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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF KANSAS, :  
Plaintiff :

v. : No. 126, Orig.

STATE OF NEBRASKA AND :  
STATE OF COLORADO. :

- - - - - x

Washington, D.C.

Tuesday, October 14, 2014

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:04 a.m.

APPEARANCES:

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Kansas, Topeka, Kan; on behalf of Plaintiff.

ANN O'CONNELL, ESQ., Assistant to the Solicitor  
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DAVID D. COOKSON, ESQ., Chief Deputy Attorney General,  
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case No. 126 on the original  
5 docket, Kansas v. Nebraska and Colorado.

6 Mr. McAllister.

7 ORAL ARGUMENT OF STEPHEN R. McALLISTER

8 ON BEHALF OF THE PLAINTIFF

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

11 Kansas seeks to ensure that Nebraska has  
12 effective incentives to comply with its compact  
13 obligations every year, including the years when water  
14 is scarce. To achieve that goal, Kansas asked this  
15 Court to take two measures: First, award a significant  
16 amount of disgorgement for Nebraska's massive gain from  
17 its compact violation; and second, decline to rewrite  
18 the detailed and complicated settlement agreement that  
19 the parties reached in 2002, an agreement that is full  
20 of compromises and concessions on all sides.

21 Ultimately, Kansas wants to receive the  
22 water to which it is entitled year in and year out,  
23 including especially when water is scarce. The best way  
24 to achieve that is to impose significant disgorgement  
25 for Nebraska's massive gain and leave any changes to the

1 accounting procedures to the parties and to the process  
2 that has been created under the compact, the RRCA. I'd  
3 like to start with -- with the accounting procedures  
4 argument.

5 Nebraska and the master suggest that  
6 the Court should rewrite the way we calculate Nebraska's  
7 consumption of imported water supply, but Kansas  
8 disagrees that that's appropriate here for several  
9 reasons.

10 First of all, that agreement itself was a  
11 complex set of concessions and compromises. The model  
12 is, at best, an estimation of what's going on in the  
13 basin. No one actually knows, perhaps can know, how  
14 much imported water comes over from the Platte or how  
15 much actually gets consumed. The parties were aware of  
16 the very phenomenon that the master and Nebraska focus  
17 on.

18 CHIEF JUSTICE ROBERTS: What if -- you know  
19 roughly what the amount of extra -- I don't know what  
20 the word -- liability on Nebraska is. What if it were  
21 way off? What if the formula resulted in Kansas getting  
22 50 percent more water than the parties anticipated?  
23 Still no authority to revise the formula?

24 MR. McALLISTER: Well, Your Honor, I think  
25 if the argument is there's a mistake, then we have to

1 find an actual mistake. That's what justifies the  
2 extraordinary remedy of reformation.

3 JUSTICE GINSBURG: And I thought it was --  
4 it was agreed that the compact itself doesn't govern  
5 imported water, which this procedure covers. So if it's  
6 not within the compact itself, then how can it stand?

7 MR. McALLISTER: Well, Your Honor, it's --  
8 it's not as black or white as the master said. By  
9 implication, the compact does not cover imported water.  
10 It never actually uses the words "imported water." It  
11 talks about the virgin water supply. And it's certainly  
12 the parties' goal to try to exclude the imported water  
13 from the calculation, but we did that very deliberately  
14 with the imported water supply credit, which is very  
15 substantial and which Nebraska gets.

16 JUSTICE GINSBURG: But I thought that --  
17 that the parties were not aware of the error that proved  
18 beneficial to Kansas. So you say that there were many  
19 compromises, tradeoffs, but in this particular result,  
20 the parties were not aware that the accounting  
21 procedures would include this imported water.

22 MR. McALLISTER: Well, I disagree with that  
23 statement, Your Honor. They were aware that it could.  
24 There may not have been awareness of the magnitude  
25 potentially of the situation and whether, in fact, it

1 would arise. But the parties -- there's evidence -- for  
2 example, Colorado's expert was asked when did you first  
3 realize this could happen under the model and he said:  
4 About 15 minutes after I looked at it. The Kansas  
5 expert also recognized it was possible.

6 All of this is an estimation. And -- and  
7 what happens, in our view, is Nebraska is saying, well,  
8 now we think we've come up with a better way to more  
9 accurately measure this based on new information, new  
10 modeling techniques that may be available. But there's  
11 a mechanism for making those changes and it's through  
12 the RRCA process. It wasn't a mistake. They just think  
13 they've got a better way to do it now.

14 JUSTICE SCALIA: What is -- what is that  
15 mechanism? What -- what does that process entail?

16 MR. McALLISTER: That process entails the  
17 chief water officers of each State and they meet  
18 regularly and they can and have considered changes to  
19 both the accounting procedures and the model. Both have  
20 been changed over time by agreement of the RRCA.

21 It's -- it's kind of like what was at issue  
22 in the Texas v. New Mexico except there it was just two  
23 States and they each had to agree; now it's three  
24 States. And each has a vote. And if all three States  
25 agree on a change, then a change is made.

