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IN THE SUPREME COURT OF THE UNITED STATES

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TARRANT REGIONAL WATER DISTRICT, :

Petitioner : No. 11-889

v. :

RUDOLF JOHN HERRMANN, ET AL. :

- - - - - x

Washington, D.C.

Tuesday, April 23, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf of Petitioner.

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

LISA S. BLATT, ESQ., Washington, D.C.; on behalf of Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	CHARLES A. ROTHFELD, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ANN O'CONNELL, ESQ.	
7	For United States, as amicus curiae,	
8	supporting Petitioner	18
9	ORAL ARGUMENT OF	
10	LISA S. BLATT, ESQ.	
11	On behalf of the Respondents	29
12	REBUTTAL ARGUMENT OF	
13	CHARLES A. ROTHFELD, ESQ.	
14	On behalf of the Petitioner	56
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3  
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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 11-889, Tarrant Regional Water District v. Herrmann.

Mr. Rothfeld?

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONER

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

In the Red River Compact, Oklahoma agreed that Texas would be allowed to use a specified quantity of water that is located in Oklahoma. Oklahoma is now trying to back out of that bargain.

What its argument to this Court in support of its position is essentially that the Court should disregard language that appears in the Red River Compact because that language is superfluous, that the Court should read into the Compact language that does not appear there, and that the Court should not give the text of the Compact what Oklahoma in its brief describes as "talismanic significance."

Our very different view is that the plain text of the Compact must control.

Now, in the Red River Compact, Texas and

1 Oklahoma, along with Louisiana and Arkansas, agreed to  
2 allocate among themselves the waters of the Red River  
3 Basin. The Compact divides that basin into large areas  
4 called reaches and subdivides the reaches into  
5 subbasins. As to some of those areas, the Compact  
6 expressly allocates entitlement to water by State line.  
7 It says that the States may use the water within their  
8 boundaries exclusively.

9 But in the section of the Compact which is  
10 at issue here, Reach 2, Subbasin 5, the Compact uses a  
11 very different and unique language. That section --  
12 that subbasin includes the territory of all -- three of  
13 the four compacting States. The boundaries of that  
14 subbasin are drawn not by State lines, but by reference  
15 to the -- the last downside dam sites before tributaries  
16 to the Red River Basin -- Red River flow into the river  
17 itself.

18 JUSTICE GINSBURG: Mr. Rothfeld, we are told  
19 that in other compacts when they really mean to give one  
20 State the right to take another State's water, the  
21 provision in the compact is much clearer, much more  
22 definite.

23 This clause, the one that you rely on, is  
24 kind of sketchy, isn't it? Doesn't say how they're  
25 going to get it, if they're going to pay for it.

1 There's a lot to be filled in.

2 MR. ROTHFELD: Well, the provision that we  
3 are relying on, I would say is not sketchy at all. It  
4 is quite clear that all four of the compacting States  
5 are in the language of the Compact, have equal rights to  
6 the use of water, defined water in a defined area of the  
7 subbasin, so long as no State uses more than 25 percent  
8 of the water. That -- that is quite express as to what  
9 is required.

10 In -- it's difficult to read that language  
11 to mean anything other than that the States can take --

12 JUSTICE SCALIA: What is the exact language?  
13 Do you want to read the exact language just to refresh  
14 our recollection?

15 MR. CLEMENT: It appears -- it is reprinted  
16 on page 8 of the blue brief in the indented text, and it  
17 says, "Within this -- within this subbasin, the  
18 signatory States have equal rights to the use of," and  
19 then it defines the water that they have the rights to  
20 the use of, "at times of normal flow" -- with the flow  
21 of the Red River at 3,000 cubic feet per second at the  
22 Arkansas/Louisiana border -- "provided that no State is  
23 entitled to more than 25 percent of the water in excess  
24 of this amount."

25 So the -- the gist of the language is States

1 have -- all -- all four signatory States have equal  
2 rights to the use of --

3 JUSTICE BREYER: It doesn't say that. It  
4 says, "No State is entitled to more than 25 percent."  
5 It doesn't say -- I mean that language doesn't say what  
6 happens if in fact there's a State that because of  
7 cliffs or something can't get the 25 percent to which it  
8 is entitled. It just doesn't say anything about it.

9 MR. ROTHFELD: Well, I have to disagree with  
10 that.

11 JUSTICE BREYER: Where does it say something  
12 about it?

13 MR. ROTHFELD: It says that -- the section  
14 is designed to allocate the water of the subbasin, and  
15 it says, "Within the subbasin, States have equal rights  
16 to use of the runoff." That's the first part of it.

17 JUSTICE BREYER: Yes.

18 MR. ROTHFELD: The second part of it then  
19 says, "provided that no State is entitled to more than  
20 25 percent" --

21 JUSTICE BREYER: All right. Does that mean  
22 that a State can, when it can't get its pipeline to the  
23 river, go into some other State and take the water out  
24 of that other State? I mean, I would have thought, if  
25 that was their intent, there would be a mechanism for

1 doing it. That you'd have some authority set up by the  
2 Compact that would decide where, whether it's really  
3 true, and how are we supposed to do it, and there is no  
4 such mechanism, rather if there is such a right, which  
5 it doesn't say anything about, it's left to the State  
6 courts in different States to try to do what is an  
7 extremely complex and controversial administrative job.

8 MR. ROTHFELD: A couple points to say about  
9 that. First of all, it is not at all a complex job.

10 JUSTICE BREYER: It's not at all complex  
11 when Oklahoma is going to say, Texas, go run the pipe to  
12 the south of the Red River, and Texas is going to say,  
13 I'm sorry, we can't get there, there's too much cactus.  
14 And then they're going to say, don't you know that, in  
15 fact, when you put your pipeline into Oklahoma, you are  
16 going to be taking part of the 25 percent that belongs  
17 to us.

18 And Texas will say, no, we aren't. And then  
19 we'll have to have a way of measuring how much goes into  
20 the river at different places and what are all these  
21 different pipelines are going to take out. You  
22 understand what I'm saying.

23 MR. ROTHFELD: Right. But --

24 JUSTICE BREYER: I would have thought a  
25 mechanism would be set up to do that and there is none.

1           MR. ROTHFELD: Okay. Again, several things  
2 about that. First of all, in all these other compacts  
3 to which Justice Ginsburg alludes that are cited by our  
4 opponents, which expressly allow for cross-border --  
5 virtually none of them provide any of the kinds of  
6 details that you are describing.

7           JUSTICE BREYER: Fine. But they do say  
8 expressly, and I don't know what the terrain is like in  
9 the other areas. And here it does not say anything  
10 about it. That's why I think we're here in the Court  
11 because all it says is you can't take more than  
12 25 percent. It doesn't say what happens when Texas is  
13 unable to get its 25 percent from the south. I'm now  
14 repeating myself, but you point to the language that  
15 says what I just say is not consistent with the  
16 language.

17           MR. ROTHFELD: What I say -- I guess I will  
18 say two things about that. One, I think what you just  
19 say is, in fact, with respect, is not consistent with  
20 the language. I think that --

21           JUSTICE BREYER: Which language is it not  
22 consistent with?

23           MR. ROTHFELD: Equal rights to use of  
24 specified water. It -- the -- the subbasin is defined,  
25 again, not by State lines, it's defined by -- by

1 downstream dam sites. So it has created a pool of water  
2 in the -- in this subbasin, and it says that all four  
3 States have equal rights to use of this water, provided  
4 that none takes more than 25 percent.

5 It seems to me that on the face of it, that  
6 is saying State lines are not relevant and that what we  
7 are looking at is a pool of water the States can come  
8 and get it. And it is particularly so --

9 JUSTICE SOTOMAYOR: Excuse me.

10 MR. ROTHFELD: If I may just -- I'm sorry.

11 JUSTICE SOTOMAYOR: No, no. Finish.

12 MR. ROTHFELD: And I think to the extent  
13 that there could be any ambiguity in the -- in that  
14 language viewed in isolation, in the context of the rest  
15 of the Compact, there are places where the drafters of  
16 the Compact, in fact, did refer to State lines. They  
17 said that States are entitled to use the water within  
18 their State boundaries, the respective States may use  
19 the water within their boundaries. They did not -- the  
20 framers did not use that language in this provision.

21 JUSTICE SOTOMAYOR: I think under your  
22 argument, and you can correct me if I'm wrong, that  
23 Louisiana could decide it doesn't want to wait for the  
24 flow of water to come to it, and it could just go right  
25 into Oklahoma, in which it shares no border, and I don't

1 know how it's going to do that, and take its 25 percent.  
2 Does that make sense in terms of the language?

3 MR. ROTHFELD: Well, I will say two things  
4 to that --

5 JUSTICE SOTOMAYOR: I mean, you're talking  
6 about Texas, but Texas shares a border and so it may be  
7 a little easier to cross the borderline. But what's  
8 Louisiana going to do?

9 MR. ROTHFELD: Well, let me make two points  
10 about that.

11 First of all, I think that not only does it  
12 make sense in the language, it's compelled by the  
13 language because the language says within this subbasin  
14 all four States have equal rights. Separately, there is  
15 another separate reach. Reach V of the -- the Compact  
16 is Louisiana's, and so the water flows into Louisiana.  
17 When the water gets to Louisiana, it's no longer within  
18 the subbasin, it's somewhere else.

19 So the plain language of the Compact compels  
20 the reading -- compels the -- the point that Louisiana  
21 could take its water from within the subbasin.

22 Now, could it do that? The subbasin runs  
23 through to Arkansas to Louisiana, so it could go to  
24 Louisiana --

25 JUSTICE BREYER: Go back to the first one

1 because what you have done is you've pushed me back to  
2 the equal rights. And now if I am going to fight you on  
3 it, I have to say the equal rights to water means equal  
4 rights to water arising within its boundaries. And all  
5 you have to say is equal rights to water arising  
6 anywhere in the subbasin.

7 And if I just heard that, then I might say  
8 okay, I think yours is a little better. But -- but we  
9 have this enormous administrative mess that would seem  
10 to be created, and both those interpretations seem  
11 possible.

12 So let's go back to that and let me hear  
13 quite clearly, now that I've focused it, what's the  
14 answer?

15 MR. ROTHFELD: If I may just finish with  
16 Justice Sotomayor and I will turn to that?

17 I think the second answer to the question  
18 is, the States are going to take the water from the  
19 closest point where they can get it. And so Louisiana  
20 is not going to go to Oklahoma. If it's going to go  
21 into Subbasin 5, it's going to go to Arkansas directly  
22 across the State line.

23 JUSTICE GINSBURG: How -- how does it do it?  
24 Does it have to apply to Texas?

25 MR. ROTHFELD: It has to apply to

1    whichever --

2                   JUSTICE GINSBURG:   To Oklahoma.

3                   MR. ROTHFELD:   If it's going to Oklahoma,  
4    and this is partially responsive to Justice Breyer, it  
5    would have to apply to the water authorities within  
6    Oklahoma.  So what is going on here, Tarrant, the Texas  
7    water district, is applying to the Oklahoma Water  
8    Resources Board.  It will seek a permit.  This will  
9    operate precisely in the same way as if an Oklahoma  
10   applicant is seeking a permit.

11                  You will go to -- you will go and say, I  
12    want to take water out of this point.  The Water  
13    Resources Board will apply its ordinary standards to  
14    determine whether or not that can be granted.

15                  JUSTICE GINSBURG:   Who -- who erects the  
16    facilities to accomplish this diversion?

17                  MR. ROTHFELD:   Tarrant presumably will do  
18    that.  If Tarrant needs to obtain rights of way,  
19    Oklahoma law provides for exercise of eminent domain, or  
20    Tarrant can simply purchase the property to do that.

21                  JUSTICE KENNEDY:   It's -- it's my  
22    understanding that there is a place where Texas can put  
23    a line into the river, and then a subset of that  
24    question is, the main stem of the river, through --  
25    without going through Oklahoma property, other than

1 perhaps just the bank itself.

2 MR. ROTHFELD: That -- that I think is not  
3 correct as a factual matter. The -- the Red River lies  
4 entirely within Oklahoma, and so Oklahoma, in order to  
5 get water out of the main stem, if -- if Texas were to  
6 do that, it would have to go into Oklahoma. And -- and  
7 in fact, this is in response to -- in part to what --

8 JUSTICE KENNEDY: But you say entirely  
9 within Oklahoma, just because of ownership of the bank?

10 MR. ROTHFELD: Because --

11 JUSTICE KENNEDY: Or because of there's also  
12 some intervening property between Texas and the bank  
13 that Oklahoma owns?

14 MR. ROTHFELD: The -- the border between  
15 Oklahoma and Texas is the south vegetation line of the  
16 Red River, so therefore it is out of the river past the  
17 bank to the vegetation line. So in order to get water  
18 out of the main stem, Oklahoma and -- Texas would have  
19 to go into Oklahoma. Now, there is --

20 JUSTICE KENNEDY: Do -- do the current laws  
21 prohibit that --

22 MR. ROTHFELD: Oklahoma's current laws  
23 would, I would think, prevent --

24 JUSTICE KENNEDY: At any point?

25 MR. ROTHFELD: At any point, because the

1 laws that Tarrant is challenging here are laws that are  
2 discriminatory Oklahoma laws that prevent any use of  
3 water originating in Oklahoma outside.

4 JUSTICE ALITO: When you say Texas has the  
5 right to go into Oklahoma, just -- just think about that  
6 phrase. That's -- that's very striking. I mean, it  
7 sounds like they are going to send in the National Guard  
8 or the Texas Rangers.

9 MR. ROTHFELD: Right. And that -- if I may,  
10 Justice Alito, that is -- that's a very misleading way  
11 of looking at it. And I think Oklahoma's brief suggests  
12 that the Texas Rangers are going to descend on Tulsa and  
13 seize the water. That is not what -- what is  
14 contemplated.

15 JUSTICE ALITO: But you were saying that  
16 Oklahoma -- that Texas has the right to force Oklahoma  
17 to take private property in Oklahoma by eminent  
18 domain if necessary.

19 MR. ROTHFELD: No, I -- there is an -- there  
20 is an Oklahoma statute that says in order to -- someone  
21 who has a permit to obtain water can exercise eminent  
22 domain. An Oklahoma person can do this. A Texas person  
23 can do this.

24 CHIEF JUSTICE ROBERTS: How does -- how does  
25 Oklahoma apply its law in this situation? I assume

1 there is normal priorities and they will get  
2 applications from a lot of people. But they have to --  
3 what do they have to give Texas? Up to 25 percent?

4 I mean, they can't just say -- deny it  
5 because another Oklahoma user has priority, or all this.  
6 How does that fit in with the existing administrative  
7 structure?

8 MR. ROTHFELD: Well, Oklahoma cannot use  
9 more than 25 percent of the water within the subbasin.  
10 I think that our friends concede that because the  
11 language of the Compact says no State is entitled to  
12 more than 25 percent.

13 Within each State's 25 percent allocation, a  
14 resident water user of the State will apply to the  
15 Oklahoma -- if they are seeking to take their water from  
16 Oklahoma, it will apply to the Oklahoma Water Resources  
17 Board, which will assess that permit precisely as it  
18 assesses permits from Oklahoma residents.

19 CHIEF JUSTICE ROBERTS: But it's got to give  
20 Texas at least up to its 25 percent, right?

21 MR. ROTHFELD: If -- if there is a request  
22 for that much water from a Texas user, and the Texas  
23 user has priority as a permit applicant against others  
24 who are seeking to take water from this particular --

25 CHIEF JUSTICE ROBERTS: I guess what I'm

1 asking is, does the Compact give Texas special priority  
2 apart from what Oklahoma -- Oklahoma's priorities would  
3 be?

4 MR. ROTHFELD: No, it does not. It's --  
5 all -- all the Compact says is that Texas is entitled to  
6 take water from within the subbasin, its 25 percent.  
7 Now when it applies in a particular place, as Tarrant  
8 has done here, it's going to apply -- be consistent with  
9 the Oklahoma -- Water Resources Board permit application  
10 policies, as it has done.

11 The resources board will assess that permit  
12 application just as it would assess an application  
13 from --

14 JUSTICE KAGAN: And what does that mean  
15 exactly? What would Oklahoma do to evaluate that  
16 application and to compare it to other applications from  
17 Oklahomans, and also maybe to compare it -- maybe there  
18 is more than one Texas application.

