited --

24 JUSTICE BREYER: I know he was on your
25 side, but that doesn't --

1 MR. PRIMIS: But -- but the rest of it
2 -- another part of his analysis shows that we
3 don't shorten the drought operations. And
4 those 71 days are small increments that don't
5 benefit Florida. They're not material.

6 JUSTICE BREYER: All right. Is there
7 any --

8 MR. PRIMIS: They're random.

9 JUSTICE BREYER: Is there -- probably
10 your answer is going to be -- but I don't like
11 to turn this thing on who presented what and on
12 what time. I mean, it's a serious matter and a
13 lot of people need the water. And there are
14 all kinds of demands and it ought to go really
15 on not who said what in such and such but what
16 the merits really are.

17 It's our case. Could we say: we
18 want, or request, the SG to provide material
19 experts and have a hearing and the hearing will
20 focus on what would be best for the region,
21 taken in light of all the demands, and Florida
22 and Georgia and anyone else who wanted to, as
23 an amicus perhaps, could participate so that
24 the Master can get a decision here about
25 whether or not there should be or should not be

1 less water going from the Flint to the grazing
2 areas in Atlanta. Do you see what I have in
3 mind?

4 Is there some way of working that out?

5 MR. PRIMIS: The Court --

6 JUSTICE BREYER: I mean not in
7 Atlanta, south of Atlanta.

8 MR. PRIMIS: The Court surely has the
9 power under its original jurisdiction --

10 JUSTICE BREYER: Would that make
11 sense?

12 MR. PRIMIS: It would not, for two
13 reasons. One is that the Army Corps just went
14 through that entire process. Everyone was
15 heard, and there is APA litigation ongoing
16 today, about just those questions that Your
17 Honor articulated.

18 The second reason is that, while I
19 understand that we -- we --

20 JUSTICE SOTOMAYOR: Except that the
21 government tells us that in its protocols, it's
22 not charged with looking at the harm we're
23 looking at; that it's not charged with looking
24 at the harm to the oysters or the mussels or
25 the other things that are being affected here.

1 So I don't think it's done a study
2 that addresses the issues of the harms that are
3 at -- in question in this litigation.

4 MR. PRIMIS: That's not correct. The
5 Army Corps, through the Endangered Species Act,
6 does look at the mussels and the sturgeon that
7 live in the Apalachicola River. It has said
8 that the Apalachicola Bay is beyond its
9 jurisdiction, and that's why to Chief Justice
10 Roberts's question, the Court has said in the
11 -- page 2-62 of its final environmental impact
12 statement that it doesn't have the authority,
13 without congressional action, which is why --
14 to -- to help the oysters or the bay.

15 And that's why this is -- this case is
16 an ill-fitting vehicle for that. But I do want
17 to --

18 CHIEF JUSTICE ROBERTS: So what --
19 what is the standard that you would require
20 Florida to meet? Presumably they don't have to
21 show to an absolute certainty that, you know,
22 they'll -- they'll benefit in a particular way,
23 but what do you think the standard is?

24 MR. PRIMIS: The standard is that
25 Florida should be required to show by clear and

1 convincing evidence that its requested --

2 CHIEF JUSTICE ROBERTS: Where did that
3 come from, by clear and convincing evidence?

4 MR. PRIMIS: That comes from Colorado
5 versus New Mexico and Colorado versus Kansas.
6 It's consistent --

7 CHIEF JUSTICE ROBERTS: Is that at the
8 equitable weighing stage or as an initial
9 matter, almost of standing?

10 MR. PRIMIS: Well, it -- this is not a
11 standing question. This is as a matter of
12 equitable apportionment, the Court has
13 consistently said both in equitable balancing
14 and at the preliminary stage of injury and
15 benefit that it's clear and convincing
16 evidence, and that makes sense given the
17 sovereign interests of the states at issue.
18 The Court has consistently recognized that.
19 And --

20 CHIEF JUSTICE ROBERTS: Okay. I
21 interrupted you. You were saying they have to
22 show by clear and convincing evidence --

23 MR. PRIMIS: That their requested
24 remedy will provide a material benefit. And
25 that is consistently mentioned in Washington

1 versus Oregon; the Court asked is it materially
2 more advantageous? In Idaho versus Oregon, the
3 Court asked, are there going to be numbers of
4 fish justifying additional restrictions? And
5 Colorado versus New Mexico put the burden on
6 the state seeking to disrupt the status quo.
7 The burden to prove benefits of the diversion
8 must -- substantially outweigh the harms that
9 might result.

10 Now, Florida told the Court, the
11 Special Master at the beginning of this case,
12 this is a quote from Docket Number 125 at 29,
13 "If you conclude after a trial that caps on
14 consumption will not redress Florida's harm,
15 then Florida will not have proved its case."

16 That's exactly what happened here.
17 Florida did not prove its case. It did not
18 prove that caps on consumption would redress
19 their harm.

20 CHIEF JUSTICE ROBERTS: I get -- but,
21 I mean, obviously that depends on what you mean
22 by redress. If -- if the Corps came up and
23 said we will definitely review our running of
24 the whole system in this -- in this basin, if
25 the Supreme Court tells us that Florida under

1 an equitable apportionment would get more
2 water, we'll take another look at it, is that
3 redress?

4 MR. PRIMIS: It's not redress. It's
5 too speculative. And the Court requires clear
6 and convincing evidence of the material
7 benefit.

8 But the Corps would have to go through
9 a whole public comment process that has taken
10 decades. And in that scenario, Chief Justice
11 Roberts --

12 JUSTICE GINSBURG: But why is that so?

13 MR. PRIMIS: What?

14 JUSTICE GINSBURG: I think one of the
15 things that we're told is that the Corps,
16 although it may not be required to do so, has
17 exceeded the minimum flows whenever water is
18 available. Are we --

19 So -- so does -- the Corps, the past
20 history is it has exceeded the minimum flows
21 when water is available.

22 MR. PRIMIS: Well, in drought periods,
23 it shoots for roughly 5,000 cfs. It's very
24 hard to get it right at 5,000. Sometimes it
25 exceeds it --

1 JUSTICE GINSBURG: But why are we --

2 MR. PRIMIS: -- sometimes it rains --

3 JUSTICE GINSBURG: -- but why are we
4 dividing drought and non-drought? If the water
5 is eventually going to get to Florida, that
6 will help Florida. And that isn't to say that
7 it has to be immediately.

8 Well that was one of the problems with
9 the Special Master's report. He seemed to
10 think that the benefit had to be immediate,
11 instead of eventual.

12 MR. PRIMIS: Not immediate, but the --
13 the time when the Corps is in drought
14 operations can be very lengthy. And Florida,
15 when the Corps is coming out of drought
16 operations, there's plenty of rain.

17 Florida has not made the case that it
18 needs more water at a time when there's plenty
19 of rain and water in the system. It just --
20 that water just will wash out to sea and won't
21 benefit anybody.

22 When they really need it -- and that's
23 what the whole trial was about -- I'm sorry,
24 Mr. Chief Justice --

25 CHIEF JUSTICE ROBERTS: You can finish

1 your sentence.

2 MR. PRIMIS: What the whole trial was
3 about was can they get it during a drought?
4 And the Army Corps -- and all the evidence
5 shows conclusively that they cannot. Thank
6 you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Kneedler.

10 ORAL ARGUMENT OF EDWIN S. KNEEDLER ON BEHALF OF
11 THE UNITED STATES, AS AMICUS CURIAE, IN SUPPORT OF
12 OVERRULING FLORIDA'S EXCEPTION 2C

13 MR. KNEEDLER: Mr. Chief Justice, and
14 may it please the Court:

15 This case has proceeded from the
16 outset on the premise that the Corps of
17 Engineers' operations have to be taken as a
18 given and any decree by this Court would not
19 require a change in the Corps' operations.

20 That flowed directly from the fact
21 that the United States is a required party but
22 has not been joined because it can't -- it
23 hasn't waived its sovereign immunity. And,
24 therefore, the -- the Court cannot order the
25 Corps of Engineers to take any different

1 operation. Or --

2 CHIEF JUSTICE ROBERTS: Well, we don't
3 -- maybe -- maybe we can order the Corps and
4 maybe we can't, but surely you will. I mean, I
5 understand that's what you say in the March 30.
6 You're not going to ignore the determination by
7 the Court that what Georgia has done is
8 inequitable in arrogating to itself water that
9 should be flowing down.

10 Now, maybe at the end of the day you
11 say: Well, we've got other interests. We're
12 still going to do this. But that would change
13 the facts on the ground, wouldn't it? A
14 decision from us?

15 MR. KNEEDLER: Yes, but let me -- let
16 me explain the role of the Corps' operations
17 here because I think it's important. This is
18 not a -- an ordinary apportionment case where
19 there is no act of Congress that -- that has
20 been involved.

21 Here, there is an act of Congress.
22 Now, Congress, pursuant to its Commerce Clause
23 and other authorities, can enact statutes or
24 approve compacts that regulate or apportion
25 water in a stream. In Arizona versus

1 California, for example, the Court concluded
2 that the Boulder Canyon project had directly
3 allocated the water and so there was nothing
4 left for the Court, as a matter of equitable
5 apportionment, to do.

6 Here, Congress has enacted a statute
7 that doesn't directly apportion between the
8 states, but it -- it does heavily regulate this
9 river system. If the protocols that are in the
10 Corps' manual had been enacted into law, I
11 think there's no question that this Court would
12 have to respect that, could not order the Corps
13 to change it, and would have to take them as a
14 given.

15 Here, what Congress did instead was to
16 delegate to the Corps of Engineers the
17 responsibility for balancing all those
18 different interests and to do so through an
19 extensive public process that takes into
20 account all the basin interests, the -- the
21 hydropower, which was one of the primary
22 purposes of -- of this integrated system of
23 dams to begin with; flood control; Endangered
24 Species Act; and also refill -- refilling water
25 and being conservative so if a -- if a drought

1 is extended, that there will be enough water to
2 serve all of those purposes.

3 Congress vested in the Corps of
4 Engineers the responsibility --

5 JUSTICE BREYER: So, why don't you
6 just waive the sovereign immunity, get into
7 this, and try to help the Special Master reach
8 an equitable solution?

9 MR. KNEEDLER: For -- for the reason
10 that I -- that I said, that here you have an
11 act of Congress that delegates the power to the
12 Corps in the first instance. The Corps'
13 judgments would be reviewed under the APA,
14 under the arbitrary and capricious standard,
15 after it balances all of the interests. It's
16 not really a role for this Court to -- to de
17 novo determine what the role of the -- of the
18 Corps of Engineers is in a situation like this.

19 JUSTICE SOTOMAYOR: So what about a
20 consumption cap? It changes the rules on the
21 ground. It gives more water.

22 In what ways does a determination by
23 the Special Master that more water should come
24 into the system negatively affect your
25 discretion?