1 JUSTICE BREYER: Will you accept that then,  
2 that we send it to that group and the group tries to  
3 work it out and if they fail to work it out, the master  
4 imposes a solution?

5 MR. McALLISTER: Well, that's where we  
6 disagree that there --

7 JUSTICE BREYER: I know. I don't  
8 understand, because I thought as it turns out when this  
9 river is dry, as it sometimes is, and there's no water  
10 in there, that Nebraska -- that they -- they don't --  
11 they use only imported water, which they should have  
12 every right to take all of it if they wanted to. But  
13 nonetheless, due to a mistake in the model, it counts it  
14 as if they were taking all the Republican River water.  
15 And nobody wanted that. That would be totally unfair.  
16 And that's what the master says and so they made a  
17 mistake about how the model worked. So what do you  
18 suggest we do about the mistake? Nothing?

19 MR. McALLISTER: I suggest you do nothing  
20 about the mistake and send it back --

21 JUSTICE BREYER: In which case, if we do  
22 nothing, it's like as if I were to enter into an  
23 agreement and I bought 17 cows from the barn and it  
24 turned out the barn didn't have any cows. It just had  
25 horses. Okay. So we're under a mutual mistake. Now,

1 what do we do?

2 MR. McALLISTER: Well, except I disagree  
3 with the premise that it's a mutual mistake, Your Honor.

4 JUSTICE BREYER: But there's a finding that  
5 the --

6 MR. McALLISTER: The master certainly  
7 characterizes it that way, but --

8 JUSTICE BREYER: Yes. All right. Now, if I  
9 accept the master's characterization, what is it I'm  
10 supposed to do in your opinion? I -- I don't think if  
11 you have the cow or horse or something, and everybody  
12 agrees it's a mistake, or if they don't the judge finds  
13 it's a mistake, then what is a court supposed to do?

14 MR. McALLISTER: Well, again, two things.  
15 Reformation requires clear and convincing proof of an  
16 actual mistake. Kansas doesn't believe that's present.  
17 But then the purpose of reformation is to -- to put  
18 together what the parties actually intended. And  
19 there's no real agreement that what the parties intended  
20 was the particular 5-run solution that the master  
21 suggests.

22 JUSTICE BREYER: All right. Now -- now,  
23 fine. So is it all right with you if we were to write  
24 these words: You agree, Kansas agrees, the object is to  
25 get what the parties really intended; therefore, send it



1 to this group and if the group agrees, fine. And if  
2 they don't agree, special master, you impose what the  
3 parties really intended. And, of course, if they don't  
4 accept that, they can always appeal here, but  
5 nonetheless, that would be a way of resolving it.

6 MR. McALLISTER: That would be a way of  
7 resolving it.

8 JUSTICE BREYER: And what's wrong with that?  
9 Or do you have a better way?

10 MR. McALLISTER: Well, one problem with the  
11 master's solution, the 5-run solution, is all he is  
12 concerned about is the imported water supply. That's  
13 only one piece of this.

14 JUSTICE SCALIA: I think your objection is  
15 that what the parties really intended was to adopt this  
16 particular formula, which they knew might be inaccurate.  
17 And that's -- what's the parallel is -- is not buying  
18 horses in a barn, but buying whatever animals are in the  
19 barn. Although both parties believed it was a mix, it  
20 turns out that was wrong. But the deal was the deal,  
21 right? They were --

22 MR. McALLISTER: That is --

23 JUSTICE SCALIA: They were rolling the dice.

24 MR. McALLISTER: That is fundamentally --

25 JUSTICE SCALIA: Whatever animals were in

1 the barn.

2 MR. McALLISTER: -- fundamentally the Kansas  
3 position, because I would like to emphasize the  
4 tradeoffs that went into this. We did give Nebraska a  
5 substantial imported water supply credit. There are in  
6 fact questions about whether some of that water is  
7 actually Republican River water being counted as  
8 imported water. That's --

9 JUSTICE ALITO: You want us to apply  
10 ordinary contract principles on this issue of  
11 reformation; is that right?

12 MR. McALLISTER: Well, yes. I mean, the  
13 high level of -- it's an extraordinary remedy and  
14 difficult to achieve and it's only to be used to put in  
15 place what the parties actually intended when somehow  
16 they mistakenly --

17 JUSTICE ALITO: And do you want us to do the  
18 same thing on the issue of disgorgement?

19 MR. McALLISTER: Well, disgorgement in our  
20 view is different, Your Honor, because --

21 JUSTICE ALITO: You want us to apply  
22 ordinary contract principles?

23 MR. McALLISTER: You can for disgorgement,  
24 which the master recognized here. So the fact that the  
25 compact also has status as a -- as a statute is one.

1 The fact that what's really being affected is downstream  
2 water rights, real property. That's another theory. We  
3 argue there's an analogy to fiduciary duty, we're not  
4 saying there is a fiduciary duty. But my point is  
5 disgorgement can be justified by more than contract  
6 principles here. That is one basis for justifying it.