19 How does the Oklahoma board make those  
20 decisions?

21 MR. ROTHFELD: It -- a permit applicant  
22 submits an application, which has to demonstrate that it  
23 satisfies the standards for obtaining the water. That  
24 will be assessed on its merits by the Water Resources  
25 Board.

1                   If there are competing applications for the  
2 same water, then it's -- it's done in the terms of  
3 priority -- of --

4                   JUSTICE KAGAN: I'm really asking you to  
5 tell me what the Oklahoma board is going to do. I mean,  
6 why doesn't the Oklahoma board just say, you know,  
7 sorry, we like Oklahomans? Would that be all right?

8                   MR. ROTHFELD: Well, that is their current  
9 policy. That would not be all right.

10                  JUSTICE KAGAN: What -- what -- what  
11 different kind of priorities do they have to use, and  
12 why do they have to use them, as I think -- somewhere  
13 along the lines of what the Chief Justice was asking?

14                  MR. ROTHFELD: I suppose there -- there are  
15 two points there. One is, if there is enough water to  
16 go around for everyone, as in fact there is, then they  
17 simply assess it in terms of priority in time. Whoever  
18 makes the first application will get it.

19                  However, Oklahoma can only get 25 -- use  
20 25 percent of the water. And therefore, Texas has the  
21 right, so long as there is water available and Texas has  
22 not used its 25 percent of the subbasin water. Texas  
23 has the right to seek that anywhere it can get it in the  
24 subbasin.

25                  If I may, Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Ms. O'Connell.

3 ORAL ARGUMENT OF ANN O'CONNELL,  
4 FOR UNITED STATES, AS AMICUS CURIAE,  
5 SUPPORTING THE PETITIONER

6 MS. O'CONNELL: Mr. Chief Justice, and may  
7 it please the Court:

8 The court of appeals concluded that Oklahoma  
9 may categorically foreclose Texas water users from  
10 accessing Reach II Subbasin 5 water in Oklahoma, and the  
11 court reached that conclusion for reasons that in the  
12 view of the United States are wrong.

13 First, the Court of Appeals erred in  
14 applying a presumption against preemption to determine  
15 whether the challenged Oklahoma laws conflict with the  
16 Compact. The rationale for that presumption where it  
17 has been applied is one of federalism, but the States  
18 themselves created the terms of the interstate Compact,  
19 and respect for the States as sovereigns in that context  
20 requires enforcement of the Compact according to its  
21 terms.

22 Second, the court of appeals relied on  
23 general Compact provisions to conclude that the Compact  
24 gives States unrestricted authority to regulate the  
25 water within their boundaries. But the general

1 provisions of the Compact make clear that a State's  
2 regulation of water has to be consistent with the  
3 allocations made under the Compact, and each State's  
4 obligations under the Compact.

5 JUSTICE KENNEDY: Well, I -- I am not quite  
6 sure I agree with your reading of the Court of Appeals'  
7 opinion. It seems to me the Court of Appeals' opinion  
8 is consistent with the Respondents' argument that they  
9 looked at the terms of the Compact.

10 And it seems to me that you may be right  
11 that the Compact either says you get the water or you  
12 don't, and the dormant Commerce Clause is just  
13 irrelevant. But I read the opinion of the court of  
14 appeals as being quite consistent with that proposition.  
15 You win or you lose, up or down, under the Compact. The  
16 dormant Commerce Clause doesn't -- just doesn't have  
17 much to do with it.

18 MS. O'CONNELL: Well, we agree with that.  
19 We don't think that the dormant Commerce Clause comes  
20 into play here. We think that whether Texas can access  
21 the water in Oklahoma through the Oklahoma permitting  
22 process depends entirely on whether the Compact gives  
23 them that right or not.

24 JUSTICE KENNEDY: But that's the way I  
25 read the analytic approach of the court of appeals at

1 39A, when it starts talking about the point of --  
2 Section 5.05.

3 MS. O'CONNELL: Right. And we don't  
4 disagree with that, that the -- that the commerce clause  
5 shouldn't come into play here.

6 Where we disagree with the Court of Appeals  
7 is with the Court of Appeals' conclusion that,  
8 regardless of whether a State law would frustrate the  
9 purpose or pose an obstacle to a State obtaining its  
10 share of water under the Compact, that that State law  
11 should prevail under the Compact. So the Compact makes  
12 clear that those general provisions preserving State  
13 water law need to be consistent with each State's  
14 obligations under the Compact.

15 And if I could --

16 CHIEF JUSTICE ROBERTS: Well, where, if  
17 you're relying on the Compact and its language, where do  
18 you come up with this idea that States first have to try  
19 to get their 25 percent from water within their borders?  
20 I don't see that anywhere.

21 MS. O'CONNELL: Well, first of all, we think  
22 that that's an issue that, if the Court decided that --  
23 that there are errors in the Court of Appeals' opinion  
24 that should be corrected, we think that's something the  
25 court of -- that the lower courts could consider on

1 remand.

2           But I'll tell you where it comes from, which  
3 is Sections 2.01 and 2.10(a) of the Compact, which  
4 preserve the application of State water law. Section  
5 2.01 says that, "Each State may freely administer water  
6 rights and uses in accordance with the laws of that  
7 State, but that such -- such uses shall be subject to  
8 the availability of water in accordance with the  
9 Compact."

10           CHIEF JUSTICE ROBERTS: Well, it seems to me  
11 that you like some provisions of State law, but not  
12 others.

13           MS. O'CONNELL: No. What we're saying is  
14 that if there's a State law that conflicts with the  
15 allocation or poses an obstacle to the allocation of  
16 water under the Compact, then it's preempted.

17           But, for example, if Texas could access  
18 25 percent of the water from within its State, then  
19 the -- the application of a State law that would bar  
20 Texas water users from obtaining a portion of its water  
21 in Oklahoma wouldn't necessarily be preempted because it  
22 wouldn't pose an obstacle to the allocation.

23           CHIEF JUSTICE ROBERTS: What do you do --  
24 what do you do with a situation -- let's say there's  
25 Oklahoma water available to Tarrant that is closer than

1 the water they would get from somewhere else in Texas.  
2 Do they have to incur the additional expense to get  
3 Texas water, or can they take the cheaper route and get  
4 Oklahoma water?

5 MS. O'CONNELL: Well, we think -- again, we  
6 think this is a -- an issue for the court of -- for the  
7 lower courts to look at on remand, but we think there's  
8 a -- there's a good argument to be made that, so long as  
9 Texas could access 25 percent of the water within its  
10 boundaries, then application of an Oklahoma law that  
11 would prohibit Texas from going through the Oklahoma  
12 permitting process wouldn't necessarily be preempted.

13 And again, we -- these -- these -- there are  
14 lots of issues, as we point out in our brief and we did  
15 at the invitation stage, that would need to be  
16 addressed, perhaps, in further proceedings or perhaps  
17 before the --

18 JUSTICE KAGAN: Ms. O'Connell, isn't that a  
19 reason why we shouldn't accept your basic view? I mean,  
20 if -- if you think of all the issues that you laid out  
21 that are going to have to be decided and the difficulty  
22 of those issues -- I mean, you read this brief that you  
23 submitted, it gives you kind of a headache. That --  
24 that -- you know, and it -- it suggests how difficult  
25 the process is.

1           And then you look at this provision, and  
2 maybe this provision can be read as an entitlement, but  
3 it can just as easily, as -- as Justice Breyer  
4 suggested, be read as a cap, "no more than 25 percent."

5           So as between those two possible readings,  
6 the complexity of your way of reading this, which would  
7 have -- why?

8           MS. O'CONNELL: Justice Kagan, I'd like to,  
9 if I could, go to the second point, which is on the --  
10 the -- whether you read this as a 25 percent entitlement  
11 or a cap, and I would like to point the Court, not just  
12 to the language of the Compact, which we think weighs in  
13 favor of the idea that each right -- each State has an  
14 equal right and that the -- the equal right to use the  
15 water in the subbasin implies an equal right, not just  
16 an opportunity.

17           But the interpretive comments that follow  
18 Section 5.05(b) -- this is at page 30 of the is Joint  
19 Appendix -- refer to a "right." The first full  
20 paragraph there says, "When the flows" -- I'm sorry,  
21 it's the -- the second line. "If the States have  
22 competing uses and the amount of water available in  
23 excess of 3,000 cubic feet per second cannot satisfy all  
24 such uses, each State will honor the other State's right  
25 to 25 percent of the excess flow."

1           The Red River Compact Commission also  
2 approved rules and regulations, and those say -- they're  
3 on page, I think, 19 of the Joint Appendix. I might  
4 have that page -- yeah, I have that page wrong.

5           But the -- the Red River Compact  
6 Commission's rules and regulations say that when the  
7 flow is above 12,000 cubic feet per second, so that  
8 Louisiana could get its 3,000 cubic feet per second,  
9 "each of the signatory States shall be entitled to  
10 25 percent of the total runoff in undesignated flow."

11           So I think it -- it's pretty clear that  
12 based on the -- both the text of the Compact and the  
13 interpretive comments in the rules that the Red River  
14 Compact Commission came up with, that there is not just  
15 that you can take whatever is in your borders even if  
16 that doesn't amount to 25 percent, but -- but that each  
17 State is entitled to 25 percent of the water, and that  
18 if that involves going into another State within this  
19 geographic area that's not defined with respect to State  
20 boundaries, then that is permissible under the Compact.

21           And as the Petitioner pointed out, when the  
22 States wanted to impose a State boundary restriction in  
23 the Compact, they did so. There are several subbasins  
24 that span more than one geographic -- or more than one  
25 State, and the Compact in those provisions says that you

1 can take whatever you want within your boundaries.

2 And I also don't think that this is going to  
3 be particularly troublesome to administer. I mean,  
4 there may need to be some further proceedings on that,  
5 but Oklahoma law provides the backdrop for what would  
6 happen when a Texas water user goes in to -- to ask for  
7 a permit to appropriate and divert water from within  
8 Oklahoma.

9 JUSTICE KAGAN: And what does that mean?  
10 What would Oklahoma do?

11 MS. O'CONNELL: Well, the Oklahoma Water  
12 Resources Board would just apply its normal procedures  
13 and laws to determine whether this particular use of  
14 water could be put to beneficial use. If -- they would  
15 just apply whatever laws they would apply to any  
16 applicant, regardless of whether they are from Texas or  
17 Oklahoma.

18 JUSTICE KAGAN: Well, people keep on saying  
19 that, and I -- I guess I just still don't understand  
20 quite what it means.

21 MS. O'CONNELL: Well --

22 JUSTICE KAGAN: I mean, let's say Oklahoma,  
23 the board is sitting there and it gets lots of  
24 applications from Oklahoma users. And let's say it also  
25 gets multiple applications from Texas users. That it's

1 not just one county, it's four counties. What does  
2 Oklahoma do to -- to decide who gets the water?

3 MS. O'CONNELL: Well, I think just as -- as  
4 Petitioner's counsel pointed out, there's a -- a  
5 priority in water law, where whoever submits the  
6 application first would -- would get the water if it's  
7 available and they can put it to beneficial use.

8 And I -- and I -- the Court shouldn't be  
9 concerned. I know all -- I know there are amicus briefs  
10 submitted by other Texas entities that would like to  
11 have water from this particular subbasin as well.  
12 They're all part of the same Region C, and they -- I  
13 think they have some way to work it out. It's not like  
14 they --

15 JUSTICE ALITO: Well, I don't understand  
16 your answer. If -- if you're correct, wouldn't the  
17 Oklahoma board have to give priority to the Texas  
18 applicants in order to make sure that Texas got its  
19 share of the water?

20 It couldn't just treat -- it couldn't just  
21 be indifferent as to whether it was an Oklahoma or Texas  
22 applicant.

23 MS. O'CONNELL: That -- true, to the extent  
24 that Texas was not receiving its water. I mean,  
25 under -- under our theory, which we think could be

1 developed more in the lower courts, if Texas was already  
2 receiving 25 percent of the water, then Oklahoma would  
3 not have to give it any kind of special priority. But  
4 if it -- if it was not, then the Oklahoma Water  
5 Resources Board would treat it just like an Oklahoma  
6 applicant.

7 JUSTICE ALITO: Is it correct that -- that  
8 there are reservoirs in Texas that flow into -- from  
9 which water is released into the Red River?

10 MS. O'CONNELL: Yes.

11 JUSTICE ALITO: Okay. And --

12 MS. O'CONNELL: And in Oklahoma as well.

13 JUSTICE ALITO: And what if Texas didn't --  
14 what if Texas could get -- could -- could release that  
15 water and increase the flow of the river, but it chose  
16 not to do so, so it could take other water out of the  
17 river?

18 MS. O'CONNELL: This -- this is the last  
19 point made in the Respondent's brief --

20 JUSTICE ALITO: Yes.

21 MS. O'CONNELL: -- and -- and the response  
22 to that would just be that all of the States would have  
23 the opportunity to do that. In fact, the whole subbasin  
24 is defined by the last major dam site on the tributaries  
25 that are running in. So Oklahoma could do the same

1 thing.

2 And also, when the reservoirs are full,  
3 they're full. It's not like Texas could keep all of the  
4 water that's -- that's there from flowing into the  
5 bottom portion of that tributary.

6 JUSTICE BREYER: Well, we're only  
7 considering the instance where there isn't enough water  
8 to meet the 25 percent in Texas. And in that instance,  
9 I guess there are 50,000 places, not just in Oklahoma,  
10 but also in Arkansas, where they might get some.

11 And all my question, and I think that was  
12 being asked, is there anything else you want to say as  
13 to why that's an easy matter to decide?

14 MS. O'CONNELL: Well, I -- it's -- we don't  
15 think it needs to be decided in this particular  
16 proceeding.

17 I think there are two errors that the Court  
18 of Appeals made in applying a presumption against  
19 preemption and in concluding that a Texas water user  
20 could never divert water from outside of its State.  
21 Those could be developed -- those additional problems  
22 could be dealt with by the Oklahoma Water Resources  
23 Board or as you said, perhaps in the original action.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Blatt?

1 ORAL ARGUMENT OF LISA S. BLATT  
2 ON BEHALF OF THE RESPONDENTS

3 MS. BLATT: Thank you, Mr. Chief Justice,  
4 and may it please the Court:

5 If I could just address two sort of factual  
6 questions.

7 Under the -- the actual Red River Boundary  
8 Compact, the lawyer for Tarrant was wrong. There's  
9 actually a strip called Shawnee Creek, from the Denison  
10 Dam to the Shawnee Creek, that actually belongs to  
11 Texas. So there's a piece of the Red River in this very  
12 subbasin that is -- it's in the express Boundary  
13 Compact.

14 Moreover, all of the Red River and Lake  
15 Texoma that is in Texas is part of the main stem, and  
16 that is not only in the land of Texas, Texas users draw  
17 water, quite a lot of water, from Lake Texoma. So  
18 that's two places on the main stem.

19 CHIEF JUSTICE ROBERTS: Are they licensed?

20 JUSTICE SOTOMAYOR: So I'm sure -- you're --  
21 you're saying that the State of Texas can take water  
22 directly from the main stem?

23 MS. BLATT: It can and does.

24 JUSTICE SOTOMAYOR: That's my point, yes.

25 CHIEF JUSTICE ROBERTS: Anywhere close to of

1 the 25 percent they claim entitlement to?

2 MS. BLATT: Well, who knows?

3 CHIEF JUSTICE ROBERTS: I was hoping you  
4 did.

5 (Laughter.)

6 MS. BLATT: Who knows? Texas has more than  
7 a dozen fresh tributaries running from Subbasin 2 and  
8 Subbasin 4.

9 CHIEF JUSTICE ROBERTS: I'm talking about  
10 Subbasin 5.

11 MS. BLATT: Subbasin 5, these are all --  
12 excuse me -- these are tributaries that run into  
13 Subbasin 5. There is more than a dozen tributaries in  
14 Subbasin 5.

15 For 30 years no one has ever kept track of  
16 any kind of accounting whatsoever, so when we say, "who  
17 knows," that is the way the drafters -- it's not only  
18 the way the drafters intended, but that has been the  
19 state of play for 30 years.

20 So nobody -- and in the laws of Louisiana  
21 and Arkansas don't even track diversions. So --

22 JUSTICE KENNEDY: Just to be clear, in your  
23 view, Texas can, without going on Oklahoma property,  
24 take water from the main stem in Basin 5?

25 MS. BLATT: In Subbasin 5, there is only up

1 from Denison Dam east to Shawnee Creek. So that's just  
2 anywhere from a half a mile to three-quarters. It runs  
3 from the -- from the middle of the channel.