1 MR. KNEEDLER: Well, it depends how
2 that plays out. As we say, I don't think the
3 Court could order the Corps to take a -- a
4 different position, but under the Corps' own
5 protocols, there are circumstances in which
6 additional water that -- that would be freed up
7 would flow to -- would flow to Florida.

8 There is -- not at the drought period,
9 because the -- the Corps has set a minimum in
10 order to preserve water in case the drought is
11 extended, but above the 5,000 --

12 JUSTICE SOTOMAYOR: But you've taken
13 no position on whether that extra release would
14 actually provide a material benefit?

15 MR. KNEEDLER: Right. We have not
16 taken -- we have not gotten in --

17 JUSTICE SOTOMAYOR: Why not? Could we
18 ask you to take that position?

19 MR. KNEEDLER: I -- I -- I suppose you
20 -- the -- the government could participate that
21 -- in that as an evidentiary matter, but -- but
22 it seems --

23 JUSTICE SOTOMAYOR: I asked a very
24 specific question. Could we ask for an amicus
25 brief that does that?

1 MR. KNEEDLER: I -- I suppose you
2 could if --

3 JUSTICE BREYER: What do you think?
4 In other words, what do you think we should do?
5 (Laughter.)

6 MR. KNEEDLER: I --

7 JUSTICE SOTOMAYOR: Do you think we
8 should --

9 MR. KNEEDLER: From the -- from the
10 United States' perspective, we think that what
11 -- we are not taking a position on whether
12 Florida has shown that -- that a cap would
13 produce sufficient water to justify the cap in
14 terms of benefits to Florida.

15 Our interest here --

16 JUSTICE KAGAN: But you do think,
17 Mr. Kneedler, am I wrong, your -- your brief
18 says that if there were a consumption cap,
19 Florida would get material amounts, more water.

20 MR. KNEEDLER: There would be
21 additional water. It depends what you mean by
22 "material." Would they be -- would -- would
23 they come at the right time such that it would
24 -- it would produce a material benefit to the
25 ecosystem in Florida?

1 The -- the claim of injury isn't just
2 -- doesn't -- can't depend just on whether
3 there's more water going through but what would
4 happen as a result of that water. Would the
5 ecosystem be -- be improved?

6 And so that is the evidentiary
7 question.

8 JUSTICE KAGAN: So suppose that we
9 think that looking at the record that was
10 before the Special Master, there was quite a
11 lot of evidence that, with more water, the
12 ecosystem would be improved.

13 Do you think -- as I hear you, you're
14 saying: And there would be more water.
15 However much water is saved in Georgia comes to
16 Florida.

17 MR. KNEEDLER: No, not -- that -- that
18 is not necessarily true because the Corps
19 operates the five dams as an integrated whole
20 and it does so in part on basin inflow but in
21 part on how much water is stored in the
22 reservoirs at any particular time of year.

23 So there are certain situations,
24 looking at total basin inflow, for example, if
25 more water came in from the Flint River, that

1 would free up water to be stored upstream for
2 release during -- during low-flow periods.
3 It's operated as an integrated whole. There is
4 not a one-for-one tradeoff. Now, it maybe --

5 JUSTICE KAGAN: And that's true even
6 in non-drought operations?

7 MR. KNEEDLER: Yes. Right above --
8 right above drought operations, there is a
9 period -- there -- under different times of
10 year, from 5 to 10,000 feet, all of that flow
11 would go to Florida, but there are other times
12 when only 50 percent of the flow would go to
13 Florida; there are still other times when none
14 of the additional flow would go to Florida.
15 That -- that is under the protocol.

16 But if the Court concludes that a cap
17 within that, not -- not -- taking that
18 framework as a given, that additional -- that a
19 cap would produce additional water, the Corps
20 does not have a stake in that fight.

21 I did want to address one point about
22 the -- the prediction, the question of how
23 certain it is what the Court will do -- the
24 Corps will do. This is a different situation
25 than the typical case where there's a third

1 party and -- and how likely is it that will --
2 something -- something will happen.

3 Congress has adopted a separate
4 statutory regime in which the Corps has to
5 decide what to do with the range of additional
6 water that may be available at any particular
7 time.

8 CHIEF JUSTICE ROBERTS: But I just --
9 I'm sorry to interrupt, but it does seem fairly
10 important. You say we can't order you to do
11 something, but you've told us that you will
12 take it into account. And it seems to me that
13 that's arguably real redress to Florida, that
14 you're going to take into account a decision
15 saying that, equitably, they're entitled to
16 more water, that Georgia is improperly taking
17 its water.

18 MR. KNEEDLER: Well --

19 CHIEF JUSTICE ROBERTS: And -- and --
20 and you say you'll take it into account.

21 MR. KNEEDLER: Well, several things
22 about that.

23 To say that Florida is equitably
24 entitled to more water can't ignore the regime
25 that the Corps of Engineers has put in place

1 because equity follows the law in an original
2 case as any other.

3 So if the allocation that the Corps
4 has made, I think, has to be taken as a given
5 in the Court deciding what -- what is an
6 equitable apportionment. And Florida --

7 JUSTICE KENNEDY: Well, you have said
8 -- you have said you don't have any stake in
9 the argument about whether more water would
10 help Florida. Can't we ask you that question
11 when we're talking about your expertise?

12 You say, well, whatever you decide,
13 we'll use our expertise to follow it, but then
14 you don't tell us what to decide and you're the
15 experts.

16 MR. KNEEDLER: Well, the -- the Corps
17 is the expert through the process of the -- of
18 the manual, which was exactly what Congress
19 meant. The Corps -- if -- if this Court --
20 going back to the -- the Chief -- Chief
21 Justice's question, if -- what would the Corps
22 do if this Court entered a decree, first of
23 all, if the Court entered a decree that Florida
24 needed more water than the Corps of Engineers'
25 operation protocols right now provide for,

1 that's really sort of inconsistent with the way
2 this case began, which is that -- that -- that
3 it was premised on the fact that the Corps'
4 procedures would not have to be changed.

5 And that's not to say that the -- that
6 I suppose the Court could decide to do that
7 anyway.

8 JUSTICE BREYER: But we don't know --
9 see, I'm sure you've got this point, but, I
10 mean, I don't know what to do without knowing
11 what the Corps is likely to do. And I agree
12 with you that it's Florida's fault; at the
13 beginning, they said we don't want the Corps in
14 here.

15 And now it seems like you're their
16 best hope, all right? So -- so -- so that's
17 why I seriously asked you the question, if you
18 were sitting right here in my shoes, what would
19 you do?

20 MR. KNEEDLER: Well, what -- one
21 course would be, if -- if you agree that
22 Florida has not made the showing that it --
23 that it said that it would make, that there
24 would be material benefits from the increased
25 flows, Florida has the ability to challenge the

1 Corps of Engineers' master manual and say that
2 it does not provide sufficient downstream flows
3 for Florida or to petition the Corps to adopt a
4 new -- a new manual and revise it.

5 It's not at all clear that the
6 governing statutes -- may I finish? -- even
7 allow the Corps of Engineers to allocate
8 additional water for the Apalachicola Bay or
9 that to do so would be consistent with
10 balancing all the other responsibilities the
11 Corps has.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Kneedler.

14 Mr. Garre, two minutes.

15 REBUTTAL ARGUMENT OF GREGORY G. GARRE

16 ON BEHALF OF THE PLAINTIFF

17 MR. GARRE: Thank you, Your Honor.

18 First, the problem here is Georgia's
19 consumption. The only way to address that is
20 through an equitable apportionment.

21 Second, we've heard a lot about the
22 Master Control Water Manual. The record of
23 decision itself says that the adoption of that
24 manual, "in no way would it prejudice this
25 Court in adopting an equitable apportionment."

1 And I think the arguments we have just
2 heard would result in a great deal of
3 prejudice.

4 JUSTICE SOTOMAYOR: Mr. Garre, what do
5 we do with the Special Master's conclusion on
6 65-66, where they credit the report by
7 Georgia's expert, Dr. Bedient, and Dr. Bedient
8 did a modeling and came to the conclusion that
9 even if there was extra flow, it wouldn't
10 materially change the environmental impact?

11 MR. GARRE: Right.

12 JUSTICE SOTOMAYOR: That's your
13 greatest challenge.

14 MR. GARRE: Special Master is relying
15 on the wrong redressability standard. The
16 evidence -- he -- Bedient was relying on a
17 model that didn't take into account
18 discretionary releases.

19 Let me give you some more evidence.
20 Shanahan --

21 JUSTICE SOTOMAYOR: If we -- if we say
22 that he couldn't, that he had to follow the
23 Army Corps' and assume that the Army Corps'
24 protocol would control, is Bedient right?

25 MR. GARRE: No, because he wouldn't be

1 addressing non-drought conditions where we're
2 going to get benefits with additional water
3 coming through. The evidence --

4 JUSTICE SOTOMAYOR: Bedient did it on
5 just drought conditions, not on --

6 MR. GARRE: That's what the focus.
7 The evidence is the water is going to come
8 through the United States --

9 JUSTICE SOTOMAYOR: So why does the
10 Special Master rely upon it with the
11 non-drought situation?

12 MR. GARRE: Your Honor, in the context
13 of that discussion, I -- I don't think that
14 reliance on that can support the conclusion
15 that this case should end.

16 If I could give you some more
17 evidence, Shanahan direct at paragraph 60
18 explains the water that goes through.
19 Shanahan's testimony, page 25, 23, says the
20 water is going to go through. Allan paragraph
21 85 says even modest amounts will help Florida.

22 Justice Ginsburg, you're right, even
23 just preventing the situation from worsening is
24 going to provide redress. Hornberger addresses
25 that at paragraphs 125 to 126.

1 When it comes to what Congress has
2 said, what I would point to is a statute that
3 my friend, Mr. Kneedler, neglected but the
4 United States pointed to in its post-trial --
5 its motion to dismiss brief, where it said that
6 there's no reason to -- to assume that the
7 Corps would ignore a decree and it pointed to
8 the Compact statute passed in 1997 where
9 Congress directed federal officials to the
10 maximum extent possible to help facilitate the
11 state's agreed-upon allocation formula, there's
12 no reason to presume that the Corps would treat
13 a decree by this Court any differently.

14 We would ask this Court to decline the
15 Special Master's recommendation. Thank you,
16 Your Honors.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 12:07 p.m., the case
20 was submitted.)