7 But what I wanted to say to Justice Scalia's  
8 point, we gave Nebraska several things in that agreement  
9 and we knew this model wasn't perfect. Everybody -- it  
10 can't be, it never will be. It's too complicated;  
11 there's too many unknowns. We gave Nebraska a high  
12 credit for groundwater recharge at a percentage much  
13 higher than Colorado and Kansas get and Nebraska crowed  
14 about that as a concession they got from Kansas that was  
15 worth 15 to \$20 million annually, that's Exhibit K, 133,  
16 in the record. We also gave up all claims for any  
17 potential compact violations prior to the agreement.

18 CHIEF JUSTICE ROBERTS: I thought the  
19 special master specifically found that this was not part  
20 of the bargaining tradeoff.

21 MR. McALLISTER: The special master was  
22 focused on the bottom line notion that somehow we were  
23 supposed to reach a bottom line accounting. And -- and  
24 with all due respect to the special master, he's simply  
25 wrong that the parties did not purposely negotiate for

1 calculating all of these factors, the imported water  
2 supply credit, the consumption of each State, the way we  
3 did. Kansas specifically wanted the mound turned on  
4 as they calculated --

5 JUSTICE SCALIA: How -- how do we decide --  
6 is -- is this a question on which we have to defer to  
7 the master's factfinding? Is it a question of fact what  
8 the parties intended? Or are we to look at the  
9 agreement and decide it from the agreement?

10 MR. McALLISTER: Well, I think you can  
11 certainly decide it from the agreement, Justice Scalia.  
12 I think the Court's cases have said things like you give  
13 respect to the master's findings, but it is actually a  
14 de novo proceeding, so there's no -- no deference that  
15 has to be given to the master's findings. And here, the  
16 agreement itself would --

17 JUSTICE SCALIA: Well, I'm going to give  
18 more deference, I suppose, if -- if I think it is  
19 entirely relevant what the prior negotiations were, and  
20 that it was appropriate for him to look into that. And  
21 to reach the conclusion he did.

22 MR. McALLISTER: Well, I think you could  
23 reach the --

24 JUSTICE SCALIA: If on the other hand, I  
25 think it's -- it's the text of the agreement that

1 governs, I don't care what he found about the  
2 negotiations.

3 MR. McALLISTER: And I think you could  
4 certainly ignore the negotiations. What I'm saying is  
5 you can look in that agreement and find many tradeoffs,  
6 some of which benefited Nebraska significantly. Some of  
7 which may benefit Kansas and Colorado.

8 JUSTICE KENNEDY: As you understand it, does  
9 the -- do both parties agree that we treat this as an  
10 application of reformation principles in an ordinary  
11 contract or is there some argument that because this  
12 negotiation was pursuant to provisions where a special  
13 master had been involved, that there is some more  
14 latitude for reforming the contract, so that the earlier  
15 special master's participation somehow gives this  
16 contract an equitable character and makes it easier to  
17 reform. Does anybody argue the latter?

18 MR. McALLISTER: Certainly, Kansas doesn't.  
19 I -- I can't speak for Nebraska.

20 JUSTICE KENNEDY: No, no. Well, I want  
21 you to know -- as I understand Nebraska's position, they  
22 argue that ordinary contract principles apply. I may be  
23 wrong.

24 MR. McALLISTER: That's -- I agree. That's  
25 my reading. So I don't think anyone is suggesting a

1 lesser standard. And in fact, taking it back to Special  
2 Master McKusick, when he approved this, at the urging of  
3 people, including my colleague, Mr. Cookson, who said,  
4 Special Master, this is close enough, you know, it's not  
5 perfect, but everything comes out in the wash, it's more  
6 or less a good deal for everyone. And Special Master  
7 McKusick said, no party represents this is perfect, and  
8 that there might not be other ways to do this. But this  
9 is a reasonable way to resolve the dispute in --

10 JUSTICE KAGAN: General, can I try to better  
11 understand what you think would have been different in  
12 the contract. Suppose that Nebraska had come in with  
13 the 5-run proposal at -- when you were negotiating this,  
14 and said this is really a much better way of doing what  
15 we all agree we ought to do, which is separate out the  
16 virgin water from the imported water.

17 What would have been different in the  
18 contract? What would you have done -- what provisions  
19 would you not have had if? If that 5-run proposal had  
20 been there and you had accepted it.

21 MR. McALLISTER: Well, I -- I can mention  
22 three or four things that might be different.  
23 Obviously, it's hypothetical, but one thing that the  
24 5-run solution does is it does take care of the imported  
25 water issue, but it actually increases the problem with

1 the unaccounted-for depletions from groundwater pumping,  
2 which is what the whole prior round of litigation was  
3 about, was that those count under the compact, too. And  
4 so the master's solution may solve, if you will, one  
5 problem, the problem that Nebraska sees, it exacerbates  
6 another problem. So we'd certainly want to talk about  
7 that. That was what the 16-run solution did a better  
8 job of, but Colorado objected to that because their ox  
9 was being gored. That's why they came around when they  
10 made a deal with Nebraska to the 5-run.