4 East -- excuse me, west is Lake Texoma, and  
5 if you want to look at the map, it's a big old lake.  
6 That is a lot of water. And they definitely do take --  
7 and that's in the brief -- they take lots of water from  
8 that lake from the Texas side.

9 JUSTICE KENNEDY: But my question was, can  
10 they take it from the main stem --

11 MS. BLATT: Only in that -- that little slip  
12 of land to Shawnee Creek. It's -- it's a part of  
13 Texas --

14 JUSTICE KENNEDY: Is that the part that,  
15 under their allegation at least, is saline?

16 MS. BLATT: Well, again, they drink the  
17 water in Subbasin 5.

18 JUSTICE KENNEDY: All right. Is that the  
19 part that --

20 MS. BLATT: Yes. They think --

21 JUSTICE KENNEDY: -- they are referring  
22 to --

23 MS. BLATT: Yes.

24 JUSTICE KENNEDY: -- when they say it's too  
25 saline?

1 MS. BLATT: Yes. They think all the water  
2 that their residents drink is salty, but they still are  
3 drinking it.

4 CHIEF JUSTICE ROBERTS: Texans.

5 MS. BLATT: They're drinking it. In fact,  
6 they're -- footnote 3 and footnote 4, their water  
7 planning documents, say this is a -- quite a -- a  
8 drinkable source of water.

9 JUSTICE SCALIA: When they --

10 MS. BLATT: I understand they think it's  
11 salty, but they drink it.

12 JUSTICE SCALIA: When they take water from  
13 the main stream of the Red River, how do they know how  
14 much of that water is from Reach V?

15 MS. BLATT: Well, the --

16 JUSTICE SCALIA: They are -- they are  
17 entitled to -- to no more than 25 percent from Reach V.  
18 Is everything that -- that comes into Texas in the main  
19 channel of the Red River water from Reach V?

20 MS. BLATT: So if you look at the -- if you  
21 look at the map in the red brief that's got all the --  
22 the colors, and the pink is Subbasin 5. So where they  
23 divert water from is all up and down those blue  
24 tributaries that are in pink south of the Red River.

25 JUSTICE SCALIA: Now what page are you

1 looking at?

2 MS. BLATT: This is 33A --

3 JUSTICE SCALIA: Yeah, okay.

4 MS. BLATT: -- this map.

5 JUSTICE SCALIA: Yeah, yeah, yeah. I didn't  
6 know --

7 MS. BLATT: So they -- and then if you look  
8 at that -- that blue lake that looks like a dragon, that  
9 is also where they are -- they are taking water.

10 JUSTICE SCALIA: What --

11 MS. BLATT: That just happens to be in Reach  
12 I.

13 JUSTICE SCALIA: Reach I. Okay.

14 MS. BLATT: But their water planning  
15 documents show that all the water in the pink on the  
16 Texas side is a very valuable source of drinking water.  
17 And if you see, all the way down to Lake Texarkana, they  
18 can -- they are taking that water, too.

19 And when we say about what we know, no one  
20 has ever done any accounting because the Equal Rights  
21 Clause has always been read as equal rights to the use  
22 of the water without prejudice to or from each other's  
23 State, and, in that sense, it means that if one State  
24 took an earlier use of the water, it wouldn't gain a  
25 priority indefinitely over the other States.

1 CHIEF JUSTICE ROBERTS: Well, it never -- it  
2 never says that. I mean, that's why we have a case. It  
3 never says it has to be from your State.

4 And I appreciate your -- the focus in your  
5 argument on State sovereignty, but this is an interstate  
6 Compact. And the whole point of interstate compacts is  
7 that we have to -- each State has to give up a little  
8 here or a little there to solve a problem.

9 So I -- I guess it's -- I don't know why  
10 these basic principles of State sovereignty apply in the  
11 context of an interstate compact.

12 MS. BLATT: Right. I mean, it is our  
13 position that the States would have never agreed to this  
14 extraordinary right without an -- an unequivocal  
15 explicit statement.

16 But I do think it is absolutely critical to  
17 understand that what they are asking for is  
18 unprecedented, Mr. Chief Justice. There has never been  
19 a cross-border diversion, ever, under any State water  
20 compact. And the two examples they cite in their reply  
21 brief are inexplicable -- absolutely inexplicable. They  
22 cite the Niobrara Compact with no cite. They -- they  
23 cite the Compact, but they never say there has been a  
24 cross-border diversion.

25 And if you look on the map --

1 JUSTICE GINSBURG: Say that again, because  
2 we have a green brief that gives us samples of  
3 provisions for cross border.

4 MS. BLATT: Yeah, under explicit right.  
5 There has never been a cross-border diversion without an  
6 explicit statement. Not only --

7 JUSTICE GINSBURG: Because there have been  
8 many, many --

9 MS. BLATT: Many with explicit statements  
10 and then the essential bells and whistles as to eminent  
11 domain, points of diversion, and which choice of law.

12 And what they tried to say because we have  
13 been saying all along how unprecedented this would be to  
14 sort of read in silence on borders, they tried to come  
15 up with two examples in their reply brief.

16 And that's what I'm talking about. The  
17 reply brief is not only -- is devoid of a citation, but  
18 Nebraska and Wyoming told both us, and Wyoming told  
19 Tarrant's counsel, that there have never been  
20 diversions. And Nebraska was quite -- like, wow, we  
21 hadn't known that. And it shows the danger of their  
22 position. They think if it's silent as to borders, the  
23 State of Wyoming can go hundreds of miles into Nebraska  
24 and take the water across the border.

25 The other example they cite is fascinating

1 because it's a lawsuit before you. They cite the Rio  
2 Grande Compact as a basis of saying El Paso can walk  
3 into New Mexico, but their lawsuit to you is based on  
4 the notion that Texas can't go into New Mexico. It's  
5 New Mexico has a downstream delivery. So --

6 JUSTICE BREYER: But there was a point, it  
7 seems to me, to favor them, which is go back to 1970 --  
8 the '70s, when they drafted this.

9 MS. BLATT: I'm there.

10 JUSTICE BREYER: So they are in the room,  
11 and there are representatives of all four States, and as  
12 they argue, there is going to be more than 3,000 feet,  
13 what happens? And Louisiana would say, we want at least  
14 25 percent, done. Arkansas, 25 percent, done.  
15 Oklahoma, same, done. Texas, same, done.

16 But everybody in the room knows that Texas  
17 could never get more than 12 percent within its borders.  
18 And since it could never get 12 -- more than 12 percent,  
19 Louisiana would be sitting there with not really  
20 25 percent but with 38. And so -- so -- - - - - --

21 MS. BLATT: But with all due -- sorry.

22 JUSTICE BREYER: -- that would suggest that,  
23 hey, no, they all knew this and so they meant there must  
24 be some way for Texas to get the extra. Otherwise, why  
25 were they saying 25 percent for Texas? If --

1 MS. BLATT: Justice Breyer. Justice Breyer.  
2 It's just not true. What they cite to is a 1970  
3 engineering report --

4 JUSTICE BREYER: You know, this is an  
5 example I made up because I think --

6 MS. BLATT: Oh. Well, the --

7 JUSTICE BREYER: -- an imaginary  
8 conversation.

9 MS. BLATT: Oh.

10 JUSTICE BREYER: But if in an imaginary  
11 conversation --

12 MS. BLATT: Well, okay. 34 percent of the  
13 watershed is in Texas, so there is no reason to think  
14 anyone thought Texas couldn't get its share.

15 JUSTICE BREYER: Why?

16 MS. BLATT: There's no -- because there's no  
17 evidence there was any discussion about any State and  
18 whether -- Texas never complained. No one ever said  
19 Texas couldn't get its water.

20 JUSTICE BREYER: Wouldn't that be a fairly  
21 easy thing to check going back to 1970 --

22 MS. BLATT: If you --

23 JUSTICE BREYER: -- to found out whether,  
24 you know, Texas was just on some little salt flat --

25 MS. BLATT: Sure.

1 JUSTICE BREYER: -- near the river and --

2 MS. BLATT: We did. They did in their  
3 brief, and they came up with an 11 to 16 percent. Our  
4 engineers ran the numbers after correcting their  
5 three-series method -- methodological errors, and we  
6 came up with 29 percent.

7 They -- they double-counted streams. They  
8 forgot that Subbasin 5 is not only runoff but also rain.  
9 And then -- this one's humorous -- they didn't count the  
10 excess. So all the -- all the math that they did  
11 favored Texas, so the math didn't come out that way.

12 But what's interesting about the Tarrant's  
13 view in juxtaposing with the United States' view,  
14 Tarrant's view is it could have all the water, but they  
15 could get all of it still from Oklahoma. So Louisiana,  
16 Arkansas, and -- and Texas could come take all their  
17 share from Oklahoma, forcing Oklahoma to have to go  
18 south.

19 Now the United States' view, and this is  
20 I -- they read a border limitation in there. They say,  
21 look, borders are here, but if Texas really needs it,  
22 you got to let them come in. That -- that's the United  
23 States.

24 They definitely -- which I don't understand  
25 their reliance on the Russello principle because they

1 read borders into this. Texas has actually disavowed  
2 this view. Tarrant's disavowed it. They disavowed it  
3 to the Tenth Circuit when the Tenth Circuit asked for  
4 what their standing would be to press it. They said,  
5 we've never claimed this.

6 JUSTICE SOTOMAYOR: So what do you think is  
7 the remedy? Meaning --

8 MS. BLATT: The remedy?

9 JUSTICE SOTOMAYOR: I -- let me just posit  
10 the point, okay? I understand your point to the Chief  
11 that there's been no proof that Texas doesn't get its  
12 25 percent or that it couldn't get it from the main stem  
13 or somewhere. I accept that.

14 But let's, for the hypothetical, say that  
15 there's a major drought and Texas can't get it from its  
16 portion. What's its remedy?

17 MS. BLATT: Okay. Yeah.

18 JUSTICE SOTOMAYOR: So that -- that it's not  
19 getting --

20 MS. BLATT: Okay.

21 JUSTICE SOTOMAYOR: -- 25 percent --

22 MS. BLATT: Yeah. So let's --

23 JUSTICE SOTOMAYOR: -- as the Compact  
24 entitles it to.

25 MS. BLATT: Okay. It's the last statement.

1 The Compact no way, no how entitles the parties to equal  
2 25 percent. It just doesn't say equal rights to a  
3 numerical share. It doesn't say equal rights to a  
4 numerical quantity.

5 JUSTICE SOTOMAYOR: It says, "shall have  
6 equal rights to the use of runoff originating in  
7 Subbasin 5."

8 MS. BLATT: Right. And you and I could have  
9 equal rights to the use of the family car or equal  
10 rights to the use of the highway. That doesn't tell me  
11 anything about how many hours I can spend on the  
12 highway.

13 But here's the problem. The real problem is  
14 with the cap. Okay? Their view is that the first  
15 clause gives you an absolute equal right to a fixed  
16 25 percent, no exceptions. But then you have this  
17 provided clause which does no work for them. The  
18 provided clause, which says you don't get any more than  
19 25 percent, they are saying, well, by definition, if you  
20 get exactly 25 percent, the State can take no more than  
21 25 percent. So they actually just sort of combine the  
22 two.

23 The other -- I hate to point this out  
24 because I -- I feel a lot of affinity for the United  
25 States, but their proof --

1 CHIEF JUSTICE ROBERTS: You feel a lot of  
2 what?

3 MS. BLATT: Affinity for them.

4 CHIEF JUSTICE ROBERTS: Oh.

5 MS. BLATT: But listen to their proof for  
6 why there's an equal 25 percent.

7 CHIEF JUSTICE ROBERTS: You are representing  
8 Oklahoma.

9 MS. BLATT: I am, but I used to work for  
10 them.

11 They say well, we're guaranteed an equal  
12 25 percent share, and they cite the compliance rules on  
13 page 19. And entertainingly so, the rules that they  
14 cite just disprove what they said.

15 The first rule they cite only gave 3 States.  
16 They divided it by 3 instead of 4. Their view, the  
17 United States' view, is there's a guarantee of  
18 25 percent of any amount that's in excess of 3,000.

19 JUSTICE KENNEDY: Well, this is a -- a  
20 perfectly legitimate argument for you to make, but I  
21 want to go back to Justice Sotomayor's question.

22 At least as I understood it, it's this, I  
23 want you to assume -- I know you don't agree with  
24 that -- I want you to assume that the Compact gives  
25 Texas a right to 25 percent of the -- of the excess --

1 of the water above the cubic foot.

2 MS. BLATT: The excess, yeah.

3 JUSTICE KENNEDY: I want you to assume that.

4 Now, wouldn't the Compact be meaningless if Texas  
5 couldn't actually reach that water?

6 MS. BLATT: That is -- that is the United  
7 States' view, and they'd have to go above it. What they  
8 would have to do, which no one else -- no one has  
9 done -- and I think the drafters thought it was  
10 ultimately impossible because of Arkansas and Louisiana,  
11 is call for an accounting and actually figure out what  
12 the total was, figure out what the excess was, divvy up  
13 the 4 shares, do exactly what Tarrant wants I guess to  
14 happen, which has never happened, and it's not clear to  
15 the drafters of the compliance rules that it could in  
16 fact ever happen because of the riparian laws of  
17 Arkansas and Louisiana.

18 But -- so in other words, if we lost this  
19 case, which is probably why Tarrant is disavowing the  
20 United States' view, is Texas would be in quite of a  
21 pickle trying to prove they couldn't get their  
22 25 percent. And so I read Tarrant as saying, don't you  
23 dare send us back to try to prove that. We want to be  
24 able to go whole hog into Oklahoma.

25 And if I could get to the point that Justice

1 Kagan was talking about, what's on the ground happening,  
2 and why Oklahoma would have never agreed to this type of  
3 cross-border right because what Tarrant is doing is  
4 exploiting Oklahoma's law, which proceeds on the  
5 assumption that water in Oklahoma is a public trust  
6 that's held for the exclusive benefits of Oklahoma.

7 And there are three ways where Oklahoma  
8 would not have agreed to this, and it would have been  
9 carefully articulated in a Compact.

10 The first is prior appropriation. There are  
11 4 Texas entities that have signed up for permits: The  
12 Upper Trinity, the North Texas Municipal Water District,  
13 Irving and Tarrant. And poor Oklahoma City got  
14 sandwiched in the middle. It beat -- it beat Trinity to  
15 the permit office by 24 hours.

16 And so not surprisingly, it's open season  
17 for Oklahoma water, all of north Texas has come in and  
18 sought a permit and there's priority.

19 CHIEF JUSTICE ROBERTS: But that's the same  
20 problem. Even if you take within State, all of these  
21 people, if they were applying for water in Texas as  
22 well, there'd be the same issue there. One of them  
23 would beat the other one. It's a question of priority.  
24 You're just claiming that everybody from Oklahoma should  
25 have -- well, not absolute priority, but --

1 MS. BLATT: Well, I have two points. First,  
2 had -- had Oklahoma seen this coming, since they hadn't  
3 heard about this until Tarrant filed its application,  
4 Oklahoma City certainly would have gotten in line  
5 faster. And second of all, the whole point of this  
6 Compact -- and if you think about your equitable  
7 apportionment doctrines, which whoever gets to the water  
8 first gets a prior -- gets a priority permanently --  
9 this was the point of the Compact. Louisiana and  
10 Arkansas wouldn't have to develop their water, Texas and  
11 Oklahoma were much more economically developed States,  
12 and the equal rights prevented a race to the permit  
13 office.

14 Let me get to the second aspect what's a  
15 problem, and that is, compacts usually spell out the  
16 points of diversion. The last place Oklahoma would have  
17 picked as the point of diversion is the Kiamichi River,  
18 and Tarrant is saying, not surprisingly, it's the most  
19 desirable.

20 And the third is the eminent domain.  
21 Eminent domain law in Oklahoma proceeds on the  
22 assumption that those are Oklahomans who got the permit,  
23 and thus can exercise a core sovereign power, and  
24 Tarrant, not surprisingly, would like to come in and do  
25 that.

1                   And none of this is happening with the  
2 normal political checks in Oklahoma. Oklahoma can't  
3 vote out of office the Tarrant officials. It cannot  
4 vote out of office the Upper Trinity or the North Texas  
5 Municipal Water District.

6                   JUSTICE GINSBURG: Ms. Blatt, does Oklahoma  
7 law in any circumstance permit an appropriation of  
8 water -- water in Oklahoma for out-of-State use?