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1	7 71 [3] 50:3,6 51:4		B
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Official

<p>border ^[1] 20:24 both ^[2] 45:21 54:13 Boulder ^[1] 60:2 bound ^[2] 25:2 37:2 BREYER ^[30] 30:24 32:12 33:6,10, 15,18,22 34:4 38:19 39:5,8,9,20, 25 40:19 45:11 49:19,23 50:2,17, 18,21,24 51:6,9 52:6,10 61:5 63:3 68:8 brief ^[20] 5:16 6:2 12:14 16:24 18: 6 20:16,17 21:12 22:25 23:1 27:9 30:23 33:21 34:5 36:23 42:13 47: 14 62:25 63:17 72:5 broad ^[1] 14:6 brought ^[1] 38:6 bumping ^[1] 20:20 burden ^[17] 9:9,11,18,24 10:2,7 14: 17,20,23 15:4,9,15,20,24 17:22 55: 5,7 burden-shifting ^[1] 14:9</p>	<p>18 54:2,7,20 55:20 56:10 57:24, 25 58:7,13 59:2 66:8,19 67:20,20 69:12 72:17 chose ^[1] 38:17 chosen ^[1] 41:11 circuited ^[1] 18:11 circumstances ^[1] 62:5 cite ^[1] 27:3 cites ^[4] 6:1 7:18 8:19 26:17 claim ^[2] 29:6 64:1 claimed ^[1] 48:22 claims ^[2] 13:11 36:5 clarified ^[1] 36:23 Clause ^[1] 59:22 clear ^[10] 8:21 11:23 14:17 21:10 53:25 54:3,15,22 56:5 69:5 clearly ^[2] 14:11 47:22 close ^[1] 11:5 Coca-Cola ^[2] 39:3,8 colleague ^[1] 43:16 Colorado ^[7] 9:23 14:3,15 16:8 54: 4,5 55:5 Columbia ^[1] 38:8 come ^[6] 6:4 13:1 54:3 61:23 63: 23 71:7 comes ^[9] 31:11,17,18,21 39:10 40:24 54:4 64:15 72:1 coming ^[8] 12:23 19:24 20:21,25 38:23 40:12 57:15 71:3 comment ^[1] 56:9 Commerce ^[1] 59:22 committed ^[1] 21:22 common ^[5] 6:22 23:7 45:12,13 49:11 Compact ^[1] 72:8 compacts ^[1] 59:24 compels ^[1] 34:6 complete ^[4] 4:3,7 9:4 24:21 complicated ^[3] 45:14,20,21 computer ^[2] 45:20 48:4 conceivable ^[1] 9:15 concentrate ^[1] 4:20 concentrated ^[1] 4:12 concern ^[1] 41:1 conclude ^[3] 9:7 21:19 55:13 concluded ^[4] 3:24 14:21 26:24 60:1 concludes ^[1] 65:16 conclusion ^[3] 70:5,8 71:14 conclusively ^[1] 58:5 conditions ^[6] 5:5,19 17:3 45:17 71:1,5 conduct ^[2] 9:22 21:18 conducted ^[1] 18:17 confirm ^[1] 38:11 Congress ^[12] 23:22 59:19,21,22 60:6,15 61:3,11 66:3 67:18 72:1,9 73:13 congressionally ^[2] 40:21 53:13 congressionally-defined ^[1] 41: 3 consequences ^[1] 3:21 conservative ^[1] 60:25 consider ^[1] 36:25 consistent ^[3] 23:18 54:6 69:9</p>	<p>consistently ^[3] 54:13,18,25 constellation ^[2] 23:2 34:17 consume ^[1] 3:19 consumes ^[2] 44:12 46:7 consumption ^[27] 3:14,16 4:1 5: 17 10:3,9 11:4,23 14:19 16:25 19: 17 25:21 26:9 27:15 29:9,25 30: 14 35:13 39:19 42:15 43:12 50:5 55:14,18 61:20 63:18 69:19 context ^[1] 71:12 continually ^[1] 23:23 continue ^[2] 4:1 42:9 continued ^[1] 21:25 continuingly ^[2] 23:15,15 contract ^[2] 37:7,12 Control ^[8] 36:15 38:5,17 40:22 41:16 60:23 69:22 70:24 convince ^[1] 39:1 convincing ^[6] 14:17 54:1,3,15,22 56:6 Corps ^[97] 6:7,10 10:24,24 16:22 17:6,9 22:8,14 23:3,6,12,14,18,22 24:5,8,16 26:23 28:15,20 29:18, 24 30:2 31:12,19,22 32:6 33:14, 20,22 34:5,18 35:15,23 36:2,7,13, 14,22 37:17 38:4,12 39:11 40:19 41:5,8,12 42:8,22 43:3,4 44:25 45: 16,19 48:11 49:16 50:8,9,10 52: 13 53:5 55:22 56:8,15,19 57:13, 15 58:4,16,25 59:3 60:12,16 61:3, 12,18 62:3,9 64:18 65:19,24 66:4, 25 67:3,16,19,21,24 68:11,13 69:1, 3,7,11 72:7,12 Corps' ^[15] 33:8 34:12 42:16 43:13 46:20 48:4 49:4 58:19 59:16 60: 10 61:12 62:4 68:3 70:23,23 correct ^[6] 10:21 15:16 42:6 43:25 45:5 53:4 cost ^[3] 15:22 17:24 18:7 cost/benefit ^[1] 19:9 costs ^[5] 9:4 14:24 18:4 19:12 22: 2 couldn't ^[1] 70:22 counsel ^[4] 35:4 46:10 58:8 72:18 course ^[3] 8:1 36:24 68:21 COURT ^[62] 1:1,14 3:10 7:20,21 8: 2,8 14:2,4 15:18 17:8 21:10,14,16 22:15 23:9,22 24:11,22,25 25:2 28:21 34:14,21 35:10,25 36:24 37: 1,2 38:7,16,18 50:10 52:5,8 53:10 54:12,18 55:1,3,10,25 56:5 58:14, 18,24 59:7 60:1,4,11 61:16 62:3 65:16,23 67:5,19,22,23 68:6 69: 25 72:13,14 Court's ^[3] 9:23 16:20 49:10 CRAIG ^[3] 1:20 2:6 35:7 create ^[1] 45:19 creates ^[1] 45:20 creating ^[1] 36:15 credit ^[1] 70:6 credited ^[1] 50:23 critical ^[3] 3:12 7:25 10:17 critically ^[1] 41:8 cubic ^[8] 30:15 31:11 32:3 36:17</p>	<p>39:10 40:2 41:9 46:7 cure ^[2] 8:17 10:4 curiae ^[3] 1:24 2:11 58:11 cycle ^[1] 13:8</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. ^[4] 1:10,18,20,23 Dam ^[1] 28:17 dams ^[2] 60:23 64:19 darn ^[1] 47:22 day ^[4] 15:5 18:13 31:16 59:10 days ^[4] 50:3,6,7 51:4 de ^[1] 61:16 deal ^[3] 8:22 44:2 70:2 dearth ^[1] 7:2 decade ^[1] 41:5 decades ^[2] 28:18 56:10 decide ^[5] 23:4 66:5 67:12,14 68:6 deciding ^[1] 67:5 decimated ^[1] 29:1 decision ^[19] 22:12 23:9,14 24:10, 11,12,16,17 25:2,3 34:13,21 35:24 36:23 37:22 51:24 59:14 66:14 69: 23 decline ^[1] 72:14 decree ^[29] 5:16 9:5 14:24 16:24 17:8,10 21:13 22:4,5,15,16,19 23: 1,11,25 24:3 28:20 34:9,14,17,22 35:25 36:4,25 58:18 67:22,23 72: 7,13 Defendant ^[5] 1:7,21 2:7 15:10 35: 8 definitely ^[1] 55:23 delaying ^[1] 42:20 delegate ^[1] 60:16 delegates ^[1] 61:11 demand ^[1] 34:22 demands ^[2] 51:14,21 Demo ^[1] 49:24 Department ^[1] 1:23 depend ^[1] 64:2 depends ^[3] 55:21 62:1 63:21 Deputy ^[1] 1:22 derive ^[1] 38:22 determination ^[2] 59:6 61:22 determine ^[2] 22:4 61:17 determined ^[3] 36:16 41:5 48:5 developments ^[1] 36:2 dictates ^[1] 40:21 difference ^[2] 8:16,17 different ^[10] 37:22 45:16,17,18 48:19 58:25 60:18 62:4 65:9,24 differently ^[1] 72:13 difficulty ^[1] 6:17 diminish ^[1] 48:2 dipped ^[1] 6:7 direct ^[5] 12:24 13:5,9 46:19 71:17 directed ^[1] 72:9 directly ^[4] 45:6 58:20 60:2,7 disagree ^[1] 43:16 disagreed ^[1] 26:2 discovery ^[1] 35:17 discrete ^[1] 4:6 discretion ^[2] 26:23 61:25</p>
---	---	---	---