11 But the other things that could be  
12 negotiated here, certainly, their groundwater recharge  
13 amount is very generous to them. Again, they said 15 to  
14 20 million annually. That's worth -- we could revisit  
15 that. We could revisit an issue of they get credit for  
16 water that's coming back on irrigated lands to the  
17 groundwater, but some of that is probably precipitation  
18 that's infiltrating. That's not fully accounted for.

19 Even the imported water supply credit is  
20 probably unduly generous, because it likely includes  
21 some Republican Basin water in it. So what -- what I'm  
22 suggesting, I think there are a number of things we  
23 could negotiate about, but it's not fair to pick out  
24 this one thing that the master got focused on and saw as  
25 a black or white issue, when it's really not, and say

1 I'm going to fix this one thing, and too bad, Kansas and  
2 even perhaps Colorado, everything else we're not going  
3 to touch. It all should go to the RRCA process or it  
4 all should be in play here. But our preference is that  
5 it goes to the RRCA process. That's where the States  
6 could negotiate this out.

7 JUSTICE SOTOMAYOR: Mr. McAllister, I  
8 thought that the special master, if I read his report  
9 right, had invited you to come in and tell him a better  
10 solution to the problem. And you guys didn't put forth  
11 one.

12 MR. McALLISTER: Well, my understanding is  
13 Kansas had worked on one, sometimes referred to as the  
14 integrated solution, I think, and it was to approximate  
15 closer what we call the virgin water supply metric, but  
16 had not had time, did not get it developed. These  
17 things are not just spur of the moment, you can come up  
18 with an answer quickly.

19 JUSTICE SOTOMAYOR: So let's assume, as we  
20 have, that we're going to credit -- I know you don't  
21 want us to -- but let's assume that we're going to  
22 credit the special master's finding that this was a  
23 mutual mistake. Generally, as I understand it under  
24 ordinary contract principles, the remedy is not contract  
25 formation. It's rescission. And I don't think you want



1 that.

2 MR. McALLISTER: Well, I don't know that any  
3 of us would want that at the end of the day.

4 JUSTICE SOTOMAYOR: All right. So if you  
5 don't want rescission, what you're left with is contract  
6 formation. And you're absolutely right, the parties  
7 never discussed this 5-run solution during their  
8 negotiations.

9 So it's not as you're -- as if you're  
10 reforming the calculus. You're reforming -- you're  
11 trying to fix the mistake. So what's left? Equitable  
12 and just solution. And if you didn't put forth an  
13 alternative, why shouldn't we accept the special  
14 master's judgment on the 5-mile run?

15 MR. McALLISTER: Well, one reason we didn't  
16 put forth the alternative is this notion of mutual  
17 mistake actually came up extremely late in the process.  
18 It wasn't until the very end. In fact, Nebraska all  
19 along didn't call it that. They -- they talked about  
20 changing the accounting procedures. And it was the  
21 master who finally labeled it as a mutual mistake. And  
22 so --

23 JUSTICE SCALIA: It seems to me, it's rather  
24 like asking a man who believes he's been wrongfully  
25 convicted whether he would like to die by the firing

1 squad or the electric chair. I mean, you -- you didn't  
2 want any remedy to be imposed.

3 MR. McALLISTER: Exactly.

4 JUSTICE SCALIA: And for the master to ask  
5 you, oh, you tell me what remedy I should impose, you  
6 don't think he should have impose any.

7 MR. McALLISTER: He shouldn't. He should  
8 leave it to the process.

9 MR. SCALIA: I don't blame you for not  
10 telling him.

11 CHIEF JUSTICE ROBERTS: You say -- you say  
12 this problem should go to the RCRA process. Each State  
13 has a representative. Your -- your representative has  
14 an absolute veto in the RCRA process.

15 MR. McALLISTER: And so does each of their  
16 States.

17 CHIEF JUSTICE ROBERTS: So -- so you're  
18 feeling pretty good about your chances if you send it  
19 back to the RCRA.

20 MR. McALLISTER: No, Your Honor. I would --  
21 I would tell you a quick story and then make a point  
22 about that. Quick story that 20-some years ago, Kansas  
23 introduced a resolution in the RRCA that said, how about  
24 we all resolve that we will comply with the compact.  
25 Kansas voted yes, Colorado voted yes, and Nebraska voted

1 no.

2           So this goes back a long ways.           But -- but I  
3 think if -- if the notion is -- that's why I think it's  
4 unfair to pick out the 5-run solution. The things I  
5 just mentioned to Justice Kagan, if we talked about  
6 infiltration by precipitation, if we talked about the  
7 groundwater recharge amounts, if we put other things on  
8 the table, then I think we have things to talk about,  
9 including the 5-run solution.