9                   MS. BLATT: Well, it's -- if it's compacted  
10 water, you have to get legislative approval and --

11                   JUSTICE GINSBURG: Just here and now, does  
12 Oklahoma ever --

13                   MS. BLATT: Yes, it can.

14                   JUSTICE GINSBURG: -- permit out-of-State  
15 use of its water?

16                   MS. BLATT: It has not. It could, but  
17 the -- but Tarrant is correct that there are facial  
18 differences with respect to out-of-State. So  
19 out-of-State users would have to get the water going  
20 faster, it's subject to a review. And there's a  
21 statement in there that you need to look and see if  
22 there's a better use for Oklahoma.

23                   Now, I hope you ask them this because I  
24 gather their view is under the dormant Commerce Clause  
25 is all of those laws are constitutional with respect to

1 99 percent of the Compact, which is it's allocated to --  
2 to Oklahoma for its free and unrestricted use. So  
3 they're basically saying there's 1 percent of this  
4 Compact that's unconstitutional.

5 And not only is it 1 percent, the minute it  
6 drops below 3,000, all of a sudden, it became. And on  
7 this, we'd like to talk to the Russello principle. I  
8 also hope you ask them, this is on page 15A of -- 14A of  
9 the 15A brief. There are border references arbitrarily  
10 and they're missing, they're there. It's completely  
11 inconsistent.

12 And this -- their view would make complete  
13 mincemeat out of 4 other provisions of the Compact. And  
14 ironically, it would march a lot of States into Texas.  
15 But back to (b) -- (b)(2) and 5.05(c) operate identical  
16 in that they're basically downstream delivery, where all  
17 States have to release 40 percent of the water  
18 downstream. So they -- they're the same. They're  
19 absolutely identical.

20 You hold on to 60, you let 40 percent go.  
21 But only (c) contains that border reference. Only (c)  
22 says, "within their respective States." And yet even in  
23 (c), it's completely redundant and unnecessary because  
24 you can't release water from without your State.

25 JUSTICE SCALIA: Where is this? Where is

1 this? Where is this?

2 MS. BLATT: This is on page 14A and 15A --  
3 sorry -- of the red brief. So only (c) says within  
4 their respective States, but (b)(2) is the exact same  
5 functioning provision, and it's missing the border  
6 reference. And I -- you don't have time now to ask the  
7 United States' view, but I think the United States would  
8 agree with us that if you give this border thing kind of  
9 the magical meaning, borders kind of appear and  
10 disappear with the water flow, which is very strange.

11 Tarrant thinks that there's some heretofore  
12 unheard of crediting system, but they don't have an  
13 explanation on how (b)(2) and (c) -- but more  
14 importantly, if you could just turn to 9A for just a  
15 minute, which is 402, I want to walk you through this --  
16 I'm sorry, 401(b). This is a provision that -- this is  
17 water wholly within Texas. And you don't have to  
18 understand much to know that Texas keeps 60, Oklahoma  
19 gets 40.

20 So you have a big chunk of Texas, and Texas  
21 is allocated 60 and Oklahoma is allocated 40. Now,  
22 under Tarrant's view, because this is silent as to  
23 borders and because Oklahoma is not in this Reach, it's  
24 not actually located within the subbasin, Oklahoma  
25 either is entitled to or has to go get all of its water

1 from Texas. And this pattern repeats itself -- this is  
2 on page 41 of our brief -- throughout the Compact, where  
3 the Compact is silent as to borders, and under their  
4 view -- and their Louisiana view is somewhat  
5 entertaining.

6 I can't tell if they think Louisiana can go  
7 into Oklahoma or has to move one inch up to the border  
8 to take it out as opposed to just waiting, but under  
9 this view -- and again, it repeats itself throughout the  
10 contract -- the State that's not in the basin because  
11 there are no borders and because, I guess under their  
12 view, the only way that Oklahoma to get its water would  
13 be to go into Texas, and that's why they're sort of  
14 taking this bit about, oh, this Russello principle, if  
15 it's here, it must mean -- it must have had  
16 significance, would make a complete mess of the Compact.

17 If I could also just turn to the remand of  
18 the United States. I just wanted to make -- to make  
19 three points. And that is, I do think it is significant  
20 that it's pointed -- it is addressed to a problem that  
21 Texas itself has never asserted. They're saying well,  
22 poor Texas can't get its water. And remember, Texas is  
23 upstream, so this sort of poor Texas is only to Texas.  
24 No other State is going to have this problem because the  
25 rest are downstream.

1           So this you have to be able to get to your  
2 25 percent is a uniquely pro-Texas provision that  
3 apparently at the same time for 20 years of drafting  
4 history when Texas was trying to buy this water, and the  
5 three States were saying, no way, no how, they either  
6 subconsciously or unconsciously or unintentionally  
7 enacted this provision for Texas's benefit.

8           JUSTICE BREYER: In Subbasin 1, that's  
9 mostly in Oklahoma, but Texas gets a lot of the water or  
10 the other way around? It looked to me like Subbasin 1's  
11 in Oklahoma.

12           MS. BLATT: Which reach?

13           JUSTICE BREYER: Subbasin 1. It says  
14 Subbasin 1.

15           MS. BLATT: Are you talking about 401?

16           JUSTICE BREYER: Yes, 401.

17           MS. BLATT: Okay. So that's in Reach 1. So  
18 that's on this map -- the next map. So none of it --  
19 it's all within the green, the same with the panhandle  
20 of Texas.

21           JUSTICE BREYER: Okay. I get it. I get it.  
22 Anyway --

23           MS. BLATT: Yes.

24           JUSTICE BREYER: -- because of that and  
25 because during the time when, let's say, there's

1 5,000 feet of the -- of the 2,000 extra, you know,  
2 Louisiana has to get 500. Okay. How do they know  
3 whether they're getting it? I mean, how -- there must  
4 be some system of measurement going on or how does this  
5 all work?

6 MS. BLATT: Justice Breyer, you have to  
7 trust me. There has never been an accounting ever,  
8 ever, ever, ever under this Compact.

9 JUSTICE BREYER: So, so -- - in other  
10 words --

11 MS. BLATT: No measurements have ever been  
12 taken with respect to this.

13 JUSTICE BREYER: Fine. So that -- I don't  
14 know how that cuts because certainly the people who drew  
15 this must have thought at least in those other  
16 provisions they are going to develop a measurement  
17 system in case of controversy.

18 MS. BLATT: Well, there are gauges. So  
19 they -- I mean, it would not be impossible, although  
20 very expensive. And just so you know, Section 211, and  
21 in the interpretive comments of 211, the State said the  
22 last thing we want is this accounting because it's  
23 expensive and burdensome. And Louisiana and Arkansas,  
24 if you look at the minutes, they are complaining because  
25 their laws are not set up for accounting. They are

1 riparian States, so they don't track diversions. They  
2 just -- they don't do it.

3 So this was -- this is -- when you talk  
4 about how this cuts, you have 20 years of silence --

5 JUSTICE SCALIA: I -- I don't understand  
6 what you just said, "They're riparian States, so they  
7 don't track diversions."

8 MS. BLATT: Okay. So when you comment --

9 JUSTICE SCALIA: Why does that follow?

10 MS. BLATT: Right. Okay. So in the -- the  
11 Oklahoma and Texas, in their permitting system, what  
12 they permit, they track how much you take under the  
13 permit. They measure.

14 JUSTICE SCALIA: Okay.

15 MS. BLATT: Louisiana, if you are a  
16 landowner, you just draw from the water and it's a --  
17 it's a voluntary reporting system, so you don't  
18 necessarily have to tell the State how much you took  
19 out.

20 JUSTICE SCALIA: Okay.

21 MS. BLATT: So one is a permitting system,  
22 and in Louisiana and Arkansas -- and, I think, again,  
23 the minutes just talk about we hope Louisiana and  
24 Arkansas will develop their laws to do better tracking  
25 of diversions. But again, this would be the problem of

1 an accounting.

2 But I -- so in terms of the 20 years of  
3 history, you have complete silence on this, even though,  
4 under our view, it always --

5 JUSTICE BREYER: The relevant legal  
6 argument, I think, is look at what you just cited to us  
7 about this Reach in the subbasin. 60 percent goes to  
8 Texas, 40 percent to Oklahoma.

9 MS. BLATT: Right.

10 JUSTICE BREYER: Okay. Now, they've never  
11 measured it. That's because they never fought about it,  
12 I guess. And now we have a fight. So why is it any  
13 easier to develop the necessary measuring system  
14 there --

15 MS. BLATT: Well --

16 JUSTICE BREYER: -- than it would be here?

17 MS. BLATT: -- the --

18 JUSTICE BREYER: And that argues against you  
19 because your main point, really, is that this is all too  
20 complicated --

21 MS. BLATT: Justice Breyer, the disaster  
22 would be and the affront to sovereignty is throughout  
23 the Compact, not so much the measuring that's a problem.  
24 Oklahoma would be able to insist on crossing Texas's  
25 borders to draw that 40 percent. And no one has ever,

1 ever envisioned any of the Compact as not applying  
2 borders. It's not so much the measurement.

3 CHIEF JUSTICE ROBERTS: Well, I thought that  
4 was what your -- the other side does envision, that it  
5 doesn't -- it's not bound by the borders, but it's bound  
6 by the agreement, the Compact. Compacts compromise the  
7 individual State sovereignty. That's the whole point of  
8 them.

9 MS. BLATT: Okay. But if their view -- I  
10 mean, it is that they have to -- again, our view is that  
11 if they had wanted, like all the other cross-border  
12 rights, to allow for an extraordinary right, they would  
13 have made an explicit statement and then spelled out  
14 exactly what that meant, most importantly the point of  
15 diversion. Here, at most you have silence on the issue.

16 Now, the government reads into borders  
17 sometimes because they say you do have borders unless  
18 there is a need. Under Tarrant's view, which I think is  
19 the most jarring and remarkable view, this is all a  
20 borderless common, and every State could have  
21 criss-crossing pipelines into every State because you  
22 don't have an exhaustion requirement. So Texas, even  
23 though it's got plenty of water in its fresh water  
24 streams and currently uses them, could take their whole  
25 25 percent from Oklahoma. Oklahoma could take its whole

1 25 percent from Texas. Arkansas could come into  
2 Oklahoma -- and that's their view of the world.

3 And I think the United States thought, no,  
4 that doesn't make too much sense. Let's at least make  
5 Texas exhaust.

6 But the provision -- the Compact doesn't say  
7 this. Again, the United States and Tarrant proceed on  
8 the assumption that there is a numerical share, that  
9 it's equal rights to an exact 25 percent, exact  
10 25 percent. Well, that's not what it says. It just  
11 says equal rights to the use subject to a cap, and we  
12 think a cap by limiting the use is not a guarantee that  
13 you can reach the cap, much less that you can cross  
14 borders to reach the cap.

15 And if I could just make one more sense --

16 JUSTICE KAGAN: Ms. Blatt, the solicitor  
17 general here today spoke of lots of different examples  
18 where the language of entitlement and rights was used.  
19 Do you have a view as -- as to that?

20 MS. BLATT: So they -- you mean the two  
21 compliance rules they cited? They cited -- so they  
22 say -- that's what I was saying that was sort of sad is  
23 because what they cited disproved what they were trying  
24 to assert it for.

25 So if you -- you don't even have to read

1 the -- you don't even have to read the compliance rules.  
2 Just read page 19 of their brief. They say in the same  
3 sentence that we have an equal -- there's an equal right  
4 to one-fourth of an excess above 3,000. So that means  
5 you take whatever is above 3,000 and divide by four  
6 equally. And then they cite a provision that only  
7 divides by 3. And then the next provision they cite  
8 didn't divide the excess, it divided the total water.

9 I don't know why they -- it's inexplicable.  
10 I can't tell you why they did that.

11 And the only other thing I want to say on  
12 the extrinsic evidence, and I do think -- if you think  
13 there's any ambiguity in here, which I think there  
14 clearly is, you have 30 years of post ratification,  
15 which the States immediately did long-term water  
16 planning without so mentioning of this right. And  
17 Tarrant actually offered to buy the same water for  
18 \$1.7 billion in 2002, which is a little bit inconsistent  
19 with the notion that they had this right all along.  
20 They just, in 18 months of negotiating history, never  
21 mentioned that they thought they owned the water, they  
22 were actually offering to pay 1.7 million. And the  
23 amicus brief filed by the Tribes, on page 4, says we  
24 were at the negotiating table and we never heard Tarrant  
25 mention this right.

1                   And the other thing, I do think the water  
2 planning documents are highly significant because not so  
3 much Louisiana and Arkansas, but Oklahoma and Texas take  
4 water planning very seriously because of their prior  
5 appropriation systems. There are hundreds of thousands  
6 of pages on the Internet and none of them mention this  
7 right. Again, they cited something in their reply  
8 brief, but if you go look at it, it doesn't come close  
9 to mentioning a right of Subbasin 5. Again, ironically  
10 it mentioned a portion of Oklahoma where Texas would  
11 have to actually buy the water.

12                   We'd ask you to affirm. Thank you.

13                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

14                   Mr. Rothfeld, you have four minutes  
15 remaining.

16                   REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

17                   ON BEHALF OF THE PETITIONER

18                   MR. ROTHFELD: Thank you, Mr. Chief Justice.

19                   A couple of points. First, my friend, Ms.  
20 Blatt, said that it would make mincemeat and a complete  
21 mess out of the Compact to apply its terms as they were  
22 written. We think that this Compact was negotiated over  
23 a period of 25 years. If you look at the Joint  
24 Appendix, you will very painfully see that there are  
25 reams and reams of commentary on the -- on the

1 negotiations.

2 I think the Court has to assume that when  
3 the drafters of the Compact used language and referred  
4 to State lines in one place and not in another place,  
5 they had some idea of what they were doing and they made  
6 these different choices intentionally. So I think the  
7 Court simply should read the terms of the Compact --

8 JUSTICE SOTOMAYOR: So how do you deal with  
9 all the provisions she was mentioning with respect to  
10 the 60/40 division? I can't make rhyme or reason of  
11 those provisions that don't use within State boundaries,  
12 but it has to mean that.

13 MR. ROTHFELD: Well, I don't think that it  
14 has to mean that. If Oklahoma wants to enter Texas to  
15 take -- if it makes more sense for them to do it, they  
16 can. If not, they can just wait for the water to flow  
17 down.

18 I think one thing which -- which Ms. Blatt  
19 did not address is the practicalities of how Subbasin 5  
20 operates. If you look at the map that was pointed out  
21 to you, Subbasin 5, which is what we're talking about  
22 here, is a very wide -- hundreds of miles wide, but  
23 extremely narrow. It's 10 to 20 miles wide -- north to  
24 south for most of its length.

25 The reason the drafters drew this is because

1 the States all take -- the assumption was all of the  
2 water in this Subbasin was going to be surplus water,  
3 literally excess water. The States all take the water  
4 that they want to use outside of Subbasin 5, and so  
5 the -- the allocations that Ms. Blatt was referring to  
6 by Oklahoma are all in Subbasin 1, they are not in  
7 Subbasin 5. The water that flows into Subbasin 5 is  
8 water that the States assumed was going to be surplus.  
9 And so it would make no sense, having divided this water  
10 evenly between the compacting States, to think that the  
11 drafters would have required a water user in Texas at  
12 the far west end, which would get its portion of the  
13 25 percent share two miles across the border in  
14 Oklahoma, instead to have to go 200 miles to the east to  
15 get it out of Texas.

16 That is not what the drafters intended to  
17 accomplish by this. They created, by the plain terms of  
18 the -- of the language, a common pool of water defined  
19 by dam site, not by State line, and gave each State  
20 equal rights to access that water so long as they did  
21 not use more than 25 percent.

22 Your response to a question which was raised  
23 by Justice Kagan both to me and Ms. Blatt, I think the  
24 practical application of this is very simple. One  
25 simply has to apply to the permitting authorities,

1 wherever you're submitting your application from, they  
2 will apply their ordinary standards. The Oklahoma Water  
3 Resources Board does that now for applications from  
4 within Oklahoma, it can do it just as well for  
5 applications from Texas or other from other States.

6 And, again, the practicality of this is,  
7 water users are going to want to use water as close to  
8 where they are located as they can. They're going to go  
9 right across the State line within Subbasin 5 if that's  
10 the place to get the water. It makes no sense to  
11 require them to go hundreds of miles distant to get it.