<p>discretionary [2] 28:16 70:18 discriminated [2] 37:9,13 discrimination [1] 37:8 discuss [1] 11:19 discussed [1] 11:16 discussion [1] 71:13 dismiss [1] 72:5 dispute [2] 18:5 26:14 disrupt [1] 55:6 distinguish [1] 36:10 district [3] 38:7,8,18 diversion [1] 55:7 diverting [1] 15:21 dividing [1] 57:4 docket [2] 3:5 55:12 document [2] 22:23 23:13 done [4] 8:25 22:1 53:1 59:7 down [11] 31:17,18,21,23 32:17,18, 23 38:23 39:11 40:7 59:9 downstream [2] 41:13 69:2 drink [2] 39:2,3 drive [1] 38:22 drought [57] 4:13,21 5:4,13,19,25 6:5,8,13,23 10:23 11:2 17:3 27:23 28:8,10,14,17 29:10,19 31:17 32:14,23 34:11 35:15 36:10,12,16 41:6,6 42:7,11,21,24,25 43:13 44:5, 25 45:7 47:7 48:2,12,22 49:3,12, 18 51:3 56:22 57:4,13,15 58:3 60:25 62:8,10 65:8 71:5 dry [1] 49:2 duration [3] 5:19 17:2 34:10 during [22] 4:15 5:4,9 6:4,8,9,13 11:2 20:18,21 29:19 35:14 36:16 37:9 42:23,23 43:6,14 44:25 58:3 65:2,2</p>	<p>entitled [3] 36:17 66:15,24 environmental [2] 53:11 70:10 equitable [18] 9:1,1,17 14:5 15:20 16:20 22:5 40:16,16 54:8,12,13 56:1 60:4 61:8 67:6 69:20,25 equitably [3] 24:3 66:15,23 equities [1] 18:18 equity [3] 21:15 34:22 67:1 error [3] 4:5 8:22 21:21 especially [1] 6:18 essentially [1] 14:23 establish [1] 25:6 established [1] 4:19 evaluate [1] 45:22 Evans [1] 24:24 even [18] 4:16 5:14 7:7 13:6,19 19:8 24:25 28:8,17 32:13,17 38:1 42:2 65:5 69:6 70:9 71:21,22 eventual [1] 57:11 eventually [3] 30:21 44:22 57:5 ever-increasing [1] 3:14 everybody [1] 37:14 Everyone [1] 52:14 everything [1] 24:14 evidence [40] 6:1 7:3 8:6,11 10:18 11:13,15,17,18 14:17 18:8 19:15, 22 20:2,3,5 25:10,16 27:18 28:14, 15 43:11,17,22 45:1,8,9 49:10 54:1,3,16,22 56:6 58:4 64:11 70:16, 19 71:3,7,17 evidentiary [4] 7:18 8:19 62:21 64:6 evolved [1] 33:9 exact [1] 13:25 exactly [7] 7:4 14:2,3 20:8 30:20 55:16 67:18 example [12] 5:25 6:3 12:9,20 19:23 20:15,23 39:21,23 45:25 60:1 64:24 exceeded [2] 56:17,20 exceeds [1] 56:25 Except [1] 52:20 exception [4] 1:25 2:12 6:18 58:12 exercise [1] 26:23 expect [1] 33:2 experienced [1] 6:6 expert [5] 8:15 49:15 50:22 67:17 70:7 expertise [2] 67:11,13 experts [4] 43:20 45:22 51:19 67:15 explain [3] 11:19 43:22 59:16 explained [2] 6:1 42:18 explains [1] 71:18 explicitly [2] 37:1 47:14 extended [3] 42:23 61:1 62:11 extensive [1] 60:19 extent [3] 18:23 42:4 72:10 extra [6] 32:16 40:5,13,23 62:13 70:9 extreme [3] 5:5,10 20:19</p>	<p>facilitate [4] 23:11 24:12,17 72:10 facilities [1] 12:11 facility [1] 12:12 fact [8] 3:17 11:15 18:7 35:22 38:12 43:1 58:20 68:3 facts [2] 36:6 59:13 failed [2] 4:2 35:18 fair [4] 5:2 20:5 22:10 37:14 fairly [2] 19:13 66:9 fallen [1] 6:10 far [4] 5:1 6:12 39:15,15 farther [1] 49:13 fashioning [1] 7:23 fault [2] 4:19 68:12 federal [3] 40:20 47:6 72:9 feet [11] 30:15 31:11 32:3 36:17 39:10 40:2,11 41:9 44:13 46:7 65:10 felt [1] 30:7 fewer [1] 49:13 fight [1] 65:20 fighting [1] 46:15 final [1] 53:11 find [4] 11:15 29:8,15,25 finding [1] 22:9 findings [7] 9:3,7 10:22 18:10 19:2,5 22:1 fine [1] 39:25 finish [2] 57:25 69:6 finished [1] 36:14 First [17] 3:13 4:22 7:9,14 10:22 11:22 14:16 15:14 16:21 18:2 19:7 26:1 28:6 34:8 61:12 67:22 69:18 Fish [4] 12:21 36:19 41:13 55:4 five [2] 45:15 64:19 five-week [1] 35:18 flew [3] 8:1 26:4 28:1 flexible [1] 14:6 Flint [9] 31:11,17,18 32:19 38:23 39:11 40:12 52:1 64:25 floor [2] 41:16 60:23 FLORIDA [80] 1:3 3:5,13 4:2,12,18 5:18 6:15 7:6 9:6 14:25 17:1 19:10,15 22:2 25:22 30:16 34:8,23 35:11,14,18 36:5,17 37:16 38:3,9, 15 40:7,17,25 41:25 42:1,3,17 43:7,11 44:3,14 45:9 46:2 47:3 48:11, 17,22 49:2,8,9,14 50:4 51:5,21 53:20,25 55:10,15,17,25 57:5,6,14,17 62:7 63:12,14,19,25 64:16 65:11, 13,14 66:13,23 67:6,10,23 68:22, 25 69:3 71:21 Florida's [10] 1:25 2:12 4:19 5:3 8:17 18:23 49:15 55:14 58:12 68:12 flow [14] 4:14 11:25 20:18,24 29:10 42:22,23 50:4 62:7,7 65:10,12, 14 70:9 flowed [1] 58:20 flowing [4] 27:16,19 32:18 59:9 flows [10] 4:13 20:19,20 43:7,14 47:18 56:17,20 68:25 69:2 focus [2] 51:20 71:6 focused [2] 5:3 27:14 follow [2] 67:13 70:22</p>	<p>followed [1] 7:5 follows [1] 67:1 Footnote [1] 14:16 form [2] 23:2 34:17 formally [1] 25:1 formula [3] 23:17,21 72:11 forth [1] 19:19 forward [1] 19:20 found [7] 3:18 18:24 21:17,17,18 30:6 43:10 frame [1] 30:4 framework [1] 65:18 free [1] 65:1 freed [1] 62:6 frequency [5] 5:12,18 17:2 28:9 34:10 friend [1] 72:3 front [2] 38:20 49:24 frustrate [1] 24:12 full [2] 9:5 18:23 future [2] 7:22 21:12</p>
E			
<p>easier [2] 24:5 33:13 ecosystem [3] 63:25 64:5,12 ecosystems [2] 19:18 20:4 EDWIN [3] 1:22 2:9 58:10 effect [2] 13:22 47:17 effects [1] 6:15 egg [1] 28:23 either [1] 15:22 enact [1] 59:23 enacted [2] 60:6,10 encourage [1] 25:11 end [6] 6:12 15:5,16 18:13 59:10 71:15 endangered [5] 36:21,21 41:13 53:5 60:23 Engineers [16] 17:7,9 22:8,15 23:3,7,14,23 24:6,8 58:25 60:16 61:4, 18 66:25 69:7 Engineers' [6] 23:12,19 24:16 58:17 67:24 69:1 enough [4] 8:16 19:16 48:13 61:1 enter [1] 17:8 entered [3] 22:6 67:22,23 enters [1] 22:15 entire [4] 4:23 35:11 36:11 52:14 entirely [1] 35:21</p>	<p>evolved [1] 33:9 exact [1] 13:25 exactly [7] 7:4 14:2,3 20:8 30:20 55:16 67:18 example [12] 5:25 6:3 12:9,20 19:23 20:15,23 39:21,23 45:25 60:1 64:24 exceeded [2] 56:17,20 exceeds [1] 56:25 Except [1] 52:20 exception [4] 1:25 2:12 6:18 58:12 exercise [1] 26:23 expect [1] 33:2 experienced [1] 6:6 expert [5] 8:15 49:15 50:22 67:17 70:7 expertise [2] 67:11,13 experts [4] 43:20 45:22 51:19 67:15 explain [3] 11:19 43:22 59:16 explained [2] 6:1 42:18 explains [1] 71:18 explicitly [2] 37:1 47:14 extended [3] 42:23 61:1 62:11 extensive [1] 60:19 extent [3] 18:23 42:4 72:10 extra [6] 32:16 40:5,13,23 62:13 70:9 extreme [3] 5:5,10 20:19</p>	<p>facilitate [4] 23:11 24:12,17 72:10 facilities [1] 12:11 facility [1] 12:12 fact [8] 3:17 11:15 18:7 35:22 38:12 43:1 58:20 68:3 facts [2] 36:6 59:13 failed [2] 4:2 35:18 fair [4] 5:2 20:5 22:10 37:14 fairly [2] 19:13 66:9 fallen [1] 6:10 far [4] 5:1 6:12 39:15,15 farther [1] 49:13 fashioning [1] 7:23 fault [2] 4:19 68:12 federal [3] 40:20 47:6 72:9 feet [11] 30:15 31:11 32:3 36:17 39:10 40:2,11 41:9 44:13 46:7 65:10 felt [1] 30:7 fewer [1] 49:13 fight [1] 65:20 fighting [1] 46:15 final [1] 53:11 find [4] 11:15 29:8,15,25 finding [1] 22:9 findings [7] 9:3,7 10:22 18:10 19:2,5 22:1 fine [1] 39:25 finish [2] 57:25 69:6 finished [1] 36:14 First [17] 3:13 4:22 7:9,14 10:22 11:22 14:16 15:14 16:21 18:2 19:7 26:1 28:6 34:8 61:12 67:22 69:18 Fish [4] 12:21 36:19 41:13 55:4 five [2] 45:15 64:19 five-week [1] 35:18 flew [3] 8:1 26:4 28:1 flexible [1] 14:6 Flint [9] 31:11,17,18 32:19 38:23 39:11 40:12 52:1 64:25 floor [2] 41:16 60:23 FLORIDA [80] 1:3 3:5,13 4:2,12,18 5:18 6:15 7:6 9:6 14:25 17:1 19:10,15 22:2 25:22 30:16 34:8,23 35:11,14,18 36:5,17 37:16 38:3,9, 15 40:7,17,25 41:25 42:1,3,17 43:7,11 44:3,14 45:9 46:2 47:3 48:11, 17,22 49:2,8,9,14 50:4 51:5,21 53:20,25 55:10,15,17,25 57:5,6,14,17 62:7 63:12,14,19,25 64:16 65:11, 13,14 66:13,23 67:6,10,23 68:22, 25 69:3 71:21 Florida's [10] 1:25 2:12 4:19 5:3 8:17 18:23 49:15 55:14 58:12 68:12 flow [14] 4:14 11:25 20:18,24 29:10 42:22,23 50:4 62:7,7 65:10,12, 14 70:9 flowed [1] 58:20 flowing [4] 27:16,19 32:18 59:9 flows [10] 4:13 20:19,20 43:7,14 47:18 56:17,20 68:25 69:2 focus [2] 51:20 71:6 focused [2] 5:3 27:14 follow [2] 67:13 70:22</p>	<p>followed [1] 7:5 follows [1] 67:1 Footnote [1] 14:16 form [2] 23:2 34:17 formally [1] 25:1 formula [3] 23:17,21 72:11 forth [1] 19:19 forward [1] 19:20 found [7] 3:18 18:24 21:17,17,18 30:6 43:10 frame [1] 30:4 framework [1] 65:18 free [1] 65:1 freed [1] 62:6 frequency [5] 5:12,18 17:2 28:9 34:10 friend [1] 72:3 front [2] 38:20 49:24 frustrate [1] 24:12 full [2] 9:5 18:23 future [2] 7:22 21:12</p>
F			