10           But Nebraska just wants to pull out this one  
11 thing and have it mandated in their favor. No  
12 negotiation. I mean, the fact that negotiation can work  
13 is demonstrated by Colorado here initially being --  
14 sided with Kansas, both opposing the 16-run solution.  
15 And then Nebraska came along and said, well, let's try a  
16 different way, and Colorado said, well, actually, that  
17 way works to our -- our advantage, we like that, we'll  
18 go along with that. That shows that the negotiation and  
19 the horse trading can work in this setting if given a  
20 chance. But I do think we have to have more than one  
21 thing to negotiate over. The other point I'd make --

22           JUSTICE GINSBURG:           Did you -- did you --  
23 suggest that there were other issues like this that  
24 favored Nebraska, so that if the accounting procedure  
25 was going to be opened up on this point, that there were

1 other things the special master should have considered?

2 MR. McALLISTER: I believe the litigation in  
3 front of the special master, Justice Ginsburg, was  
4 mostly just saying, you shouldn't change anything, you  
5 should leave this to the process. I'm not sure in front  
6 of the master we got deeply into other things that might  
7 be changed with regard to the model.

8 JUSTICE GINSBURG: What would happen -- I  
9 think Justice Breyer asked you -- if it goes to the  
10 commission and they are unable to agree? What's the  
11 next step?

12 MR. McALLISTER: Well, there is the option  
13 of nonbinding arbitration, which we all love and almost  
14 always works out our disputes. And then from there,  
15 we'd go, presumably, to try -- you know, if any of the  
16 States feel strongly enough about it, would probably  
17 come back with a request for a special master.

18 But again, I don't think we'll get there  
19 because the parties can and have negotiated  
20 successfully. When we can't do it is when you pick out  
21 one discreet thing and put the court or the master's  
22 thumb on the side of the State. Well, then there's  
23 nothing left to negotiate about.

24 But the veto is nothing new in the compact  
25 territory. I mean, this was true in Texas v. New

1 Mexico. Either State could disagree and nothing could  
2 happen, and the Court said in that setting so be it;  
3 that's the system the States created under their  
4 compact. Here it's a three-way.

5 JUSTICE SOTOMAYOR: It's been a while since  
6 I read the briefs in total, but I thought you had gone  
7 through all those other alternatives before filing the  
8 petition here for a special master.

9 MR. McALLISTER: On our issues.

10 JUSTICE SOTOMAYOR: Yes.

11 MR. McALLISTER: On the 5-run, no. I mean,  
12 that's something Nebraska brought in as a  
13 counterclaim --

14 JUSTICE SOTOMAYOR: I see. Okay.

15 MR. McALLISTER: -- before the special  
16 master. So on -- on the issues Kansas pressed,  
17 absolutely. If I could --

18 JUSTICE SOTOMAYOR: The disgorgement issue,  
19 you -- you had failed on that.

20 MR. McALLISTER: Well, in arbitration, I  
21 think we were trying to establish whether there was a  
22 compact violation and -- and the amounts and so forth.  
23 And there was some discussion of the accounting  
24 procedures. But then we brought the case to this Court  
25 because we believed there was a compact violation that

1 required a remedy.

2 And all the parties -- let me speak to  
3 remedy for just a moment before I sit down. All the  
4 parties agreed the remedy should be money here. It's  
5 not a perfect remedy. It doesn't really substitute for  
6 the water that people didn't receive in the years that  
7 they needed it and were supposed to receive it. But  
8 it's the remedy we've agreed on. I will say the  
9 reaction of --

10 JUSTICE SCALIA: Well, You got money. You  
11 got money, didn't you? You got damages.

12 MR. McALLISTER: We got damages less than --

13 JUSTICE SCALIA: But you want more than  
14 damages. You -- you want to say I not only want to  
15 receive what it cost me, what your violation cost me,  
16 but I want in addition to receive any benefits that you  
17 got from the violation.

18 MR. McALLISTER: In order to stabilize the  
19 compact, we think that's --

20 JUSTICE SCALIA: That's not a normal  
21 contract remedy.

22 MR. McALLISTER: It's not -- it's not  
23 necessarily a common one, but it's a recognized one in a  
24 situation where the master suggests Nebraska gained at  
25 least, perhaps, 25 million from the breach. If it only

1 has to pay Kansas 3.7, then next time conditions are  
2 dry, there's little incentive, especially when it takes  
3 us 8 years basically to get from the point of breach to  
4 even the possibility of recovery.

5 JUSTICE ALITO: But this is not a case where  
6 Nebraska was found to have intentionally violated the  
7 agreement in order -- on the ground that it would be  
8 efficient to do that; isn't that right?

9 MR. McALLISTER: Well, they didn't -- the  
10 master found that they knowingly exposed Kansas to a  
11 risk of violation of the compact. They didn't purposely  
12 set out to violate the compact, but they did -- I think  
13 you have to say it's more than negligent. They had  
14 notice every year around by June 1 of what their  
15 consumption was the previous year, and for 4 years in a  
16 row they didn't just exceed a little bit, they blew past  
17 their allocations. These were massive violations on  
18 Nebraska's part, knowing they were in trouble and just  
19 really not taking any kind of adequate steps.