12 Ms. Blatt suggested that we are reading the  
13 25 percent limitation out of the Compact. I think her  
14 reading reads the equal rights language out of the  
15 Compact. They read the Subbasin 5 language as being all  
16 capped and no entitlement. It does two things. It  
17 gives equal rights to the water, and then says that you  
18 can't take more than 25 percent within your State. So  
19 it's designed to do two things. It's designed to give  
20 you an entitlement and to say you can only use  
21 25 percent of it.

22 And finally, Ms. Blatt raised questions of  
23 -- of sovereignty and political concern. As the Chief  
24 Justice suggested, this is a Compact that's an agreement  
25 between coordinate sovereigns. They have decided what

1 they want to do. And the thing that gives respect to  
2 sovereignty is to write -- to read the plain language of  
3 the Compact as the framers wrote it. Again, they spent  
4 25 years writing it. They took considerable care, as  
5 you can tell if you look at the negotiating history, in  
6 using the words for each provision. Those words should  
7 be given meaning.

8 If there are no further questions.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 The case is submitted.

11 (Whereupon, at 12:08 p.m., the case in the  
12 above-entitled matter was submitted.)

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<b>A</b>				
<b>able</b> 42:24 49:1 52:24	27:13,20 <b>allegation</b> 31:15	16:12,12,16,18 16:22 17:18	42:10,17 44:10 50:23 51:22,24	<b>based</b> 24:12 36:3
<b>above-entitled</b> 1:11 60:12	<b>allocate</b> 4:2 6:14	21:4,19 22:10	54:1 56:3	<b>basic</b> 22:19 34:10
<b>absolute</b> 40:15 43:25	<b>allocated</b> 46:1 47:21,21	26:6 44:3 58:24 59:1	<b>Arkansas/Loui...</b> 5:22	<b>basically</b> 46:3,16
<b>absolutely</b> 34:16 34:21 46:19	<b>allocates</b> 4:6	<b>applications</b> 15:2 16:16 17:1	<b>articulated</b> 43:9	<b>basin</b> 4:3,3,16 30:24 48:10
<b>accept</b> 22:19 39:13	<b>allocation</b> 15:13 21:15,15,22	25:24,25 59:3,5	<b>asked</b> 28:12 39:3	<b>basis</b> 36:2
<b>access</b> 19:20 21:17 22:9 58:20	<b>allocations</b> 19:3 58:5	<b>applied</b> 18:17	<b>asking</b> 16:1 17:4 17:13 34:17	<b>beat</b> 43:14,14,23
<b>accessing</b> 18:10	<b>allow</b> 8:4 53:12	<b>applies</b> 16:7	<b>aspect</b> 44:14	<b>behalf</b> 1:15,20 2:4,11,14 3:8 29:2 56:17
<b>accomplish</b> 12:16 58:17	<b>allowed</b> 3:12	<b>apply</b> 11:24,25 12:5,13 14:25	<b>assert</b> 54:24	<b>bells</b> 35:10
<b>accounting</b> 30:16 33:20 42:11 50:7,22,25 52:1	<b>alludes</b> 8:3	15:14,16 16:8 25:12,15,15 34:10 56:21	<b>asserted</b> 48:21	<b>belongs</b> 7:16 29:10
<b>action</b> 28:23	<b>ambiguity</b> 9:13 55:13	58:25 59:2	<b>assess</b> 15:17 16:11,12 17:17	<b>beneficial</b> 25:14 26:7
<b>actual</b> 29:7	<b>amicus</b> 1:19 2:7 18:4 26:9 55:23	<b>applying</b> 12:7 18:14 28:18	<b>assessed</b> 16:24	<b>benefit</b> 49:7
<b>additional</b> 22:2 28:21	<b>amount</b> 5:24 23:22 24:16 41:18	43:21 53:1	<b>assesses</b> 15:18	<b>benefits</b> 43:6
<b>address</b> 29:5 57:19	<b>analytic</b> 19:25	<b>apportionment</b> 44:7	<b>Assistant</b> 1:17	<b>better</b> 11:8 45:22 51:24
<b>addressed</b> 22:16 48:20	<b>ANN</b> 1:17 2:6 18:3	<b>appreciate</b> 34:4	<b>assume</b> 14:25 41:23,24 42:3 57:2	<b>big</b> 31:5 47:20
<b>administer</b> 21:5 25:3	<b>answer</b> 11:14,17 26:16	<b>approach</b> 19:25	<b>assumed</b> 58:8	<b>billion</b> 55:18
<b>administrative</b> 7:7 11:9 15:6	<b>Anyway</b> 49:22	<b>appropriate</b> 25:7 43:10 45:7 56:5	<b>assumption</b> 43:5 44:22 54:8 58:1	<b>bit</b> 48:14 55:18
<b>affinity</b> 40:24 41:3	<b>apart</b> 16:2	<b>approval</b> 45:10	<b>authorities</b> 12:5 58:25	<b>Blatt</b> 1:20 2:10 28:25 29:1,3,23 30:2,6,11,25 31:11,16,20,23 32:1,5,10,15 32:20 33:2,4,7 33:11,14 34:12 35:4,9 36:9,21 37:1,6,9,12,16 37:22,25 38:2 39:8,17,20,22 39:25 40:8 41:3 41:5,9 42:2,6 44:1 45:6,9,13 45:16 47:2 49:12,15,17,23 50:6,11,18 51:8 51:10,15,21 52:9,15,17,21 53:9 54:16,20 56:20 57:18 58:5,23 59:12
<b>affirm</b> 56:12	<b>appeals</b> 18:8,13 18:22 19:6,7,14 19:25 20:6,7,23 28:18	<b>approved</b> 24:2	<b>authority</b> 7:1 18:24	
<b>affront</b> 52:22	<b>appear</b> 3:20 47:9	<b>April</b> 1:9	<b>availability</b> 21:8	
<b>agree</b> 19:6,18 41:23 47:8	<b>APPEARANC...</b> 1:14	<b>arbitrarily</b> 46:9	<b>available</b> 17:21 21:25 23:22 26:7	
<b>agreed</b> 3:11 4:1 34:13 43:2,8	<b>appears</b> 3:17 5:15	<b>area</b> 5:6 24:19	<b>a.m</b> 1:13 3:2	
<b>agreement</b> 53:6 59:24	<b>Appendix</b> 23:19 24:3 56:24	<b>areas</b> 4:3,5 8:9	<b>B</b>	
<b>AL</b> 1:6	<b>applicant</b> 12:10 15:23 16:21 25:16 26:22 27:6	<b>argue</b> 36:12	<b>b</b> 46:15,15 47:4 47:13	
<b>Alito</b> 14:4,10,15 26:15 27:7,11	<b>applicants</b> 26:18	<b>argues</b> 52:18	<b>back</b> 3:14 10:25 11:1,12 36:7 37:21 41:21 42:23 46:15	
	<b>application</b> 16:9	<b>argument</b> 1:12 2:2,5,9,12 3:4,7 3:15 9:22 18:3 19:8 22:8 29:1 34:5 41:20 52:6 56:16	<b>backdrop</b> 25:5	
		<b>arising</b> 11:4,5	<b>bank</b> 13:1,9,12 13:17	
		<b>Arkansas</b> 4:1 10:23 11:21 28:10 30:21 36:14 38:16	<b>bar</b> 21:19	
			<b>bargain</b> 3:14	

59:22	32:21 34:21	28:24 29:3,19	<b>come</b> 9:7,24 20:5	60:3
<b>blue</b> 5:16 32:23	35:2,15,17 38:3	29:25 30:3,9	20:18 35:14	<b>compacted</b> 45:9
33:8	46:9 47:3 48:2	32:4 34:1,18	38:11,16,22	<b>compacting</b> 4:13
<b>board</b> 12:8,13	55:2,23 56:8	39:10 41:1,4,7	43:17 44:24	5:4 58:10
15:17 16:9,11	<b>briefs</b> 26:9	43:19 53:3	54:1 56:8	<b>compacts</b> 4:19
16:19,25 17:5,6	<b>burdensome</b>	56:13,18 59:23	<b>comes</b> 19:19	8:2 34:6 44:15
25:12,23 26:17	50:23	60:9	21:2 32:18	53:6
27:5 28:23 59:3	<b>buy</b> 49:4 55:17	<b>choice</b> 35:11	<b>coming</b> 44:2	<b>compare</b> 16:16
<b>border</b> 5:22 9:25	56:11	<b>choices</b> 57:6	<b>comment</b> 51:8	16:17
10:6 13:14 35:3	<b>C</b>	<b>chose</b> 27:15	<b>commentary</b>	<b>compelled</b> 10:12
35:24 38:20		<b>chunk</b> 47:20	56:25	<b>compels</b> 10:19
46:9,21 47:5,8	<b>c</b> 2:1 3:1 26:12	<b>Circuit</b> 39:3,3	<b>comments</b> 23:17	10:20
48:7 58:13	46:21,21,23	<b>circumstance</b>	24:13 50:21	<b>competing</b> 17:1
<b>borderless</b> 53:20	47:3,13	45:7	<b>commerce</b> 19:12	23:22
<b>borderline</b> 10:7	<b>cactus</b> 7:13	<b>citation</b> 35:17	19:16,19 20:4	<b>complained</b>
<b>borders</b> 20:19	<b>call</b> 42:11	<b>cite</b> 34:20,22,22	45:24	37:18
24:15 35:14,22	<b>called</b> 4:4 29:9	34:23 35:25	<b>Commission</b>	<b>complaining</b>
36:17 38:21	<b>cap</b> 23:4,11	36:1 37:2 41:12	24:1,14	50:24
39:1 47:9,23	40:14 54:11,12	41:14,15 55:6,7	<b>Commission's</b>	<b>complete</b> 46:12
48:3,11 52:25	54:13,14	<b>cited</b> 8:3 52:6	24:6	48:16 52:3
53:2,5,16,17	<b>capped</b> 59:16	54:21,21,23	<b>common</b> 53:20	56:20
54:14	<b>car</b> 40:9	56:7	58:18	<b>completely</b> 46:10
<b>bottom</b> 28:5	<b>care</b> 60:4	<b>City</b> 43:13 44:4	<b>compact</b> 3:11,17	46:23
<b>bound</b> 53:5,5	<b>carefully</b> 43:9	<b>claim</b> 30:1	3:19,21,24,25	<b>complex</b> 7:7,9,10
<b>boundaries</b> 4:8	<b>case</b> 3:4 34:2	<b>claimed</b> 39:5	4:3,5,9,10,21	<b>complexity</b> 23:6
4:13 9:18,19	42:19 50:17	<b>claiming</b> 43:24	5:5 7:2 9:15,16	<b>compliance</b>
11:4 18:25	60:10,11	<b>clause</b> 4:23	10:15,19 15:11	41:12 42:15
22:10 24:20	<b>categorically</b>	19:12,16,19	16:1,5 18:16,18	54:21 55:1
25:1 57:11	18:9	20:4 33:21	18:20,23,23	<b>complicated</b>
<b>boundary</b> 24:22	<b>certainly</b> 44:4	40:15,17,18	19:1,3,4,9,11	52:20
29:7,12	50:14	45:24	19:15,22 20:10	<b>compromise</b> 53:6
<b>Breyer</b> 6:3,11,17	<b>challenged</b> 18:15	<b>clear</b> 5:4 19:1	20:11,11,14,17	<b>concede</b> 15:10
6:21 7:10,24	<b>challenging</b> 14:1	20:12 24:11	21:3,9,16 23:12	<b>concern</b> 59:23
8:7,21 10:25	<b>channel</b> 31:3	30:22 42:14	24:1,5,12,14	<b>concerned</b> 26:9
12:4 23:3 28:6	32:19	<b>clearer</b> 4:21	24:20,23,25	<b>conclude</b> 18:23
36:6,10,22 37:1	<b>CHARLES</b> 1:15	<b>clearly</b> 11:13	29:8,13 34:6,11	<b>concluded</b> 18:8
37:1,4,7,10,15	2:3,13 3:7	55:14	34:20,22,23	<b>concluding</b> 28:19
37:20,23 38:1	56:16	<b>CLEMENT</b> 5:15	36:2 39:23 40:1	<b>conclusion</b> 18:11
49:8,13,16,21	<b>cheaper</b> 22:3	<b>cliffs</b> 6:7	41:24 42:4 43:9	20:7
49:24 50:6,9,13	<b>check</b> 37:21	<b>close</b> 29:25 56:8	44:6,9 46:1,4	<b>conflict</b> 18:15
52:5,10,16,18	<b>checks</b> 45:2	59:7	46:13 48:2,3,16	<b>conflicts</b> 21:14
52:21	<b>Chief</b> 3:3,9 14:24	<b>closer</b> 21:25	50:8 52:23 53:1	<b>consider</b> 20:25
<b>brief</b> 3:21 5:16	15:19,25 17:13	<b>closest</b> 11:19	53:6 54:6 56:21	<b>considerable</b>
14:11 22:14,22	17:25 18:1,6	<b>colors</b> 32:22	56:22 57:3,7	60:4
27:19 31:7	20:16 21:10,23	<b>combine</b> 40:21	59:13,15,24	<b>considering</b> 28:7

<b>consistent</b> 8:15 8:19,22 16:8 19:2,8,14 20:13	58:17 <b>crediting</b> 47:12 <b>Creek</b> 29:9,10 31:1,12 <b>criss-crossing</b> 53:21 <b>critical</b> 34:16 <b>cross</b> 10:7 35:3 54:13 <b>crossing</b> 52:24 <b>cross-border</b> 8:4 34:19,24 35:5 43:3 53:11 <b>cubic</b> 5:21 23:23 24:7,8 42:1 <b>curiae</b> 1:19 2:7 18:4 <b>current</b> 13:20,22 17:8 <b>currently</b> 53:24 <b>cuts</b> 50:14 51:4	<b>delivery</b> 36:5 46:16 <b>demonstrate</b> 16:22 <b>Denison</b> 29:9 31:1 <b>deny</b> 15:4 <b>Department</b> 1:18 <b>depends</b> 19:22 <b>descend</b> 14:12 <b>describes</b> 3:21 <b>describing</b> 8:6 <b>designed</b> 6:14 59:19,19 <b>desirable</b> 44:19 <b>details</b> 8:6 <b>determine</b> 12:14 18:14 25:13 <b>develop</b> 44:10 50:16 51:24 52:13 <b>developed</b> 27:1 28:21 44:11 <b>devoid</b> 35:17 <b>differences</b> 45:18 <b>different</b> 3:23 4:11 7:6,20,21 17:11 54:17 57:6 <b>difficult</b> 5:10 22:24 <b>difficulty</b> 22:21 <b>directly</b> 11:21 29:22 <b>disagree</b> 6:9 20:4 20:6 <b>disappear</b> 47:10 <b>disaster</b> 52:21 <b>disavowed</b> 39:1 39:2,2 <b>disavowing</b> 42:19 <b>discriminatory</b> 14:2	<b>discussion</b> 37:17 <b>disprove</b> 41:14 <b>disproved</b> 54:23 <b>disregard</b> 3:17 <b>distant</b> 59:11 <b>district</b> 1:3 3:5 12:7 43:12 45:5 <b>diversion</b> 12:16 34:19,24 35:5 35:11 44:16,17 53:15 <b>diversions</b> 30:21 35:20 51:1,7,25 <b>divert</b> 25:7 28:20 32:23 <b>divide</b> 55:5,8 <b>divided</b> 41:16 55:8 58:9 <b>divides</b> 4:3 55:7 <b>division</b> 57:10 <b>divvy</b> 42:12 <b>doctrines</b> 44:7 <b>documents</b> 32:7 33:15 56:2 <b>doing</b> 7:1 43:3 57:5 <b>domain</b> 12:19 14:18,22 35:11 44:20,21 <b>dormant</b> 19:12 19:16,19 45:24 <b>double-counted</b> 38:7 <b>downside</b> 4:15 <b>downstream</b> 9:1 36:5 46:16,18 48:25 <b>dozen</b> 30:7,13 <b>drafted</b> 36:8 <b>drafters</b> 9:15 30:17,18 42:9 42:15 57:3,25 58:11,16 <b>drafting</b> 49:3 <b>dragon</b> 33:8	<b>draw</b> 29:16 51:16 52:25 <b>drawn</b> 4:14 <b>drew</b> 50:14 57:25 <b>drink</b> 31:16 32:2 32:11 <b>drinkable</b> 32:8 <b>drinking</b> 32:3,5 33:16 <b>drops</b> 46:6 <b>drought</b> 39:15 <b>due</b> 36:21 <b>D.C</b> 1:8,15,18,20
	<b>D</b>		<b>E</b>	
	<b>D</b> 3:1 <b>dam</b> 4:15 9:1 27:24 29:10 31:1 58:19 <b>danger</b> 35:21 <b>dare</b> 42:23 <b>deal</b> 57:8 <b>dealt</b> 28:22 <b>decide</b> 7:2 9:23 26:2 28:13 <b>decided</b> 20:22 22:21 28:15 59:25 <b>decisions</b> 16:20 <b>defined</b> 5:6,6 8:24,25 24:19 27:24 58:18 <b>defines</b> 5:19 <b>definite</b> 4:22 <b>definitely</b> 31:6 38:24 <b>definition</b> 40:19		<b>E</b> 2:1 3:1,1 <b>earlier</b> 33:24 <b>easier</b> 10:7 52:13 <b>easily</b> 23:3 <b>east</b> 31:1,4 58:14 <b>easy</b> 28:13 37:21 <b>economically</b> 44:11 <b>either</b> 19:11 47:25 49:5 <b>EI</b> 36:2 <b>eminent</b> 12:19 14:17,21 35:10 44:20,21 <b>enacted</b> 49:7 <b>enforcement</b> 18:20 <b>engineering</b> 37:3 <b>engineers</b> 38:4 <b>enormous</b> 11:9 <b>enter</b> 57:14 <b>entertaining</b> 48:5 <b>entertainingly</b> 41:13 <b>entirely</b> 13:4,8 19:22 <b>entities</b> 26:10 43:11 <b>entitled</b> 5:23 6:4 6:8,19 9:17	