<p>gotten ^[4] 6:24 7:4 37:11 62:16 governed ^[2] 14:6 40:20 governing ^[1] 69:6 government ^[8] 23:8 24:2 25:1 28:12 47:5,6 52:21 62:20 government's ^[1] 27:9 granting ^[1] 36:4 grateful ^[1] 31:25 gravel ^[1] 11:6 gravely ^[1] 18:25 gravity ^[1] 48:24 grazing ^[1] 52:1 great ^[2] 5:1 70:2 greater ^[2] 17:24 36:5 greatest ^[1] 70:13 Greenblatt ^[1] 43:19 GREGORY ^[5] 1:18 2:3,14 3:7 69:15 ground ^[3] 36:6 59:13 61:21 groups ^[1] 31:2 guarantee ^[3] 26:22 29:17 40:10 guess ^[1] 7:14 Gulf ^[1] 19:3</p>	<p>hypotheticals ^[1] 47:15</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>Idaho ^[3] 7:20,20 55:2 ignore ^[3] 59:6 66:24 72:7 II ^[2] 7:20,21 III ^[1] 9:13 ill-fitting ^[1] 53:16 imagine ^[3] 31:7 38:23 39:3 immediate ^[2] 57:10,12 immediately ^[1] 57:7 immunity ^[2] 58:23 61:6 impact ^[4] 21:5 43:12 53:11 70:10 implement ^[2] 23:16,24 important ^[4] 5:6 49:8 59:17 66:10 importantly ^[1] 22:24 imposing ^[1] 34:21 improperly ^[1] 66:16 improve ^[2] 19:18,19 improved ^[2] 64:5,12 improvement ^[1] 13:16 inadequate ^[1] 43:23 included ^[1] 49:6 including ^[1] 24:15 incomprehensible ^[1] 38:21 inconsistent ^[1] 68:1 increase ^[1] 35:14 increased ^[7] 4:14 42:19 43:3,3,5,13 68:24 incredibly ^[2] 45:14,21 increments ^[1] 51:4 incur ^[3] 9:5 22:3,3 indeed ^[1] 8:7 individuals ^[1] 44:1 inequitable ^[3] 9:22 21:17 59:8 inflow ^[2] 64:20,24 inflows ^[1] 42:19 information ^[1] 27:23 initial ^[1] 54:8 injured ^[2] 8:4 18:25 injuries ^[1] 18:24 injury ^[4] 10:3 14:25 54:14 64:1 inquiry ^[2] 8:24 15:2 insofar ^[1] 34:9 instance ^[1] 61:12 instead ^[7] 8:25 14:5 21:24 31:16 37:20 57:11 60:15 instituted ^[1] 23:21 integrated ^[3] 60:22 64:19 65:3 interest ^[1] 63:15 interests ^[6] 41:1 54:17 59:11 60:18,20 61:15 interrupt ^[1] 66:9 interrupted ^[1] 54:21 intervened ^[1] 33:14 involved ^[1] 59:20 irreversible ^[1] 13:7 isn't ^[5] 31:2 32:21 43:8 57:6 64:1 issue ^[4] 4:6 29:4 35:25 54:17 issued ^[2] 22:12 38:4 issues ^[2] 44:2 53:2 it'll ^[1] 31:13 itself ^[7] 16:23 24:18 28:10 34:6</p>	<p>36:7 59:8 69:23</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>January ^[1] 1:11 joined ^[2] 38:9 58:22 judgments ^[1] 61:13 jurisdiction ^[2] 52:9 53:9 Justice ^[169] 1:23 3:3,10 4:9 5:21 6:16,21 7:13 8:12,20 9:8,13 10:1,6,12,16,20 11:9,12,21 12:2,2,5,8,15 13:13,15,23 14:7,8 15:3,8,12,23 16:5,12,16,19 17:12,20 18:1,2,12 19:6 20:1,10 21:22 22:18,21 25:10,14,15,19,24 26:7,16 27:2,7,11,20,22 29:3,6,13,20,23 30:9,13,19,24 32:12 33:6,10,15,18,22 34:4 35:3,6,9,20 36:9 37:4,6,20,25 38:19 39:5,8,9,20,25 40:19 41:19,20,22 42:7,12 43:9,15 44:9,21 45:3,11,24 46:10,11,12,15,18,22,23 47:1,5,13,19 48:1,14 49:1,19,23 50:2,17,18,21,24 51:6,9 52:6,10,20 53:9,18 54:2,7,20 55:20 56:10,12,14 57:1,3,24,25 58:7,13 59:2 61:5,19 62:12,17,23 63:3,7,16 64:8 65:5 66:8,19 67:7 68:8 69:12 70:4,12,21 71:4,9,22 72:17 Justice's ^[1] 67:21 justify ^[1] 63:13 justifying ^[1] 55:4 JX ^[1] 12:21</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[23] 5:21 6:16,21 7:13 14:7 19:6 20:1,10 25:10 26:7 30:9,13,19 44:9,21 45:3,24 46:11 48:14 49:1 63:16 64:8 65:5 Kagan's ^[2] 12:3 25:15 Kansas ^[1] 54:5 KENNEDY ^[5] 9:8,13 10:1,6 67:7 kind ^[5] 7:7 20:12 21:4 49:19,23 kinds ^[2] 20:2 51:14 KNEEDLER ^[23] 1:22 2:9 58:9,10,13 59:15 61:9 62:1,15,19 63:1,6,9,17,20 64:17 65:7 66:18,21 67:16 68:20 69:13 72:3 knowing ^[1] 68:10</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>laid ^[1] 14:15 largely ^[1] 3:16 later ^[3] 50:14,15,15 Laughter ^[4] 32:10 34:2 39:4 63:5 law ^[2] 60:10 67:1 laws ^[3] 23:3 25:4 34:18 lawyers ^[1] 31:2 least ^[10] 14:22 17:17 18:19 32:2 36:6 40:5,17 41:23 42:4 47:10 left ^[1] 60:4 legal ^[2] 4:5,24 legally ^[1] 3:19 lengthy ^[2] 38:14 57:14 lens ^[1] 26:20 less ^[5] 4:17 31:19 44:13 50:8 52:1 level ^[1] 41:8</p>	<p>lies ^[1] 15:15 life ^[2] 29:2 33:13 light ^[3] 4:24 33:20 51:21 likelihood ^[1] 17:17 likely ^[4] 8:7 25:8 66:1 68:11 limit ^[1] 25:21 limited ^[1] 11:24 limiting ^[2] 5:17 16:24 limits ^[1] 27:17 line ^[1] 48:8 link ^[1] 25:20 litigation ^[2] 52:15 53:3 little ^[7] 14:11 31:19,20,25 32:4 40:4,17 live ^[1] 53:7 logic ^[1] 12:3 long-term ^[1] 3:21 longer ^[2] 42:23,23 look ^[12] 20:17 23:4,9 24:10,23 26:5,11 31:6 37:21 38:20 53:6 56:2 looking ^[6] 26:21 52:22,23,23 64:9,24 lot ^[12] 20:3 21:2 32:16,21 33:13 37:16 40:1 43:2,17 51:13 64:11 69:21 love ^[1] 33:3 low ^[5] 4:13 20:18,19,19 41:8 low-flow ^[3] 5:5,10 65:2</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made ^[11] 4:5 10:22 21:10 22:1,13 25:7 28:16 38:15 57:17 67:4 68:22 mandates ^[1] 40:21 Manual ^[10] 36:15 38:5,6,18 60:10 67:18 69:1,4,22,24 March ^[3] 22:19 35:24 59:5 Master ^[36] 3:11,17,23 4:4,10 8:13 9:3,19 10:21 12:6 14:21 18:10,14,24 19:8 21:21 22:10,13 26:2,20 29:8,15 42:19 43:10,21 49:6 50:23 51:24 55:11 61:7,23 64:10 69:1,22 70:14 71:10 Master's ^[7] 4:23 8:22 16:11 34:7 57:9 70:5 72:15 material ^[10] 35:14 51:5,18 54:24 56:6 62:14 63:19,22,24 68:24 materially ^[2] 55:1 70:10 matter ^[8] 1:13 19:12 44:13 51:12 54:9,11 60:4 62:21 maximum ^[1] 72:10 mayor ^[1] 39:1 mean ^[21] 6:22 11:22 26:1,20 27:8 28:21 30:17,24 31:3,5 33:7 36:4 42:14 44:11 51:12 52:6 55:21,21 59:4 63:21 68:10 meaningful ^[7] 11:17,19 13:17,21 14:1 28:11 34:23 means ^[2] 6:9 50:8 meant ^[2] 6:7 67:19 meet ^[6] 9:14 14:20 15:16 16:17 42:22 53:20 mention ^[1] 26:17 mentioned ^[4] 26:17 27:3 44:1 54:</p>
---	--	---	--