20 And that's what the master reacted to and so  
21 does Kansas and urges the Court.

22 I'd like to reserve the remainder of my time  
23 for rebuttal if I could, but nothing less than a  
24 substantial disgorgement award seems to really get their  
25 attention. And here it has gotten their attention and

1 it has also gotten Colorado's attention, as you see in  
2 the briefs.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Ms. O'Connell.

5 ORAL ARGUMENT OF ANN O'CONNELL ON BEHALF

6 OF THE UNITED STATES, AS AMICUS CURIAE

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

9 There are two primary points that the United  
10 States would like to make. First, it is important that  
11 disgorgement be an available remedy for breach of an  
12 interstate water compact. Unlike a regular contract  
13 between private parties, interstate water compacts are  
14 laws of the United States that apportion a scarce  
15 resource among sovereigns. It is important that water  
16 flows down the river, not just money, and the  
17 availability of a disgorgement remedy will help to  
18 stabilize compacts and ensure that States are working  
19 vigorously to meet their compact obligations.

20 JUSTICE SCALIA: Well, you could say the  
21 same about contracts. I mean, no -- nobody is saying  
22 that disgorgement is not a remedy for contracts, right?

23 MS. O'CONNELL: That's right.

24 JUSTICE SCALIA: The problem is what should  
25 be the conditions under which disgorgement is imposed.



1 Does it require an intentional violation or not?

2 That's -- that's all the debate is about here.

3 MS. O'CONNELL: Right. And it typically  
4 does for -- for disgorgement of profits or some amount  
5 of profits. And although Section 39 of the Restatement  
6 of Restitution and Unjust Enrichment -- that's the  
7 provision on opportunistic breach -- says that it  
8 requires a deliberate breach, and the master did find  
9 here that this was not deliberate, we -- we're drawn to  
10 that provision because the Court has said repeatedly a  
11 compact is like a contract.

12 But there are lots of principles that are  
13 equally applicable here, including Section 40 of the  
14 Restatement, which talks about interference with  
15 property rights. And if you interfere with another  
16 party's property rights and gain a profit from that,  
17 then the remedy for a conscious wrongdoer -- and I think  
18 the master's finding or conclusion about Nebraska's  
19 intent here is that of a conscious wrongdoer, that they  
20 knowingly exposed Kansas to a risk of a breach.

21 JUSTICE SCALIA: What does the Restatement  
22 base that on? Did they just make that up? Are there  
23 are a lot of cases that say that?

24 MS. O'CONNELL: About what --

25 JUSTICE SCALIA: Just because the

1 Restatement says it, we -- we've got to believe it? How  
2 many cases are there that impose disgorgement where  
3 there is no intentional violation, but property rights  
4 are involved. Do you have a lot of cases?

5 MS. O'CONNELL: Well, there's no deliberate  
6 violation, but I think if you're finding that somebody  
7 is a conscious wrongdoer and that they -- they  
8 recklessly violated the compact, which I think is about  
9 what the conscious wrongdoer standard is akin to, then  
10 yes. I mean --

11 JUSTICE SCALIA: That's not enough for  
12 normal contract disgorgement, is it?

13 MS. O'CONNELL: No, I think it is.

14 JUSTICE SCALIA: You need intentional  
15 violation, don't you?

16 MS. O'CONNELL: If there's -- if you're only  
17 looking at the contract provision of the Restatement,  
18 then it typically requires a deliberate, opportunistic  
19 breach of the contract.

20 JUSTICE SCALIA: Exactly. And -- and you  
21 say there's an exception where it's property rights  
22 involved. And I'm asking you what cases do you have for  
23 that? You see, I don't -- I don't -- I don't think the  
24 Restatement can change our law by just saying something  
25 by consensus of law professors.

1 MS. O'CONNELL: Well --

2 JUSTICE SCALIA: Are there cases that --  
3 that have established that rule?

4 MS. O'CONNELL: In Texas v. New Mexico,  
5 the Court, when it was talking about why awarding money  
6 damages is not -- shouldn't be a concern that States  
7 will just continue to violate compacts as long as they  
8 can send money down the river, the Court said, we don't  
9 really need to worry about that because there's always  
10 the possibility of ordering specific performance plus  
11 whatever additional penalty might be warranted for a  
12 deliberate breach.

13 And even -- I mean, the Court wasn't saying  
14 in that case it has to be deliberate or setting forth a  
15 legal standard, but I think this Court has -- has  
16 indicated that disgorgement may be appropriate when you  
17 have an intentional breach or something.

18 JUSTICE ALITO: If disgorgement is  
19 appropriate, and I have a question about that, where did  
20 this \$1.8 million figure come from? Out of thin air.  
21 Is this an approximation of attorneys' fees or expert  
22 costs? Where did it come from?