<p>15:11 16:5 24:9 24:17 32:17 47:25 <b>entitlement</b> 4:6 23:2,10 30:1 54:18 59:16,20 <b>entitles</b> 39:24 40:1 <b>envision</b> 53:4 <b>envisioned</b> 53:1 <b>equal</b> 5:5,18 6:1 6:15 8:23 9:3 10:14 11:2,3,3 11:5 23:14,14 23:15 33:20,21 40:1,2,3,6,9,9 40:15 41:6,11 44:12 54:9,11 55:3,3 58:20 59:14,17 <b>equally</b> 55:6 <b>equitable</b> 44:6 <b>erects</b> 12:15 <b>erred</b> 18:13 <b>errors</b> 20:23 28:17 38:5 <b>ESQ</b> 1:15,17,20 2:3,6,10,13 <b>essential</b> 35:10 <b>essentially</b> 3:16 <b>ET</b> 1:6 <b>evaluate</b> 16:15 <b>evenly</b> 58:10 <b>everybody</b> 36:16 43:24 <b>evidence</b> 37:17 55:12 <b>exact</b> 5:12,13 47:4 54:9,9 <b>exactly</b> 16:15 40:20 42:13 53:14 <b>example</b> 21:17 35:25 37:5 <b>examples</b> 34:20</p>	<p>35:15 54:17 <b>exceptions</b> 40:16 <b>excess</b> 5:23 23:23,25 38:10 41:18,25 42:2 42:12 55:4,8 58:3 <b>exclusive</b> 43:6 <b>exclusively</b> 4:8 <b>excuse</b> 9:9 30:12 31:4 <b>exercise</b> 12:19 14:21 44:23 <b>exhaust</b> 54:5 <b>exhaustion</b> 53:22 <b>existing</b> 15:6 <b>expense</b> 22:2 <b>expensive</b> 50:20 50:23 <b>explanation</b> 47:13 <b>explicit</b> 34:15 35:4,6,9 53:13 <b>exploiting</b> 43:4 <b>express</b> 5:8 29:12 <b>expressly</b> 4:6 8:4 8:8 <b>extent</b> 9:12 26:23 <b>extra</b> 36:24 50:1 <b>extraordinary</b> 34:14 53:12 <b>extremely</b> 7:7 57:23 <b>extrinsic</b> 55:12</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> 9:5 <b>facial</b> 45:17 <b>facilities</b> 12:16 <b>fact</b> 6:6 7:15 8:19 9:16 13:7 17:16 27:23 32:5 42:16</p>	<p><b>factual</b> 13:3 29:5 <b>fairly</b> 37:20 <b>family</b> 40:9 <b>far</b> 58:12 <b>fascinating</b> 35:25 <b>faster</b> 44:5 45:20 <b>favor</b> 23:13 36:7 <b>favored</b> 38:11 <b>federalism</b> 18:17 <b>feel</b> 40:24 41:1 <b>feet</b> 5:21 23:23 24:7,8 36:12 50:1 <b>fight</b> 11:2 52:12 <b>figure</b> 42:11,12 <b>filed</b> 44:3 55:23 <b>filled</b> 5:1 <b>finally</b> 59:22 <b>Fine</b> 8:7 50:13 <b>finish</b> 9:11 11:15 <b>first</b> 6:16 7:9 8:2 10:11,25 17:18 18:13 20:18,21 23:19 26:6 40:14 41:15 43:10 44:1,8 56:19 <b>fit</b> 15:6 <b>fixed</b> 40:15 <b>flat</b> 37:24 <b>flow</b> 4:16 5:20,20 9:24 23:25 24:7 24:10 27:8,15 47:10 57:16 <b>flowing</b> 28:4 <b>flows</b> 10:16 23:20 58:7 <b>focus</b> 34:4 <b>focused</b> 11:13 <b>follow</b> 23:17 51:9 <b>foot</b> 42:1 <b>footnote</b> 32:6,6 <b>force</b> 14:16 <b>forcing</b> 38:17 <b>foreclose</b> 18:9</p>	<p><b>forgot</b> 38:8 <b>fought</b> 52:11 <b>found</b> 37:23 <b>four</b> 4:13 5:4 6:1 9:2 10:14 26:1 36:11 55:5 56:14 <b>framers</b> 9:20 60:3 <b>free</b> 46:2 <b>freely</b> 21:5 <b>fresh</b> 30:7 53:23 <b>friend</b> 56:19 <b>friends</b> 15:10 <b>frustrate</b> 20:8 <b>full</b> 23:19 28:2,3 <b>functioning</b> 47:5 <b>further</b> 22:16 25:4 60:8</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>G</b> 3:1 <b>gain</b> 33:24 <b>gather</b> 45:24 <b>gauges</b> 50:18 <b>general</b> 1:17 18:23,25 20:12 54:17 <b>geographic</b> 24:19,24 <b>getting</b> 39:19 50:3 <b>Ginsburg</b> 4:18 8:3 11:23 12:2 12:15 35:1,7 45:6,11,14 <b>gist</b> 5:25 <b>give</b> 3:20 4:19 15:3,19 16:1 26:17 27:3 34:7 47:8 59:19 <b>given</b> 60:7 <b>gives</b> 18:24 19:22 22:23 35:2 40:15</p>	<p>41:24 59:17 60:1 <b>go</b> 6:23 7:11 9:24 10:23,25 11:12 11:20,20,21 12:11,11 13:6 13:19 14:5 17:16 23:9 35:23 36:4,7 38:17 41:21 42:7,24 46:20 47:25 48:6,13 56:8 58:14 59:8 59:11 <b>goes</b> 7:19 25:6 52:7 <b>going</b> 4:25,25 7:11,12,14,16 7:21 10:1,8 11:2,18,20,20 11:21 12:3,6,25 14:7,12 16:8 17:5 22:11,21 24:18 25:2 30:23 36:12 37:21 45:19 48:24 50:4,16 58:2,8 59:7,8 <b>good</b> 22:8 <b>gotten</b> 44:4 <b>government</b> 53:16 <b>Grande</b> 36:2 <b>granted</b> 12:14 <b>green</b> 35:2 49:19 <b>ground</b> 43:1 <b>guarantee</b> 41:17 54:12 <b>guaranteed</b> 41:11 <b>Guard</b> 14:7 <b>guess</b> 8:17 15:25 25:19 28:9 34:9 42:13 48:11 52:12</p>
---	---	---	--	--

<b>H</b>	<p><b>imaginary</b> 37:7 37:10</p> <p><b>immediately</b> 55:15</p> <p><b>implies</b> 23:15</p> <p><b>importantly</b> 47:14 53:14</p> <p><b>impose</b> 24:22</p> <p><b>impossible</b> 42:10 50:19</p> <p><b>inch</b> 48:7</p> <p><b>includes</b> 4:12</p> <p><b>inconsistent</b> 46:11 55:18</p> <p><b>increase</b> 27:15</p> <p><b>incur</b> 22:2</p> <p><b>indefinitely</b> 33:25</p> <p><b>indented</b> 5:16</p> <p><b>indifferent</b> 26:21</p> <p><b>individual</b> 53:7</p> <p><b>inexplicable</b> 34:21,21 55:9</p> <p><b>insist</b> 52:24</p> <p><b>instance</b> 28:7,8</p> <p><b>intended</b> 30:18 58:16</p> <p><b>intent</b> 6:25</p> <p><b>intentionally</b> 57:6</p> <p><b>interesting</b> 38:12</p> <p><b>Internet</b> 56:6</p> <p><b>interpretations</b> 11:10</p> <p><b>interpretive</b> 23:17 24:13 50:21</p> <p><b>interstate</b> 18:18 34:5,6,11</p> <p><b>intervening</b> 13:12</p> <p><b>invitation</b> 22:15</p> <p><b>involves</b> 24:18</p> <p><b>ironically</b> 46:14 56:9</p>	<p><b>irrelevant</b> 19:13</p> <p><b>Irving</b> 43:13</p> <p><b>isolation</b> 9:14</p> <p><b>issue</b> 4:10 20:22 22:6 43:22 53:15</p> <p><b>issues</b> 22:14,20 22:22</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>jarring</b> 53:19</p> <p><b>job</b> 7:7,9</p> <p><b>JOHN</b> 1:6</p> <p><b>Joint</b> 23:18 24:3 56:23</p> <p><b>juxtaposing</b> 38:13</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>Kagan</b> 16:14 17:4,10 22:18 23:8 25:9,18,22 43:1 54:16 58:23</p> <p><b>keep</b> 25:18 28:3</p> <p><b>keeps</b> 47:18</p> <p><b>KENNEDY</b> 12:21 13:8,11 13:20,24 19:5 19:24 30:22 31:9,14,18,21 31:24 41:19 42:3</p> <p><b>kept</b> 30:15</p> <p><b>Kiamichi</b> 44:17</p> <p><b>kind</b> 4:24 17:11 22:23 27:3 30:16 47:8,9</p> <p><b>kinds</b> 8:5</p> <p><b>knew</b> 36:23</p> <p><b>know</b> 7:14 8:8 10:1 17:6 22:24 26:9,9 32:13 33:6,19 34:9 37:4,24 41:23</p>	<p>47:18 50:1,2,14 50:20 55:9</p> <p><b>known</b> 35:21</p> <p><b>knows</b> 30:2,6,17 36:16</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>laid</b> 22:20</p> <p><b>lake</b> 29:14,17 31:4,5,8 33:8 33:17</p> <p><b>land</b> 29:16 31:12</p> <p><b>landowner</b> 51:16</p> <p><b>language</b> 3:17,18 3:19 4:11 5:5 5:10,12,13,25 6:5 8:14,16,20 8:21 9:14,20 10:2,12,13,13 10:19 15:11 20:17 23:12 54:18 57:3 58:18 59:14,15 60:2</p> <p><b>large</b> 4:3</p> <p><b>Laughter</b> 30:5</p> <p><b>law</b> 12:19 14:25 20:8,10,13 21:4 21:11,14,19 22:10 25:5 26:5 35:11 43:4 44:21 45:7</p> <p><b>laws</b> 13:20,22 14:1,1,2 18:15 21:6 25:13,15 30:20 42:16 45:25 50:25 51:24</p> <p><b>lawsuit</b> 36:1,3</p> <p><b>lawyer</b> 29:8</p> <p><b>left</b> 7:5</p> <p><b>legal</b> 52:5</p> <p><b>legislative</b> 45:10</p> <p><b>legitimate</b> 41:20</p> <p><b>length</b> 57:24</p>	<p><b>let's</b> 11:12 21:24 25:22,24 39:14 39:22 49:25 54:4</p> <p><b>licensed</b> 29:19</p> <p><b>lies</b> 13:3</p> <p><b>limitation</b> 38:20 59:13</p> <p><b>limiting</b> 54:12</p> <p><b>line</b> 4:6 11:22 12:23 13:15,17 23:21 44:4 58:19 59:9</p> <p><b>lines</b> 4:14 8:25 9:6,16 17:13 57:4</p> <p><b>LISA</b> 1:20 2:10 29:1</p> <p><b>listen</b> 41:5</p> <p><b>literally</b> 58:3</p> <p><b>little</b> 10:7 11:8 31:11 34:7,8 37:24 55:18</p> <p><b>located</b> 3:13 47:24 59:8</p> <p><b>long</b> 5:7 17:21 22:8 58:20</p> <p><b>longer</b> 10:17</p> <p><b>long-term</b> 55:15</p> <p><b>look</b> 22:7 23:1 31:5 32:20,21 33:7 34:25 38:21 45:21 50:24 52:6 56:8 56:23 57:20 60:5</p> <p><b>looked</b> 19:9 49:10</p> <p><b>looking</b> 9:7 14:11 33:1</p> <p><b>looks</b> 33:8</p> <p><b>lose</b> 19:15</p> <p><b>lost</b> 42:18</p> <p><b>lot</b> 5:1 15:2 29:17 31:6 40:24 41:1</p>
<b>I</b>	<p><b>idea</b> 20:18 23:13 57:5</p> <p><b>identical</b> 46:15 46:19</p> <p><b>II</b> 18:10</p>			