<p>25 mere [1] 10:15 merits [1] 51:16 met [1] 16:10 meteorology [1] 48:24 Mexico [6] 9:24 14:3,16 16:8 54:5 55:5 might [3] 20:2 33:4 55:9 million [2] 18:7,9 mind [1] 52:3 mine [1] 25:25 minimal [1] 19:14 minimum [7] 27:24 29:10 30:1 42:22 56:17,20 62:9 minutes [1] 69:14 mistake [1] 49:9 model [3] 48:5 49:16 70:17 modeled [1] 48:7 modeling [2] 49:14 70:8 models [2] 45:20,23 modest [2] 13:6 71:21 moment [1] 33:23 Monday [1] 1:11 months [3] 6:9,12 49:2 morning [1] 3:4 motion [1] 72:5 move [3] 46:24 48:10 49:18 much [12] 3:20 7:4 14:24 15:22 20:8 26:8 32:18 39:18 44:16 46:7 64:15,21 multiple [3] 41:1,2,3 multitude [1] 41:17 mussels [5] 13:3 19:4 40:6 52:24 53:6 must [4] 7:8,15 49:1 55:8 mystery [1] 30:25 mystical [1] 31:4</p>	<p>normal [2] 4:15 42:25 nothing [4] 38:23 42:1 45:13 60:3 notion [1] 26:3 novo [1] 61:17 number [5] 17:4 41:11,11,12 55:12 numbers [1] 55:3</p>	<p style="text-align: center;">P</p> <p>p.m [1] 72:19 PAGE [19] 2:2 4:11 5:15 12:14,21 16:23 20:17 22:23,25 23:13 27:10 28:12 29:17 30:22 34:11 43:10 47:20 53:11 71:19 pages [3] 6:1 12:9 26:5 panoply [1] 40:20 papers [1] 48:25 paragraph [5] 12:25 13:5,10 71:17,20 paragraphs [1] 71:25 part [8] 15:2 23:2 31:22 34:17 46:9 51:2 64:20,21 partial [1] 17:17 participate [2] 51:23 62:20 particular [7] 9:24 26:13,24 47:17 53:22 64:22 66:6 parties [2] 18:5 26:15 party [2] 58:21 66:1 pass [4] 40:24 42:9 44:4,10 pass-through [1] 43:14 passed [1] 72:8 passive [1] 48:13 past [1] 56:19 people [3] 32:5 44:3 51:13 Pepsi [1] 39:2 per [3] 36:17 41:9 46:7 percent [3] 48:7 49:17 65:12 perhaps [1] 51:23 period [6] 6:9 20:21 31:17 48:10 62:8 65:9 periods [21] 4:15 5:5,10,10 10:23 11:3 12:19 13:20 17:3 20:19 28:8,10 29:19 36:11,11,12 41:6 42:7 44:6 56:22 65:2 person [1] 37:10 perspective [1] 63:10 petition [1] 69:3 physics [3] 30:19,20 44:14 place [7] 11:2 19:18 20:11,11 27:17 47:12 66:25 Plaintiff [8] 1:4,19 2:4,15 3:8 9:12 15:25 69:16 plays [1] 62:2 please [3] 3:10 35:10 58:14 plenty [6] 11:15 25:16 48:20,23 57:16,18 point [20] 5:24 7:19 8:14 9:22 11:18 12:3,19,24 13:4,9 17:4,5 20:14 27:8 33:5 43:16 49:8 65:21 68:9 72:2 pointed [3] 25:9 72:4,7 points [1] 43:1 politically [1] 3:19 position [7] 3:18 31:24 33:8 62:4,13,18 63:11 possibility [1] 39:17 possible [9] 8:7 17:3 20:20 21:19,20 44:10 46:3 48:16 72:10 post-trial [2] 20:15 72:4 power [2] 52:9 61:11 practically [1] 3:18</p>	<p>precedents [1] 9:23 precise [2] 13:22 47:20 precisely [1] 47:17 precision [2] 14:4 21:13 prediction [1] 65:22 prejudice [2] 69:24 70:3 preliminary [1] 54:14 premise [1] 58:16 premised [4] 35:11,21,22 68:3 premises [1] 3:12 preparedness [2] 23:16,24 present [3] 45:8 49:9,14 presentation [1] 5:3 presented [2] 43:11 51:11 preserve [1] 62:10 Presumably [1] 53:20 presume [1] 72:12 pretty [3] 31:24 32:20 47:22 prevent [2] 41:24,24 preventing [1] 71:23 primary [1] 60:21 PRIMIS [53] 1:20 2:6 35:6,7,9 36:9 37:5,19,24 38:3 39:7,16,24 40:19 42:6 43:9,24 44:9,20,23 45:5 46:4,14,17,21,25 47:4,13,25 48:3,18 49:4,21 50:1,17,19,22 51:1,8 52:5,8,12 53:4,24 54:4,10,23 56:4,13,22 57:2,12 58:2 principle [1] 7:25 prior [1] 20:7 probably [1] 51:9 problem [7] 8:17 10:4 28:23,24 38:13 46:5 69:18 problems [1] 57:8 procedures [1] 68:4 proceed [1] 34:25 proceeded [1] 58:15 proceeding [5] 9:2 14:6 18:22 21:10 38:7 proceedings [1] 18:11 process [8] 36:15 37:9,13 38:15 52:14 56:9 60:19 67:17 produce [3] 63:13,24 65:19 project [1] 60:2 proof [1] 8:14 proposition [1] 35:12 protect [3] 36:21 41:12,14 protected [1] 42:4 protocol [3] 43:4 65:15 70:24 protocols [6] 11:2 43:5 52:21 60:9 62:5 67:25 prove [10] 10:23 13:25 14:1 15:4 17:22 29:16 35:18 55:7,17,18 proved [1] 55:15 proven [1] 25:20 provide [12] 5:9 7:22 21:12 24:18,19 42:15 51:18 54:24 62:14 67:25 69:2 71:24 provided [1] 44:7 providing [1] 11:14 public [2] 56:9 60:19 purposes [4] 41:3 45:18 60:22 61:2 pursuant [1] 59:22</p>
<p style="text-align: center;">N</p> <p>name [1] 31:18 nature [1] 30:18 navigation [1] 41:16 necessarily [2] 30:16 64:18 necessary [1] 38:12 need [4] 36:10 39:12 51:13 57:22 needed [1] 67:24 needles [1] 6:11 needs [2] 48:22 57:18 negatively [1] 61:24 neglected [1] 72:3 Neither [1] 44:7 never [4] 8:3 21:16 24:22 40:5 nevertheless [1] 3:23 New [9] 9:23 14:3,15 16:8 54:5 55:5 69:4,4 next [2] 3:4 18:21 nine [2] 6:9,12 non-drought [24] 4:15 11:10 12:19 13:20 17:13,15 18:15,19 27:24 29:11 30:10 32:15 36:11 42:13 43:6 44:5 45:4 47:2,23 48:15 57:4 65:6 71:1,11 none [1] 65:13 Nope [1] 8:8</p>	<p>objective [1] 24:6 obtain [1] 16:2 obvious [1] 32:5 obviously [3] 7:8,10 55:21 officials [1] 72:9 Okay [20] 7:9 13:14 16:12,18 17:13,25 18:23 22:21 25:23 26:1 31:10 32:25 39:11,23,25 46:17 48:18 50:2,18 54:20 once [4] 10:2 14:12,20 32:23 One [20] 5:9 6:5,5 8:21 10:22 20:3 27:3,24 31:1,16 33:7,19 40:25 45:11 52:13 56:14 57:8 60:21 65:21 68:20 one-for-one [1] 65:4 ongoing [1] 52:15 only [9] 4:12 24:4,19 29:1 31:1 39:12,13 65:12 69:19 onset [2] 42:21 47:7 operate [2] 25:5 34:19 operated [1] 65:3 operates [1] 64:19 operation [3] 42:16 59:1 67:25 operations [40] 5:13 6:8 16:22 17:11,13,15 22:17 23:10 28:14,18 30:11 34:11,15 35:16 36:3,8 41:7 42:21,25 43:13 44:6 45:8,13 47:2,7,23 48:2,12,15 49:4,12,18 51:3 57:14,16 58:17,19 59:16 65:6,8 opinion [1] 12:20 oral [7] 1:13 2:2,5,8 3:7 35:7 58:10 order [9] 23:4 36:25 37:2 58:24 59:3 60:12 62:3,10 66:10 ordinary [1] 59:18 Oregon [3] 7:21 55:1,2 original [3] 3:5 52:9 67:1 other [15] 5:11 25:12 26:13 31:12,20 32:6 43:20 52:25 59:11,23 63:4 65:11,13 67:2 69:10 others [1] 40:7 ought [1] 51:14 out [6] 14:15 50:15 52:4 57:15,20 62:2 outset [2] 3:25 58:16 outside [1] 28:8 outweigh [4] 14:25 15:6 16:2 55:8 over [2] 23:19 36:12 overall [1] 7:24 overruling [3] 1:25 2:11 58:12 overwhelmingly [1] 21:4 own [5] 24:16 43:4,5 46:20 62:4 oyster [1] 19:19 oysters [6] 19:1 29:1 32:1 40:6 52:24 53:14</p>		