23 MS. O'CONNELL: I think it's -- it's the one  
24 part of the special master's opinion that is -- is  
25 pretty much unexplained. And we're not here to defend

1 1.8. I think we said this in footnote 1 of our brief.  
2 It's not our intention to say that we think 1.8 is the  
3 exact right amount. What we are saying is that the  
4 master, because he weighed all of the different things  
5 that you would want to look at when you're determining  
6 whether you want to look at disgorgement -- whether  
7 Nebraska profited, whether Nebraska had intent or was a  
8 conscious wrongdoer, whether there was any need for  
9 deterrence -- the master looked at all of the things  
10 that you should be looking at.

11 JUSTICE KAGAN: Well, how would you set the  
12 amount in a circumstance like this? What would you  
13 think an explanation would look like?

14 MS. O'CONNELL: Well, we haven't taken a  
15 position of what exactly the amount should be. What --  
16 what we have tried to say in the brief is if the Court  
17 wanted to go with what the special master said and award  
18 \$5.5 million, which is a disgorgement of part of  
19 Nebraska's gain, then it could be satisfied that that's  
20 not an arbitrary amount. I mean, to some extent, any  
21 amount you choose if you're balancing equities would be  
22 arbitrary. But I think what the Court would want to do  
23 is to point out that Nebraska profited and one of the  
24 purposes of disgorgement is to relieve a wrongdoer of  
25 unjust enrichment; that Nebraska -- there is a finding

1 that they knowingly exposed Kansas to this risk. It's a  
2 finding of a conscious wrongdoer. I mean, the master --

3 JUSTICE KAGAN: But this 1.8 seems to be  
4 much less than the amount of unjust enrichment that the  
5 master was suggesting Nebraska had -- had gained. So if  
6 he's not going to do the full measure of unjust  
7 enrichment, what's he supposed to do? Or is he supposed  
8 to do just that? If -- if the master thinks that  
9 disgorgement is necessary, you look to the unjust  
10 enrichment, that's the number you choose, there's no  
11 other discretion. Or is there some other discretion,  
12 and if so, what would you look to and how would you base  
13 the award?

14 MS. O'CONNELL: I think there -- there is  
15 discretion and there is certainly support for that in  
16 the Restatement where if you are, you know, if you are a  
17 conscious wrongdoer, you can typically get your profits  
18 taken away. If you're an innocent party, you might just  
19 have the property taken away from you, but you can keep  
20 the profits. If you're somewhere in the middle, if  
21 you're negligent or it's just an ordinary breach of  
22 contract, Restatement section 52 says that you can  
23 choose or adjust the level of disgorgement based on the  
24 -- the wrongful conduct of the party.

25 JUSTICE SCALIA: Ms. O'Connell, we've --

1 we've had a lot of compact -- water compact cases before  
2 this Court. I mean, a lot. Can you give us one case in  
3 which we have imposed disgorgement even -- even for an  
4 intentional violation?

5 MS. O'CONNELL: No. And I think the --

6 JUSTICE SCALIA: And the second question is:  
7 How many for an unintentional violation?

8 MS. O'CONNELL: The Court --

9 JUSTICE SCALIA: Minus something, right?

10 MS. O'CONNELL: The Court has indicated  
11 in -- in Texas v. New Mexico that disgorgement could be  
12 a possible remedy. It certainly left that door open.

13 JUSTICE SCALIA: For an intentional  
14 violation.

15 MS. O'CONNELL: Yes.

16 JUSTICE SCALIA: But we've never done it,  
17 have we?

18 MS. O'CONNELL: No. And this is a -- a  
19 novel --

20 JUSTICE SCALIA: So it's dictum, right?

21 MS. O'CONNELL: Well, in that case, sure.

22 But, I mean, the Court certainly has left that open.

23 And, Justice Kagan, to get back to the question, I think  
24 that if you really thought that somebody was a conscious  
25 wrongdoer and you thought all of their profits should be

1 disgorged, then you could do that.

2 I think the master was also weighing some  
3 other things here. Unjust enrichment is not the only  
4 purpose of disgorgement, but also a need to deter is  
5 something else that you look at. And what the master  
6 concluded here was that Nebraska had all the tools in  
7 its toolkit now to comply with the compact going forward  
8 and that perhaps the 1.8 million was just the push it  
9 needed to make sure that it was conscientiously using  
10 those tools that it had.

11 CHIEF JUSTICE ROBERTS: Well, we're dealing  
12 here with an agreement between States. And it seems to  
13 me particularly important that they have some idea about  
14 what they're agreeing to based on our -- our precedent.  
15 And particularly since the special master, according to  
16 your position, has such broad discretion. It can be  
17 zero, it can be 40 -- 20 million, whatever the maximum  
18 is here. I'm not sure that the States bargain for that  
19 exposure.

20 MS. O'CONNELL: Well, when the States agreed  
21 to an equitable apportionment of the compact, I mean,  
22 the -- this Court does have all of the tools of equity  
23 available to it to ensure that there's a fair solution  
24 imposed. And it's not just the special master's  
25 decision. I mean, this Court could certainly award a

1 different amount of damages. It is de novo review.  
2 It's up to you to determine what you think is fair.