<p>46:14 49:9  <b>lots</b> 22:14 25:23                  31:7 54:17  <b>Louisiana</b> 4:1                  9:23 10:8,16,17                  10:20,23,24                  11:19 24:8                  30:20 36:13,19                  38:15 42:10,17                  44:9 48:4,6                  50:2,23 51:15                  51:22,23 56:3  <b>Louisiana's</b>                  10:16  <b>lower</b> 20:25 22:7                  27:1</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>magical</b> 47:9  <b>main</b> 12:24 13:5                  13:18 29:15,18                  29:22 30:24                  31:10 32:13,18                  39:12 52:19  <b>major</b> 27:24                  39:15  <b>map</b> 31:5 32:21                  33:4 34:25                  49:18,18 57:20  <b>march</b> 46:14  <b>math</b> 38:10,11  <b>matter</b> 1:11 13:3                  28:13 60:12  <b>mean</b> 4:19 5:11                  6:5,21,24 10:5                  14:6 15:4 16:14                  17:5 22:19,22                  25:3,9,22 26:24                  34:2,12 48:15                  50:3,19 53:10                  54:20 57:12,14  <b>meaning</b> 39:7                  47:9 60:7  <b>meaningless</b>                  42:4</p>	<p><b>means</b> 11:3                  25:20 33:23                  55:4  <b>meant</b> 36:23                  53:14  <b>measure</b> 51:13  <b>measured</b> 52:11  <b>measurement</b>                  50:4,16 53:2  <b>measurements</b>                  50:11  <b>measuring</b> 7:19                  52:13,23  <b>mechanism</b> 6:25                  7:4,25  <b>meet</b> 28:8  <b>mention</b> 55:25                  56:6  <b>mentioned</b> 55:21                  56:10  <b>mentioning</b>                  55:16 56:9 57:9  <b>merits</b> 16:24  <b>mess</b> 11:9 48:16                  56:21  <b>method</b> 38:5  <b>methodological</b>                  38:5  <b>Mexico</b> 36:3,4,5  <b>middle</b> 31:3                  43:14  <b>mile</b> 31:2  <b>miles</b> 35:23                  57:22,23 58:13                  58:14 59:11  <b>million</b> 55:22  <b>mincemeat</b> 46:13                  56:20  <b>minute</b> 46:5                  47:15  <b>minutes</b> 50:24                  51:23 56:14  <b>misleading</b> 14:10  <b>missing</b> 46:10                  47:5</p>	<p><b>months</b> 55:20  <b>morning</b> 3:4  <b>move</b> 48:7  <b>multiple</b> 25:25  <b>Municipal</b> 43:12                  45:5</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>N</b> 2:1,1 3:1  <b>narrow</b> 57:23  <b>National</b> 14:7  <b>near</b> 38:1  <b>Nebraska</b> 35:18                  35:20,23  <b>necessarily</b>                  21:21 22:12                  51:18  <b>necessary</b> 14:18                  52:13  <b>need</b> 20:13 22:15                  25:4 45:21                  53:18  <b>needs</b> 12:18                  28:15 38:21  <b>negotiated</b> 56:22  <b>negotiating</b>                  55:20,24 60:5  <b>negotiations</b>                  57:1  <b>never</b> 28:20 34:1                  34:2,3,13,18                  34:23 35:5,19                  36:17,18 37:18                  39:5 42:14 43:2                  48:21 50:7                  52:10,11 55:20                  55:24  <b>New</b> 36:3,4,5  <b>Niobrara</b> 34:22  <b>normal</b> 5:20 15:1                  25:12 45:2  <b>north</b> 43:12,17                  45:4 57:23  <b>notion</b> 36:4 55:19  <b>numbers</b> 38:4</p>	<p><b>numerical</b> 40:3,4                  54:8</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 2:1 3:1  <b>obligations</b> 19:4                  20:14  <b>obstacle</b> 20:9                  21:15,22  <b>obtain</b> 12:18                  14:21  <b>obtaining</b> 16:23                  20:9 21:20  <b>offered</b> 55:17  <b>offering</b> 55:22  <b>office</b> 43:15                  44:13 45:3,4  <b>officials</b> 45:3  <b>oh</b> 37:6,9 41:4                  48:14  <b>okay</b> 8:1 11:8                  27:11 33:3,13                  37:12 39:10,17                  39:20,25 40:14                  49:17,21 50:2                  51:8,10,14,20                  52:10 53:9  <b>Oklahomans</b>                  16:17 17:7                  44:22  <b>Oklahoma's</b>                  13:22 14:11                  16:2 43:4  <b>old</b> 31:5  <b>one's</b> 38:9  <b>one-fourth</b> 55:4  <b>open</b> 43:16  <b>operate</b> 12:9                  46:15  <b>operates</b> 57:20  <b>opinion</b> 19:7,7,13                  20:23  <b>opponents</b> 8:4  <b>opportunity</b>                  23:16 27:23</p>	<p><b>opposed</b> 48:8  <b>oral</b> 1:11 2:2,5,9                  3:7 18:3 29:1  <b>order</b> 13:4,17                  14:20 26:18  <b>ordinary</b> 12:13                  59:2  <b>original</b> 28:23  <b>originating</b> 14:3                  40:6  <b>other's</b> 33:22  <b>outside</b> 14:3                  28:20 58:4  <b>out-of-State</b> 45:8                  45:14,18,19  <b>owned</b> 55:21  <b>ownership</b> 13:9  <b>owns</b> 13:13  <b>O'Connell</b> 18:2,3                  18:6 19:18 20:3                  20:21 21:13                  22:5,18 23:8                  25:11,21 26:3                  26:23 27:10,12                  27:18,21 28:14  <b>O'CONNELL</b>                  1:17 2:6</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 3:1  <b>page</b> 2:2 5:16                  23:18 24:3,4,4                  32:25 41:13                  46:8 47:2 48:2                  55:2,23  <b>pages</b> 56:6  <b>painfully</b> 56:24  <b>panhandle</b> 49:19  <b>paragraph</b> 23:20  <b>part</b> 6:16,18 7:16                  13:7 26:12                  29:15 31:12,14                  31:19  <b>partially</b> 12:4  <b>particular</b> 15:24</p>
--	---	---	---	---

<p>16:7 25:13 26:11 28:15 <b>particularly</b> 9:8 25:3 <b>parties</b> 40:1 <b>Paso</b> 36:2 <b>pattern</b> 48:1 <b>pay</b> 4:25 55:22 <b>people</b> 15:2 25:18 43:21 50:14 <b>percent</b> 5:7,23 6:4,7,20 7:16 8:12,13 9:4 10:1 15:3,9,12 15:13,20 16:6 17:20,22 20:19 21:18 22:9 23:4 23:10,25 24:10 24:16,17 27:2 28:8 30:1 32:17 36:14,14,17,18 36:20,25 37:12 38:3,6 39:12,21 40:2,16,19,20 40:21 41:6,12 41:18,25 42:22 46:1,3,5,17,20 49:2 52:7,8,25 53:25 54:1,9,10 58:13,21 59:13 59:18,21 <b>perfectly</b> 41:20 <b>period</b> 56:23 <b>permanently</b> 44:8 <b>permissible</b> 24:20 <b>permit</b> 12:8,10 14:21 15:17,23 16:9,11,21 25:7 43:15,18 44:12 44:22 45:7,14 51:12,13 <b>permits</b> 15:18</p>	<p>43:11 <b>permitting</b> 19:21 22:12 51:11,21 58:25 <b>person</b> 14:22,22 <b>Petitioner</b> 1:4,16 1:19 2:4,8,14 3:8 18:5 24:21 56:17 <b>Petitioner's</b> 26:4 <b>phrase</b> 14:6 <b>picked</b> 44:17 <b>pickle</b> 42:21 <b>piece</b> 29:11 <b>pink</b> 32:22,24 33:15 <b>pipe</b> 7:11 <b>pipeline</b> 6:22 7:15 <b>pipelines</b> 7:21 53:21 <b>place</b> 12:22 16:7 44:16 57:4,4 59:10 <b>places</b> 7:20 9:15 28:9 29:18 <b>plain</b> 3:23 10:19 58:17 60:2 <b>planning</b> 32:7 33:14 55:16 56:2,4 <b>play</b> 19:20 20:5 30:19 <b>please</b> 3:10 18:7 29:4 <b>plenty</b> 53:23 <b>point</b> 8:14 10:20 11:19 12:12 13:24,25 20:1 22:14 23:9,11 27:19 29:24 34:6 36:6 39:10 39:10 40:23 42:25 44:5,9,17 52:19 53:7,14</p>	<p><b>pointed</b> 24:21 26:4 48:20 57:20 <b>points</b> 7:8 10:9 17:15 35:11 44:1,16 48:19 56:19 <b>policies</b> 16:10 <b>policy</b> 17:9 <b>political</b> 45:2 59:23 <b>pool</b> 9:1,7 58:18 <b>poor</b> 43:13 48:22 48:23 <b>portion</b> 21:20 28:5 39:16 56:10 58:12 <b>pose</b> 20:9 21:22 <b>poses</b> 21:15 <b>posit</b> 39:9 <b>position</b> 3:16 34:13 35:22 <b>possible</b> 11:11 23:5 <b>post</b> 55:14 <b>power</b> 44:23 <b>practical</b> 58:24 <b>practicalities</b> 57:19 <b>practicality</b> 59:6 <b>precisely</b> 12:9 15:17 <b>preempted</b> 21:16 21:21 22:12 <b>preemption</b> 18:14 28:19 <b>prejudice</b> 33:22 <b>preserve</b> 21:4 <b>preserving</b> 20:12 <b>press</b> 39:4 <b>presumably</b> 12:17 <b>presumption</b> 18:14,16 28:18 <b>pretty</b> 24:11</p>	<p><b>prevail</b> 20:11 <b>prevent</b> 13:23 14:2 <b>prevented</b> 44:12 <b>principle</b> 38:25 46:7 48:14 <b>principles</b> 34:10 <b>prior</b> 43:10 44:8 56:4 <b>priorities</b> 15:1 16:2 17:11 <b>priority</b> 15:5,23 16:1 17:3,17 26:5,17 27:3 33:25 43:18,23 43:25 44:8 <b>private</b> 14:17 <b>probably</b> 42:19 <b>problem</b> 34:8 40:13,13 43:20 44:15 48:20,24 51:25 52:23 <b>problems</b> 28:21 <b>procedures</b> 25:12 <b>proceed</b> 54:7 <b>proceeding</b> 28:16 <b>proceedings</b> 22:16 25:4 <b>proceeds</b> 43:4 44:21 <b>process</b> 19:22 22:12,25 <b>prohibit</b> 13:21 22:11 <b>proof</b> 39:11 40:25 41:5 <b>property</b> 12:20 12:25 13:12 14:17 30:23 <b>proposition</b> 19:14 <b>prove</b> 42:21,23 <b>provide</b> 8:5</p>	<p><b>provided</b> 5:22 6:19 9:3 40:17 40:18 <b>provides</b> 12:19 25:5 <b>provision</b> 4:21 5:2 9:20 23:1,2 47:5,16 49:2,7 54:6 55:6,7 60:6 <b>provisions</b> 18:23 19:1 20:12 21:11 24:25 35:3 46:13 50:16 57:9,11 <b>pro-Texas</b> 49:2 <b>public</b> 43:5 <b>purchase</b> 12:20 <b>purpose</b> 20:9 <b>pushed</b> 11:1 <b>put</b> 7:15 12:22 25:14 26:7 <b>p.m</b> 60:11</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>quantity</b> 3:12 40:4 <b>question</b> 11:17 12:24 28:11 31:9 41:21 43:23 58:22 <b>questions</b> 29:6 59:22 60:8 <b>quite</b> 5:4,8 11:13 19:5,14 25:20 29:17 32:7 35:20 42:20</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 3:1 <b>race</b> 44:12 <b>rain</b> 38:8 <b>raised</b> 58:22 59:22 <b>ran</b> 38:4</p>
--	--	--	---	---

<p><b>Rangers</b> 14:8,12  <b>ratification</b> 55:14  <b>rationale</b> 18:16  <b>reach</b> 4:10 10:15              10:15 18:10              32:14,17,19              33:11,13 42:5              47:23 49:12,17              52:7 54:13,14  <b>reached</b> 18:11  <b>reaches</b> 4:4,4  <b>read</b> 3:19 5:10              5:13 19:13,25              22:22 23:2,4,10              33:21 35:14              38:20 39:1              42:22 54:25              55:1,2 57:7              59:15 60:2  <b>reading</b> 10:20              19:6 23:6 59:12              59:14  <b>readings</b> 23:5  <b>reads</b> 53:16              59:14  <b>real</b> 40:13  <b>really</b> 4:19 7:2              17:4 36:19              38:21 52:19  <b>reams</b> 56:25,25  <b>reason</b> 22:19              37:13 57:10,25  <b>reasons</b> 18:11  <b>REBUTTAL</b>              2:12 56:16  <b>receiving</b> 26:24              27:2  <b>recollection</b> 5:14  <b>red</b> 3:11,17,25              4:2,16,16 5:21              7:12 13:3,16              24:1,5,13 27:9              29:7,11,14              32:13,19,21,24              47:3</p>	<p><b>redundant</b> 46:23  <b>refer</b> 9:16 23:19  <b>reference</b> 4:14              46:21 47:6  <b>references</b> 46:9  <b>referred</b> 57:3  <b>referring</b> 31:21              58:5  <b>refresh</b> 5:13  <b>regardless</b> 20:8              25:16  <b>Region</b> 26:12  <b>Regional</b> 1:3 3:5  <b>regulate</b> 18:24  <b>regulation</b> 19:2  <b>regulations</b> 24:2              24:6  <b>release</b> 27:14              46:17,24  <b>released</b> 27:9  <b>relevant</b> 9:6 52:5  <b>reliance</b> 38:25  <b>relied</b> 18:22  <b>rely</b> 4:23  <b>relying</b> 5:3 20:17  <b>remaining</b> 56:15  <b>remand</b> 21:1              22:7 48:17  <b>remarkable</b>              53:19  <b>remedy</b> 39:7,8              39:16  <b>remember</b> 48:22  <b>repeating</b> 8:14  <b>repeats</b> 48:1,9  <b>reply</b> 34:20              35:15,17 56:7  <b>report</b> 37:3  <b>reporting</b> 51:17  <b>representatives</b>              36:11  <b>representing</b>              41:7  <b>reprinted</b> 5:15  <b>request</b> 15:21</p>	<p><b>require</b> 59:11  <b>required</b> 5:9              58:11  <b>requirement</b>              53:22  <b>requires</b> 18:20  <b>reservoirs</b> 27:8              28:2  <b>resident</b> 15:14  <b>residents</b> 15:18              32:2  <b>resources</b> 12:8              12:13 15:16              16:9,11,24              25:12 27:5              28:22 59:3  <b>respect</b> 8:19              18:19 24:19              45:18,25 50:12              57:9 60:1  <b>respective</b> 9:18              46:22 47:4  <b>Respondents</b>              1:21 2:11 19:8              29:2  <b>Respondent's</b>              27:19  <b>response</b> 13:7              27:21 58:22  <b>responsive</b> 12:4  <b>rest</b> 9:14 48:25  <b>restriction</b> 24:22  <b>review</b> 45:20  <b>rhyme</b> 57:10  <b>right</b> 4:20 6:21              7:4,23 9:24              14:5,9,16 15:20              17:7,9,21,23              19:10,23 20:3              23:13,14,14,15              23:19,24 31:18              34:12,14 35:4              40:8,15 41:25              43:3 51:10 52:9              53:12 55:3,16</p>	<p>55:19,25 56:7,9              59:9  <b>rights</b> 5:5,18,19              6:2,15 8:23 9:3              10:14 11:2,3,4              11:5 12:18 21:6              33:20,21 40:2,3              40:6,9,10 44:12              53:12 54:9,11              54:18 58:20              59:14,17  <b>Rio</b> 36:1  <b>riparian</b> 42:16              51:1,6  <b>river</b> 3:11,17,25              4:2,16,16,16              5:21 6:23 7:12              7:20 12:23,24              13:3,16,16 24:1              24:5,13 27:9,15              27:17 29:7,11              29:14 32:13,19              32:24 38:1              44:17  <b>ROBERTS</b> 3:3              14:24 15:19,25              18:1 20:16              21:10,23 28:24              29:19,25 30:3,9              32:4 34:1 41:1              41:4,7 43:19              53:3 56:13 60:9  <b>room</b> 36:10,16  <b>Rothfeld</b> 1:15              2:3,13 3:6,7,9              4:18 5:2 6:9,13              6:18 7:8,23 8:1              8:17,23 9:10,12              10:3,9 11:15,25              12:3,17 13:2,10              13:14,22,25              14:9,19 15:8,21              16:4,21 17:8,14              56:14,16,18              57:13</p>	<p><b>route</b> 22:3  <b>RUDOLF</b> 1:6  <b>rule</b> 41:15  <b>rules</b> 24:2,6,13              41:12,13 42:15              54:21 55:1  <b>run</b> 7:11 30:12  <b>running</b> 27:25              30:7  <b>runoff</b> 6:16 24:10              38:8 40:6  <b>runs</b> 10:22 31:2  <b>Russello</b> 38:25              46:7 48:14</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 1:20 2:1,10 3:1              29:1  <b>sad</b> 54:22  <b>saline</b> 31:15,25  <b>salt</b> 37:24  <b>salty</b> 32:2,11  <b>samples</b> 35:2  <b>sandwiched</b>              43:14  <b>satisfies</b> 16:23  <b>satisfy</b> 23:23  <b>saying</b> 7:22 9:6              14:15 21:13              25:18 29:21              35:13 36:2,25              40:19 42:22              44:18 46:3              48:21 49:5              54:22  <b>says</b> 4:7 5:17 6:4              6:13,15,19 8:11              8:15 9:2 10:13              14:20 15:11              16:5 19:11 21:5              23:20 24:25              34:2,3 40:5,18              46:22 47:3              49:13 54:10,11              55:23 59:17</p>
--	---	--	---	---