Official

<p>put ^[1] 7:6,16 8:15 18:8 19:15,22 27:17 28:14 31:14 55:5 66:25 Putting ^[2] 11:5 25:21</p>	<p>reduce ^[8] 5:12 13:2 17:1 28:9 31:22 34:10 47:7 50:8 reducing ^[1] 5:18 reduction ^[1] 48:7 refill ^[1] 60:24 refilling ^[1] 60:24 regard ^[3] 3:20 44:20 45:7 regime ^[3] 14:9 66:4,24 region ^[5] 3:22 6:6 28:25 36:20 51:20</p>	<p>role ^[3] 59:16 61:16,17 roughly ^[1] 56:23 rules ^[2] 45:16 61:20 ruling ^[1] 21:24 run-of-the-river ^[1] 12:12 running ^[1] 55:23</p>	<p>17:16 21:4,9 24:20 34:24 37:10,12 53:21,25 54:22 showed ^[2] 4:17 45:2 showing ^[5] 27:14 43:2,20 44:17 68:22 shown ^[8] 9:19 10:2 17:18,23 19:11 26:22,25 63:12 shows ^[4] 6:3 8:6 51:2 58:5 side ^[4] 6:22 48:8 50:11,25 sides ^[1] 45:21 significant ^[2] 19:22 21:5 significantly ^[1] 16:2 similar ^[1] 13:11 simple ^[1] 40:23 sitting ^[1] 68:18 situation ^[12] 8:3 11:6 21:16 28:22 40:9 41:24 42:1 45:22 61:18 65:24 71:11,23 situations ^[3] 24:25 43:6 64:23 six ^[1] 22:13 skimp ^[1] 48:7 slightly ^[1] 38:20 small ^[1] 51:4 smaller ^[1] 46:8 Solicitor ^[1] 1:22 solution ^[1] 61:8 solve ^[1] 38:12 somehow ^[1] 24:9 someone ^[1] 37:8 Sometimes ^[2] 56:24 57:2 sorry ^[3] 48:11 57:23 66:9 sort ^[5] 6:11 28:22 33:24 37:7 68:11 9:12,21 12:2,5,8,15 13:13,15,23 17:20 18:3 25:14,19,24 26:16 27:2,7,11,20,22 29:3,6,13,20,23 42:12 43:9,15 46:23 52:20 61:19 62:12,17,23 63:7 70:4,12,21 71:4,9</p>
Q			
<p>quality ^[1] 41:15 quantification ^[1] 47:20 quantified ^[1] 26:8 quantify ^[4] 13:16 27:12 47:17 48:4 quantifying ^[1] 7:3 quarrel ^[1] 39:16 quart ^[1] 30:7 question ^[33] 10:10 17:21 18:3 19:7 20:7 24:7 25:15,25 28:3,13,19 30:25 31:1 32:6 33:19,24,25,25 42:8 44:24 45:1,23 48:19 53:3,10 54:11 60:11 62:24 64:7 65:22 67:10,21 68:17 questions ^[2] 28:3 52:16 quicken ^[1] 42:24 quite ^[2] 11:16 64:10 quo ^[2] 16:1 55:6 quote ^[2] 47:16 55:12 quoted ^[1] 24:15</p>	<p>regulate ^[2] 59:24 60:8 rejected ^[1] 11:17 rejuvenate ^[1] 13:21 release ^[5] 10:24 29:25 41:8 62:13 65:2 released ^[1] 28:16 releases ^[2] 28:16 70:18 reliance ^[1] 71:14 relief ^[10] 4:3 7:23 8:7 16:3 21:18,20 24:21 28:11,11 34:23 rely ^[1] 71:10 relying ^[2] 70:14,16 remainder ^[2] 35:1 42:10 remedy ^[1] 54:24 reminds ^[1] 37:7 repeat ^[1] 47:21 report ^[8] 4:11,23 11:13 12:10 29:7 49:7 57:9 70:6 request ^[1] 51:18 requested ^[2] 54:1,23 require ^[3] 37:10 53:19 58:19 required ^[7] 14:5 21:14 24:22 34:24 53:25 56:16 58:21 requires ^[1] 56:5 reserve ^[1] 35:1 reservoirs ^[4] 41:7 42:11 45:15 64:22 resource ^[1] 8:5 respect ^[7] 4:4 6:18 18:25 19:13 20:5 46:12 60:12 respond ^[2] 23:5 28:20 responsibilities ^[1] 69:10 responsibility ^[2] 60:17 61:4 ResSim ^[1] 49:16 rest ^[2] 15:9 51:1 restrictions ^[1] 55:4 result ^[13] 3:14 9:21 11:24 14:19 19:17 24:4 26:9 27:15 34:22 35:13 55:9 64:4 70:2 resulted ^[1] 6:14 resumption ^[1] 42:24 returned ^[1] 4:7 review ^[5] 17:10 22:16 34:14 36:25 55:23 reviewed ^[1] 61:13 revise ^[1] 69:4 rid ^[1] 32:7 River ^[9] 19:4 21:6 31:9,11,13 38:24 53:7 60:9 64:25 ROBERTS ^[24] 3:3 22:18,21 35:3,6,20 37:4,6,20,25 41:20 53:18 54:2,7,20 55:20 56:11 57:25 58:7 59:2 66:8,19 69:12 72:17 Roberts's ^[1] 53:10</p>	<p>salinity ^[2] 13:2 44:2 same ^[3] 23:21 38:16 46:2 save ^[1] 50:10 saved ^[8] 32:3 42:10 44:21 46:1 48:6,16 50:12 64:15 saves ^[2] 30:14,15 saying ^[8] 7:14 20:3 25:20 27:22 29:24 54:21 64:14 66:15 says ^[12] 11:1 23:14 30:22,23 40:10 43:4 47:6,14 63:18 69:23 71:19,21 scenario ^[1] 56:10 sea ^[1] 57:20 second ^[11] 3:15 5:2 7:11 15:18 17:5 34:12 36:18 41:9 46:7 52:18 69:21 see ^[5] 27:20 29:4 39:13 52:2 68:9 seek ^[4] 15:6 23:10 24:11,17 seeking ^[3] 16:17,19 55:6 seeks ^[1] 16:3 seem ^[4] 7:6 44:15 47:11 66:9 seemed ^[2] 50:2 57:9 seems ^[9] 7:2 20:12 25:19 37:15 44:17 49:11 62:22 66:12 68:15 send ^[3] 24:9 31:19 32:23 sends ^[1] 31:22 sense ^[10] 6:22 9:13 23:8 24:1 28:21 45:12,13 49:11 52:11 54:16 sentence ^[1] 58:1 separate ^[2] 22:9 66:3 serious ^[3] 28:24,25 51:12 seriously ^[1] 68:17 serve ^[2] 45:18 61:2 Service ^[1] 36:19 Services ^[2] 12:21 41:14 set ^[2] 49:2 62:9 setting ^[1] 21:11 Seventy-one ^[1] 50:7 several ^[1] 66:21 severity ^[5] 5:12,19 17:2 28:9 34:10 SG ^[2] 11:1 51:18 SG's ^[2] 43:18 46:22 Shanahan ^[3] 44:7 70:20 71:17 Shanahan's ^[1] 71:19 shift ^[1] 15:4 shifts ^[3] 9:18,24 14:23 shoes ^[1] 68:18 shoots ^[1] 56:23 short ^[1] 18:11 shorten ^[2] 49:12 51:3 shortened ^[3] 6:23 44:5 45:7 shortening ^[1] 43:12 shot ^[1] 37:14 show ^[24] 4:2 5:22 9:9,12 10:3,7,9,14 13:16 14:12,18,23 15:21 16:1</p>	<p>17:16 21:4,9 24:20 34:24 37:10,12 53:21,25 54:22 showed ^[2] 4:17 45:2 showing ^[5] 27:14 43:2,20 44:17 68:22 shown ^[8] 9:19 10:2 17:18,23 19:11 26:22,25 63:12 shows ^[4] 6:3 8:6 51:2 58:5 side ^[4] 6:22 48:8 50:11,25 sides ^[1] 45:21 significant ^[2] 19:22 21:5 significantly ^[1] 16:2 similar ^[1] 13:11 simple ^[1] 40:23 sitting ^[1] 68:18 situation ^[12] 8:3 11:6 21:16 28:22 40:9 41:24 42:1 45:22 61:18 65:24 71:11,23 situations ^[3] 24:25 43:6 64:23 six ^[1] 22:13 skimp ^[1] 48:7 slightly ^[1] 38:20 small ^[1] 51:4 smaller ^[1] 46:8 Solicitor ^[1] 1:22 solution ^[1] 61:8 solve ^[1] 38:12 somehow ^[1] 24:9 someone ^[1] 37:8 Sometimes ^[2] 56:24 57:2 sorry ^[3] 48:11 57:23 66:9 sort ^[5] 6:11 28:22 33:24 37:7 68:11 9:12,21 12:2,5,8,15 13:13,15,23 17:20 18:3 25:14,19,24 26:16 27:2,7,11,20,22 29:3,6,13,20,23 42:12 43:9,15 46:23 52:20 61:19 62:12,17,23 63:7 70:4,12,21 71:4,9 south ^[5] 31:8,10 44:22,25 52:7 sovereign ^[3] 54:17 58:23 61:6 Spear ^[1] 24:24 Spears ^[1] 25:6 Special ^[40] 3:11,17,23 4:4,10,23 8:13,21 9:2,19 10:21 12:6 14:20 16:10 18:9,14,24 19:7 21:21 22:10,13 26:2,20 29:8,15 34:7 42:19 43:10,21 49:6 50:23 55:11 57:9 61:7,23 64:10 70:5,14 71:10 72:15 species ^[4] 36:21 41:13 53:5 60:24 specific ^[2] 27:18 62:24 specifically ^[1] 7:3 spectrum ^[1] 6:12 speculative ^[1] 56:5 stage ^[6] 9:1,17,18 15:20 54:8,14 stake ^[2] 65:20 67:8 stakeholders ^[1] 41:2 stand ^[1] 34:12 standard ^[14] 4:24 5:1 9:15 10:11,15 13:24 15:17 16:14 17:14 53:19,23,24 61:14 70:15 standing ^[4] 31:8,9 54:9,11</p>
R			
<p>rain ^[3] 48:21 57:16,19 rains ^[1] 57:2 ran ^[2] 48:4 49:16 random ^[1] 51:8 range ^[2] 9:5 66:5 rate ^[1] 20:24 rather ^[1] 24:12 reach ^[2] 25:22 61:7 reaction ^[1] 7:15 read ^[4] 11:12 25:11 29:7 46:23 real ^[7] 3:13 7:2 9:21 14:18 17:21 18:12 66:13 really ^[8] 11:7 29:2,3 51:14,16 57:22 61:16 68:1 realm ^[1] 21:15 reason ^[11] 7:15 32:24 34:20 39:6 40:3,7 45:10 52:18 61:9 72:6,12 reasons ^[2] 41:17 52:13 REBUTTAL ^[2] 2:13 69:15 receive ^[1] 50:4 reckoned ^[1] 17:6 recognize ^[1] 34:16 recognized ^[7] 8:3,4,6 17:7 24:2 25:3 54:18 recognizes ^[9] 5:16 12:7,10,13 16:23 20:18 22:25 27:9 28:12 recommendation ^[4] 3:12 22:14 34:8 72:15 record ^[15] 5:21 7:3,7,16 21:20 22:12 23:13 25:10 26:21 34:13 36:23 43:17 44:16 64:9 69:22 red ^[1] 6:11 redress ^[10] 5:8 17:18 25:7 55:14,18,22 56:3,4 66:13 71:24 redressability ^[16] 4:25 8:24 9:10,12,14 15:17 18:15,16 21:24 22:9 24:18,20,23 25:7 47:10 70:15</p>	<p>reduce ^[8] 5:12 13:2 17:1 28:9 31:22 34:10 47:7 50:8 reducing ^[1] 5:18 reduction ^[1] 48:7 refill ^[1] 60:24 refilling ^[1] 60:24 regard ^[3] 3:20 44:20 45:7 regime ^[3] 14:9 66:4,24 region ^[5] 3:22 6:6 28:25 36:20 51:20 regulate ^[2] 59:24 60:8 rejected ^[1] 11:17 rejuvenate ^[1] 13:21 release ^[5] 10:24 29:25 41:8 62:13 65:2 released ^[1] 28:16 releases ^[2] 28:16 70:18 reliance ^[1] 71:14 relief ^[10] 4:3 7:23 8:7 16:3 21:18,20 24:21 28:11,11 34:23 rely ^[1] 71:10 relying ^[2] 70:14,16 remainder ^[2] 35:1 42:10 remedy ^[1] 54:24 reminds ^[1] 37:7 repeat ^[1] 47:21 report ^[8] 4:11,23 11:13 12:10 29:7 49:7 57:9 70:6 request ^[1] 51:18 requested ^[2] 54:1,23 require ^[3] 37:10 53:19 58:19 required ^[7] 14:5 21:14 24:22 34:24 53:25 56:16 58:21 requires ^[1] 56:5 reserve ^[1] 35:1 reservoirs ^[4] 41:7 42:11 45:15 64:22 resource ^[1] 8:5 respect ^[7] 4:4 6:18 18:25 19:13 20:5 46:12 60:12 respond ^[2] 23:5 28:20 responsibilities ^[1] 69:10 responsibility ^[2] 60:17 61:4 ResSim ^[1] 49:16 rest ^[2] 15:9 51:1 restrictions ^[1] 55:4 result ^[13] 3:14 9:21 11:24 14:19 19:17 24:4 26:9 27:15 34:22 35:13 55:9 64:4 70:2 resulted ^[1] 6:14 resumption ^[1] 42:24 returned ^[1] 4:7 review ^[5] 17:10 22:16 34:14 36:25 55:23 reviewed ^[1] 61:13 revise ^[1] 69:4 rid ^[1] 32:7 River ^[9] 19:4 21:6 31:9,11,13 38:24 53:7 60:9 64:25 ROBERTS ^[24] 3:3 22:18,21 35:3,6,20 37:4,6,20,25 41:20 53:18 54:2,7,20 55:20 56:11 57:25 58:7 59:2 66:8,19 69:12 72:17 Roberts's ^[1] 53:10</p>	<p>role ^[3] 59:16 61:16,17 roughly ^[1] 56:23 rules ^[2] 45:16 61:20 ruling ^[1] 21:24 run-of-the-river ^[1] 12:12 running ^[1] 55:23</p>	<p>17:16 21:4,9 24:20 34:24 37:10,12 53:21,25 54:22 showed ^[2] 4:17 45:2 showing ^[5] 27:14 43:2,20 44:17 68:22 shown ^[8] 9:19 10:2 17:18,23 19:11 26:22,25 63:12 shows ^[4] 6:3 8:6 51:2 58:5 side ^[4] 6:22 48:8 50:11,25 sides ^[1] 45:21 significant ^[2] 19:22 21:5 significantly ^[1] 16:2 similar ^[1] 13:11 simple ^[1] 40:23 sitting ^[1] 68:18 situation ^[12] 8:3 11:6 21:16 28:22 40:9 41:24 42:1 45:22 61:18 65:24 71:11,23 situations ^[3] 24:25 43:6 64:23 six ^[1] 22:13 skimp ^[1] 48:7 slightly ^[1] 38:20 small ^[1] 51:4 smaller ^[1] 46:8 Solicitor ^[1] 1:22 solution ^[1] 61:8 solve ^[1] 38:12 somehow ^[1] 24:9 someone ^[1] 37:8 Sometimes ^[2] 56:24 57:2 sorry ^[3] 48:11 57:23 66:9 sort ^[5] 6:11 28:22 33:24 37:7 68:11 9:12,21 12:2,5,8,15 13:13,15,23 17:20 18:3 25:14,19,24 26:16 27:2,7,11,20,22 29:3,6,13,20,23 42:12 43:9,15 46:23 52:20 61:19 62:12,17,23 63:7 70:4,12,21 71:4,9 south ^[5] 31:8,10 44:22,25 52:7 sovereign ^[3] 54:17 58:23 61:6 Spear ^[1] 24:24 Spears ^[1] 25:6 Special ^[40] 3:11,17,23 4:4,10,23 8:13,21 9:2,19 10:21 12:6 14:20 16:10 18:9,14,24 19:7 21:21 22:10,13 26:2,20 29:8,15 34:7 42:19 43:10,21 49:6 50:23 55:11 57:9 61:7,23 64:10 70:5,14 71:10 72:15 species ^[4] 36:21 41:13 53:5 60:24 specific ^[2] 27:18 62:24 specifically ^[1] 7:3 spectrum ^[1] 6:12 speculative ^[1] 56:5 stage ^[6] 9:1,17,18 15:20 54:8,14 stake ^[2] 65:20 67:8 stakeholders ^[1] 41:2 stand ^[1] 34:12 standard ^[14] 4:24 5:1 9:15 10:11,15 13:24 15:17 16:14 17:14 53:19,23,24 61:14 70:15 standing ^[4] 31:8,9 54:9,11</p>