<p><b>SCALIA</b> 5:12                  32:9,12,16,25                  33:3,5,10,13                  46:25 51:5,9,14                  51:20  <b>season</b> 43:16  <b>second</b> 5:21 6:18                  11:17 18:22                  23:9,21,23 24:7                  24:8 44:5,14  <b>section</b> 4:9,11                  6:13 20:2 21:4                  23:18 50:20  <b>Sections</b> 21:3  <b>see</b> 20:20 33:17                  45:21 56:24  <b>seek</b> 12:8 17:23  <b>seeking</b> 12:10                  15:15,24  <b>seen</b> 44:2  <b>seize</b> 14:13  <b>send</b> 14:7 42:23  <b>sense</b> 10:2,12                  33:23 54:4,15                  57:15 58:9                  59:10  <b>sentence</b> 55:3  <b>separate</b> 10:15  <b>Separately</b> 10:14  <b>seriously</b> 56:4  <b>set</b> 7:1,25 50:25  <b>share</b> 20:10                  26:19 37:14                  38:17 40:3                  41:12 54:8                  58:13  <b>shares</b> 9:25 10:6                  42:13  <b>Shawnee</b> 29:9,10                  31:1,12  <b>show</b> 33:15  <b>shows</b> 35:21  <b>side</b> 31:8 33:16                  53:4  <b>signatory</b> 5:18</p>	<p>6:1 24:9  <b>signed</b> 43:11  <b>significance</b> 3:22                  48:16  <b>significant</b> 48:19                  56:2  <b>silence</b> 35:14                  51:4 52:3 53:15  <b>silent</b> 35:22                  47:22 48:3  <b>simple</b> 58:24  <b>simply</b> 12:20                  17:17 57:7                  58:25  <b>site</b> 27:24 58:19  <b>sites</b> 4:15 9:1  <b>sitting</b> 25:23                  36:19  <b>situation</b> 14:25                  21:24  <b>sketchy</b> 4:24 5:3  <b>slip</b> 31:11  <b>solicitor</b> 1:17                  54:16  <b>solve</b> 34:8  <b>somewhat</b> 48:4  <b>sorry</b> 7:13 9:10                  17:7 23:20                  36:21 47:3,16  <b>sort</b> 29:5 35:14                  40:21 48:13,23                  54:22  <b>Sotomayor</b> 9:9                  9:11,21 10:5                  11:16 29:20,24                  39:6,9,18,21                  39:23 40:5 57:8  <b>Sotomayor's</b>                  41:21  <b>sought</b> 43:18  <b>sounds</b> 14:7  <b>source</b> 32:8                  33:16  <b>south</b> 7:12 8:13                  13:15 32:24</p>	<p>38:18 57:24  <b>sovereign</b> 44:23  <b>sovereigns</b> 18:19                  59:25  <b>sovereignty</b> 34:5                  34:10 52:22                  53:7 59:23 60:2  <b>span</b> 24:24  <b>special</b> 16:1 27:3  <b>specified</b> 3:12                  8:24  <b>spell</b> 44:15  <b>spelled</b> 53:13  <b>spend</b> 40:11  <b>spent</b> 60:3  <b>spoke</b> 54:17  <b>stage</b> 22:15  <b>standards</b> 12:13                  16:23 59:2  <b>standing</b> 39:4  <b>starts</b> 20:1  <b>state</b> 4:6,14,20                  5:7,22 6:4,6,19                  6:22,23,24 7:5                  8:25 9:6,16,18                  11:22 15:11,14                  20:8,9,10,12                  21:4,5,7,11,14                  21:18,19 23:13                  23:24 24:17,18                  24:19,22,25                  28:20 29:21                  30:19 33:23,23                  34:3,5,7,10,19                  35:23 37:17                  40:20 43:20                  46:24 48:10,24                  50:21 51:18                  53:7,20,21 57:4                  57:11 58:19,19                  59:9,18  <b>statement</b> 34:15                  35:6 39:25                  45:21 53:13  <b>statements</b> 35:9</p>	<p><b>States</b> 1:1,12,19                  2:7 4:7,13 5:4                  5:11,18,25 6:1                  6:15 7:6 9:3,7                  9:17,18 10:14                  11:18 18:4,12                  18:17,19,24                  20:18 23:21                  24:9,22 27:22                  33:25 34:13                  36:11 38:13,19                  38:23 40:25                  41:15,17 42:7                  42:20 44:11                  46:14,17,22                  47:4,7,7 48:18                  49:5 51:1,6                  54:3,7 55:15                  58:1,3,8,10                  59:5  <b>State's</b> 4:20                  15:13 19:1,3                  20:13 23:24  <b>statute</b> 14:20  <b>stem</b> 12:24 13:5                  13:18 29:15,18                  29:22 30:24                  31:10 39:12  <b>strange</b> 47:10  <b>stream</b> 32:13  <b>streams</b> 38:7                  53:24  <b>striking</b> 14:6  <b>strip</b> 29:9  <b>structure</b> 15:7  <b>subbasin</b> 4:10,12                  4:14 5:7,17                  6:14,15 8:24                  9:2 10:13,18,21                  10:22 11:6,21                  15:9 16:6 17:22                  17:24 18:10                  23:15 26:11                  27:23 29:12                  30:7,8,10,11</p>	<p>30:13,14,25                  31:17 32:22                  38:8 40:7 47:24                  49:8,10,13,14                  52:7 56:9 57:19                  57:21 58:2,4,6                  58:7,7 59:9,15  <b>subbasins</b> 4:5                  24:23  <b>subconsciously</b>                  49:6  <b>subdivides</b> 4:4  <b>subject</b> 21:7                  45:20 54:11  <b>submits</b> 16:22                  26:5  <b>submitted</b> 22:23                  26:10 60:10,12  <b>submitting</b> 59:1  <b>subset</b> 12:23  <b>sudden</b> 46:6  <b>suggest</b> 36:22  <b>suggested</b> 23:4                  59:12,24  <b>suggests</b> 14:11                  22:24  <b>superfluous</b> 3:18  <b>support</b> 3:15  <b>supporting</b> 1:19                  2:8 18:5  <b>suppose</b> 17:14  <b>supposed</b> 7:3  <b>Supreme</b> 1:1,12  <b>sure</b> 19:6 26:18                  29:20 37:25  <b>surplus</b> 58:2,8  <b>surprisingly</b>                  43:16 44:18,24  <b>system</b> 47:12                  50:4,17 51:11                  51:17,21 52:13  <b>systems</b> 56:5</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1</p>
--	--	---	---	---

<p><b>table</b> 55:24  <b>take</b> 4:20 5:11          6:23 7:21 8:11          10:1,21 11:18          12:12 14:17          15:15,24 16:6          22:3 24:15 25:1          27:16 29:21          30:24 31:6,7,10          32:12 35:24          38:16 40:20          43:20 48:8          51:12 53:24,25          55:5 56:3 57:15          58:1,3 59:18  <b>taken</b> 50:12  <b>takes</b> 9:4  <b>talismanic</b> 3:22  <b>talk</b> 46:7 51:3,23  <b>talking</b> 10:5 20:1          30:9 35:16 43:1          49:15 57:21  <b>Tarrant</b> 1:3 3:4          12:6,17,18,20          14:1 16:7 21:25          29:8 42:13,19          42:22 43:3,13          44:3,18,24 45:3          45:17 47:11          54:7 55:17,24  <b>Tarrant's</b> 35:19          38:12,14 39:2          47:22 53:18  <b>tell</b> 17:5 21:2          40:10 48:6          51:18 55:10          60:5  <b>Tenth</b> 39:3,3  <b>terms</b> 10:2 17:2          17:17 18:18,21          19:9 52:2 56:21          57:7 58:17  <b>terrain</b> 8:8  <b>territory</b> 4:12  <b>Texans</b> 32:4</p>	<p><b>Texarkana</b>          33:17  <b>Texas's</b> 49:7          52:24  <b>Texoma</b> 29:15          29:17 31:4  <b>text</b> 3:21,24 5:16          24:12  <b>Thank</b> 3:9 18:1          28:24 29:3          56:12,13,18          60:9  <b>theory</b> 26:25  <b>they'd</b> 42:7  <b>thing</b> 28:1 37:21          47:8 50:22          55:11 56:1          57:18 60:1  <b>things</b> 8:1,18          10:3 59:16,19  <b>think</b> 8:10,18,20          9:12,21 10:11          11:8,17 13:2,23          14:5,11 15:10          17:12 19:19,20          20:21,24 22:5,6          22:7,20 23:12          24:3,11 25:2          26:3,13,25          28:11,15,17          31:20 32:1,10          34:16 35:22          37:5,13 39:6          42:9 44:6 47:7          48:6,19 51:22          52:6 53:18 54:3          54:12 55:12,12          55:13 56:1,22          57:2,6,13,18          58:10,23 59:13  <b>thinks</b> 47:11  <b>third</b> 44:20  <b>thought</b> 6:24          7:24 37:14 42:9          50:15 53:3 54:3</p>	<p>55:21  <b>thousands</b> 56:5  <b>three</b> 4:12 43:7          48:19 49:5  <b>three-quarters</b>          31:2  <b>three-series</b> 38:5  <b>time</b> 17:17 47:6          49:3,25  <b>times</b> 5:20  <b>today</b> 54:17  <b>told</b> 4:18 35:18          35:18  <b>total</b> 24:10 42:12          55:8  <b>track</b> 30:15,21          51:1,7,12  <b>tracking</b> 51:24  <b>treat</b> 26:20 27:5  <b>Tribes</b> 55:23  <b>tributaries</b> 4:15          27:24 30:7,12          30:13 32:24  <b>tributary</b> 28:5  <b>tried</b> 35:12,14  <b>Trinity</b> 43:12,14          45:4  <b>troublesome</b>          25:3  <b>true</b> 7:3 26:23          37:2  <b>trust</b> 43:5 50:7  <b>try</b> 7:6 20:18          42:23  <b>trying</b> 3:14 42:21          49:4 54:23  <b>Tuesday</b> 1:9  <b>Tulsa</b> 14:12  <b>turn</b> 11:16 47:14          48:17  <b>two</b> 8:18 10:3,9          17:15 23:5          28:17 29:5,18          34:20 35:15          40:22 44:1</p>	<p>54:20 58:13          59:16,19  <b>type</b> 43:2</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimately</b> 42:10  <b>unable</b> 8:13  <b>unconsciously</b>          49:6  <b>unconstitutional</b>          46:4  <b>understand</b> 7:22          25:19 26:15          32:10 34:17          38:24 39:10          47:18 51:5  <b>understanding</b>          12:22  <b>understood</b>          41:22  <b>undesignated</b>          24:10  <b>unequivocal</b>          34:14  <b>unheard</b> 47:12  <b>unintentionally</b>          49:6  <b>unique</b> 4:11  <b>uniquely</b> 49:2  <b>United</b> 1:1,12,18          2:7 18:4,12          38:13,19,22          40:24 41:17          42:6,20 47:7,7          48:18 54:3,7  <b>unnecessary</b>          46:23  <b>unprecedented</b>          34:18 35:13  <b>unrestricted</b>          18:24 46:2  <b>Upper</b> 43:12 45:4  <b>upstream</b> 48:23  <b>use</b> 3:12 4:7 5:6          5:18,20 6:2,16</p>	<p>8:23 9:3,17,18          9:20 14:2 15:8          17:11,12,19          23:14 25:13,14          26:7 33:21,24          40:6,9,10 45:8          45:15,22 46:2          54:11,12 57:11          58:4,21 59:7,20  <b>user</b> 15:5,14,22          15:23 25:6          28:19 58:11  <b>users</b> 18:9 21:20          25:24,25 29:16          45:19 59:7  <b>uses</b> 4:10 5:7          21:6,7 23:22,24          53:24  <b>usually</b> 44:15</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:5 3:5 10:15          32:14,17,19  <b>valuable</b> 33:16  <b>vegetation</b> 13:15          13:17  <b>view</b> 3:23 18:12          22:19 30:23          38:13,13,14,19          39:2 40:14          41:16,17 42:7          42:20 45:24          46:12 47:7,22          48:4,4,9,12          52:4 53:9,10,18          53:19 54:2,19  <b>viewed</b> 9:14  <b>virtually</b> 8:5  <b>voluntary</b> 51:17  <b>vote</b> 45:3,4</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> 9:23 57:16  <b>waiting</b> 48:8  <b>walk</b> 36:2 47:15</p>
---	---	--	---	---

<b>want</b> 5:13 9:23 12:12 25:1 28:12 31:5 36:13 41:21,23 41:24 42:3,23 47:15 50:22 55:11 58:4 59:7 60:1 <b>wanted</b> 24:22 48:18 53:11 <b>wants</b> 42:13 57:14 <b>Washington</b> 1:8 1:15,18,20 <b>waters</b> 4:2 <b>watershed</b> 37:13 <b>way</b> 7:19 12:9,18 14:10 19:24 23:6 26:13 30:17,18 33:17 36:24 38:11 40:1 48:12 49:5 49:10 <b>ways</b> 43:7 <b>weighs</b> 23:12 <b>west</b> 31:4 58:12 <b>we'll</b> 7:19 <b>we're</b> 8:10 21:13 28:6 41:11 57:21 <b>we've</b> 39:5 <b>whatsoever</b> 30:16 <b>whichever</b> 12:1 <b>whistles</b> 35:10 <b>wholly</b> 47:17 <b>wide</b> 57:22,22,23 <b>win</b> 19:15 <b>words</b> 42:18 50:10 60:6,6 <b>work</b> 26:13 40:17 41:9 50:5 <b>world</b> 54:2 <b>wouldn't</b> 21:21 21:22 22:12	26:16 33:24 37:20 42:4 44:10 <b>wow</b> 35:20 <b>write</b> 60:2 <b>writing</b> 60:4 <b>written</b> 56:22 <b>wrong</b> 9:22 18:12 24:4 29:8 <b>wrote</b> 60:3 <b>Wyoming</b> 35:18 35:18,23 <hr/> <b>X</b> <hr/> <b>x</b> 1:2,7 <hr/> <b>Y</b> <hr/> <b>yeah</b> 24:4 33:3,5 33:5,5 35:4 39:17,22 42:2 <b>years</b> 30:15,19 49:3 51:4 52:2 55:14 56:23 60:4 <hr/> <b>\$</b> <hr/> <b>\$1.7</b> 55:18 <hr/> <b>1</b> <hr/> <b>1</b> 46:3,5 49:8,13 49:14,17 58:6 <b>1's</b> 49:10 <b>1.7</b> 55:22 <b>10</b> 57:23 <b>11</b> 38:3 <b>11-889</b> 1:4 3:4 <b>11:10</b> 1:13 3:2 <b>12</b> 36:17,18,18 <b>12,000</b> 24:7 <b>12:08</b> 60:11 <b>14A</b> 46:8 47:2 <b>15A</b> 46:8,9 47:2 <b>16</b> 38:3 <b>18</b> 2:8 55:20 <b>19</b> 24:3 41:13 55:2	<b>1970</b> 36:7 37:2 37:21 <hr/> <b>2</b> <hr/> <b>2</b> 4:10 30:7 46:15 47:4,13 <b>2,000</b> 50:1 <b>2.01</b> 21:3,5 <b>2.10(a)</b> 21:3 <b>20</b> 49:3 51:4 52:2 57:23 <b>200</b> 58:14 <b>2002</b> 55:18 <b>2013</b> 1:9 <b>211</b> 50:20,21 <b>23</b> 1:9 <b>24</b> 43:15 <b>25</b> 5:7,23 6:4,7 6:20 7:16 8:12 8:13 9:4 10:1 15:3,9,12,13 15:20 16:6 17:19,20,22 20:19 21:18 22:9 23:4,10,25 24:10,16,17 27:2 28:8 30:1 32:17 36:14,14 36:20,25 39:12 39:21 40:2,16 40:19,20,21 41:6,12,18,25 42:22 49:2 53:25 54:1,9,10 56:23 58:13,21 59:13,18,21 60:4 <b>29</b> 2:11 38:6 <hr/> <b>3</b> <hr/> <b>3</b> 2:4 32:6 41:15 41:16 55:7 <b>3,000</b> 5:21 23:23 24:8 36:12 41:18 46:6 55:4	55:5 <b>30</b> 23:18 30:15 30:19 55:14 <b>33A</b> 33:2 <b>34</b> 37:12 <b>38</b> 36:20 <b>39A</b> 20:1 <hr/> <b>4</b> <hr/> <b>4</b> 30:8 32:6 41:16 42:13 43:11 46:13 55:23 <b>40</b> 46:17,20 47:19,21 52:8 52:25 <b>401</b> 49:15,16 <b>401(b)</b> 47:16 <b>402</b> 47:15 <b>41</b> 48:2 <hr/> <b>5</b> <hr/> <b>5</b> 4:10 11:21 18:10 30:10,11 30:13,14,24,25 31:17 32:22 38:8 40:7 56:9 57:19,21 58:4,7 58:7 59:9,15 <b>5,000</b> 50:1 <b>5.05</b> 20:2 <b>5.05(b)</b> 23:18 <b>5.05(c)</b> 46:15 <b>50,000</b> 28:9 <b>500</b> 50:2 <b>56</b> 2:14 <hr/> <b>6</b> <hr/> <b>60</b> 46:20 47:18 47:21 52:7 <b>60/40</b> 57:10 <hr/> <b>7</b> <hr/> <b>70s</b> 36:8 <hr/> <b>8</b> <hr/> <b>8</b> 5:16	<hr/> <b>9</b> <hr/> <b>9A</b> 47:14 <b>99</b> 46:1
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