Official

<p>started ^[1] 49:21 stash ^[1] 24:9 state ^[5] 8:4,5 15:21 46:9 55:6 state's ^[1] 72:11 statement ^[6] 34:13 42:13 43:18 46:20,23 53:12 statements ^[3] 23:19 43:18 49:11 STATES ^[22] 1:1,14,24 2:10 5:14, 15 12:13 16:23 17:6,7 22:24 23: 17 30:22 31:3 36:18 47:14 54:17 58:11,21 60:8 71:8 72:4 States' ^[2] 20:15 63:10 status ^[2] 15:25 55:6 statute ^[3] 60:6 72:2,8 statutes ^[3] 40:20 59:23 69:6 statutory ^[1] 66:4 step ^[1] 21:8 stepping ^[1] 21:8 stick ^[1] 17:13 still ^[4] 49:17,21 59:12 65:13 store ^[1] 42:9 stored ^[2] 64:21 65:1 stream ^[1] 59:25 stuck ^[2] 16:13 47:9 studied ^[2] 36:19 41:4 study ^[1] 53:1 stuffed ^[1] 32:16 surgeon ^[2] 19:3 53:6 subjected ^[1] 45:16 submitted ^[2] 72:18,20 substantial ^[1] 28:15 substantially ^[1] 55:8 suffered ^[6] 3:13 5:4 9:6,21 14:18 28:25 suffering ^[1] 15:1 suffers ^[1] 22:2 sufficient ^[3] 25:6 63:13 69:2 suggest ^[2] 42:15 44:16 suggested ^[1] 43:17 suggests ^[1] 47:1 suit ^[2] 38:9,11 Sunding ^[1] 18:8 supply ^[1] 41:15 support ^[4] 1:25 2:11 58:11 71:14 supporting ^[1] 13:12 Suppose ^[6] 19:7 31:10 62:19 63: 1 64:8 68:6 SUPREME ^[4] 1:1,14 35:25 55:25 surely ^[3] 6:24 52:8 59:4 suspect ^[1] 38:10 system ^[12] 6:4 11:25 12:23 13:20 24:5 42:20 48:21 55:24 57:19 60: 9,22 61:24 systems ^[1] 48:13</p>	<p>test ^[1] 18:18 testimonies ^[1] 25:12 testimony ^[8] 12:25 13:10 25:12 26:12,12,13 44:8 71:19 that'll ^[1] 46:24 There's ^[22] 5:8 18:4 20:7,12 25: 16 28:22 32:16 34:20 39:17 41:16 43:2,5 45:10,12 48:21 57:16,18 60:11 64:3 65:25 72:6,11 therefore ^[2] 18:17 58:24 they'll ^[3] 40:8 53:22,22 they've ^[5] 35:21,22 37:22 40:11 48:25 thinking ^[2] 31:21 32:25 third ^[2] 34:16 65:25 thorough ^[1] 18:17 thought ^[6] 7:6,7 25:1,15 27:12 44: 18 threatened ^[3] 19:3,3 29:2 three ^[1] 31:2 threshold ^[3] 8:24 16:17 21:24 timing ^[2] 30:23 44:24 today ^[3] 24:21 34:6 52:16 tomorrow ^[1] 38:25 total ^[1] 64:24 tough ^[1] 31:24 track ^[2] 18:14 21:23 tradeoff ^[1] 65:4 treat ^[1] 72:12 treated ^[1] 24:25 trial ^[7] 4:12 35:18 36:12 45:2 55: 13 57:23 58:2 tried ^[1] 49:17 true ^[11] 7:8,10 25:5 27:23 28:2 30: 24 44:17,18,19 64:18 65:5 truth ^[1] 48:9 try ^[1] 61:7 trying ^[1] 50:19 turn ^[1] 51:11 two ^[9] 3:12 5:6,8 10:22 20:1 28:3 35:17 52:12 69:14 typical ^[1] 65:25</p>	<p>unusual ^[1] 28:22 up ^[8] 20:20 31:14 32:16,22 50:12 55:22 62:6 65:1 upstream ^[5] 3:15 8:5 14:19 42:11 65:1 uses ^[1] 49:16 using ^[2] 39:20,22 Utah ^[1] 24:24</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacuum ^[1] 20:12 vague ^[1] 33:24 vehicle ^[1] 53:16 versus ^[14] 7:21 9:23 14:3,15 16:8 24:24,24 25:5 54:5,5 55:1,2,5 59: 25 vested ^[1] 61:3 view ^[3] 15:10 30:9,14 viewed ^[1] 4:24</p>	<p>58:2 64:19 65:3 Wildlife ^[3] 12:21 36:19 41:14 will ^[28] 31:12,22 34:14 36:5 40:13 41:8 42:8 44:22,24 47:2,6,24 48:2 51:19 54:24 55:14,15,23 57:6,20 59:4 61:1 65:23,24 66:1,2,11 71: 21 win ^[1] 17:14 wishes ^[3] 3:20 15:25 16:1 within ^[1] 65:17 without ^[6] 3:20 19:20 34:3 35:15 53:13 68:10 witness ^[1] 18:8 witnesses ^[2] 19:23 21:3 wonder ^[1] 33:5 Woodruff ^[3] 12:11 28:17 31:8 word ^[2] 23:12 45:12 words ^[3] 24:15 31:20 63:4 work ^[3] 4:7 10:10 21:25 working ^[1] 52:4 worse ^[4] 41:25 42:2,2,5 worsening ^[1] 71:23 worst ^[5] 5:11,11 6:6 17:2 20:20 worth ^[1] 15:22</p>
<hr/> <p style="text-align: center;">T</p> <hr/> <p>talked ^[1] 15:19 talks ^[3] 12:22,25 13:5 teaspoon ^[1] 32:14 teaspoonful ^[2] 32:3 40:4 tells ^[2] 52:21 55:25 terminated ^[1] 3:24 terms ^[5] 21:9 22:1 27:5 30:5 63: 14</p>	<hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[1] 42:14 ultimate ^[1] 33:21 ultimately ^[3] 15:9,24 18:20 unabated ^[1] 4:1 uncertainties ^[2] 7:22 21:11 under ^[18] 9:14,22 11:2 15:16 16:8 17:14 25:4 41:6 43:4,5 45:23 52:9 55:25 61:13,14 62:4 65:9,15 understand ^[10] 5:7 14:10 29:4 31:5,7 33:1 44:11 49:10 52:19 59: 5 unequivocally ^[1] 43:10 UNITED ^[21] 1:1,14,24 2:10 5:14, 14 12:13 16:22 17:6,7 20:15 22: 24 30:22 31:3 36:18 47:14 58:11, 21 63:10 71:8 72:4 units ^[1] 46:1 unreasonable ^[1] 3:16 unrestrained ^[1] 3:17 until ^[1] 42:11</p>	<hr/> <p style="text-align: center;">W</p> <hr/> <p>waive ^[1] 61:6 waived ^[1] 58:23 wanted ^[1] 51:22 wants ^[2] 32:7 49:3 wash ^[1] 57:20 Washington ^[5] 1:10,18,20,23 54: 25 wasteful ^[1] 3:25 wasting ^[1] 8:5 water ^[132] 3:20 5:9 6:4,25 7:4 8:1 10:25 11:3,14,24,25 12:17,23 13: 1,19 19:16,24 20:3,8,21,25 21:2,4 24:4,8 25:13,17,22 26:3,8,14,25 27:6,19 28:2,4,7,13,17 29:18 30:1, 15 32:4,16,23 35:13,14,23 36:5,15 37:23 38:5,17 39:18 40:1,5,22,24 41:15,15 42:10 43:3,4,6,6 44:4,13, 22,23,24 46:8 47:3,24 48:6,8,9,13, 16,20,23,23 49:3 50:4,5,6,7,8,10, 12,15 51:13 52:1 56:2,17,21 57:4, 18,19,20 59:8,25 60:3,24 61:1,21, 23 62:6,10 63:13,19,21 64:3,4,11, 14,15,21,25 65:1,19 66:6,16,17,24 67:9,24 69:8,22 71:2,7,18,20 water's ^[1] 12:12 waters ^[4] 3:15 13:7 24:3 36:1 way ^[19] 5:11 15:15 19:9 23:10 24: 19 26:24 29:2,14 30:4,4,18 33:2,7 37:17 52:4 53:22 68:1 69:19,24 ways ^[2] 5:8 61:22 weeks ^[1] 22:13 weigh ^[1] 47:11 weighing ^[2] 18:18 54:8 whatever ^[5] 39:1,2,5 50:12 67:12 whenever ^[1] 56:17 whereas ^[1] 32:6 Whereupon ^[1] 72:19 whether ^[10] 11:5 22:4 26:22 33: 24 44:4 51:25 62:13 63:11 64:2 67:9 whichever ^[1] 15:15 White ^[1] 13:9 whole ^[7] 31:7 55:24 56:9 57:23</p>	<hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[4] 18:7,9 64:22 65:10 years ^[9] 4:13,21 17:15 18:15,19 29:11 32:15,15 35:17</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zone ^[3] 6:11 32:18,22 zones ^[1] 50:13</p>