3 I think what -- what we've put forth is that  
4 if you wanted to go with and -- and give some preference  
5 to what the special master did, that 5.5 million is not  
6 an arbitrary amount based on the weighing that he did.

7 JUSTICE KAGAN: Can I understand your  
8 position, Ms. O'Connell, on whether this is just a  
9 contract or whether it's something else entirely? I  
10 mean, should we be looking solely to contract rules or  
11 is your position that because public rights and public  
12 interests are affected here, we have a different kind of  
13 obligation?

14 MS. O'CONNELL: I think it's not  
15 specifically just contract rules when the Court is  
16 exercising its original jurisdiction. The Court has  
17 said many times, in Ohio v. Kentucky, that its -- its  
18 jurisdiction in original cases is equitable. It's an  
19 equitable division of the water that underlies the  
20 compact and so the Court is just deciding what it thinks  
21 is fair as the remedy --

22 JUSTICE SCALIA: Well, wait. A lot of  
23 contracts -- my goodness. Equity courts adjudicate  
24 contract rights sometimes.

25 MS. O'CONNELL: Right.



1 JUSTICE SCALIA: So, I mean, the -- the  
2 issue is whether normal contract principles apply,  
3 whether they are the principles dealing with law or the  
4 principles dealing with equity. And disgorgement is an  
5 example.

6 MS. O'CONNELL: Right.

7 JUSTICE SCALIA: And normal contract  
8 principles say an equity court will not give  
9 disgorgement unless there's an intentional violation.  
10 So I don't think your appeal to equity carries the day  
11 at all.

12 MS. O'CONNELL: Justice Scalia, though, I do  
13 want to point out the -- the deliberate breach that  
14 you're talking about is one particular, like breach of  
15 contract type of -- of a violation of a -- of a party's  
16 rights.

17 As I mentioned before, there's a lot of  
18 different analogies to what's happened here and one of  
19 them is interference with somebody's property. And if  
20 there is a -- it doesn't just have to be deliberate, but  
21 just, you know, a knowing risk or recklessness can also  
22 qualify there.

23 And if I -- if I could talk, since we took  
24 time from both parties about the being the accounting  
25 procedures for -- for just a -- well --

1 CHIEF JUSTICE ROBERTS: Maybe for one  
2 sentence.

3 MS. O'CONNELL: We just -- I want to point  
4 out, and the parties can correct me if I'm wrong, but  
5 this issue has already been to the Republican River  
6 Compact Administration and Kansas wouldn't agree to it,  
7 and there was an arbitration about Nebraska's crediting  
8 dispute. We described that in pages 8 and 9 of our  
9 brief, and we support the master's recommendation to  
10 reform the compact.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
12 Mr. Cookson.

13 ORAL ARGUMENT BY DAVID D. COOKSON

14 ON BEHALF OF DEFENDANTS

15 MR. COOKSON: Mr. Chief Justice, may it  
16 please the Court:

17 This Court should affirm the special  
18 master's report except for his award of exemplary  
19 damages that is not justified in this case. If I could,  
20 I would turn to the Court's questions regarding what is  
21 the deal and why should this Court reform the Technical  
22 Appendix C, which is the accounting procedures.

23 The deal between the parties is found in the  
24 Final Settlement Stipulation that this Court approved in  
25 2003. Section IV F expressly provides that this compact

1 accounting will not count imported Platte River water  
2 supply as part of the Republican River Basin, in part  
3 because that's --

4 JUSTICE SCALIA: And the -- it went on to  
5 say how -- how you will determine whether there is such  
6 water supply.

7 MR. COOKSON: That is --

8 JUSTICE SCALIA: It went on to determine  
9 that.

10 MR. COOKSON: That is correct, Your Honor.

11 JUSTICE SCALIA: Through a formula.

12 MR. COOKSON: That is correct, Your Honor.

13 JUSTICE SCALIA: And they agreed to that  
14 formula, right?

15 MR. COOKSON: Right. But the deal we bought  
16 was not the formula. The deal we bought was we're not  
17 going to count imported water that is inconsistent with  
18 the terms of the compact.

19 JUSTICE SCALIA: Let's assume two parties --  
20 I come into an antique store and I see this -- this item  
21 of furniture that I like, and I talk it over with the --  
22 with the owner, and I say, you know, let -- let's come  
23 to a fair price on this. He says, yes, that's what I  
24 want to do, too. Let's have a fair price. And we write  
25 it down. It's going to be a fair price. And the fair

1 price is \$200. Okay?

2 It turns out this thing is worth more than  
3 \$200. Okay? But both the antique dealer and I know  
4 that this is a game of rolling the dice, that -- that  
5 the risks you take when you buy and you sell antiques is  
6 that it's worth more.

7 And that's the same risk here. The parties  
8 knew that this formula would not be entirely accurate  
9 and they agreed to a fair price, that is, none of this  
10 water should be counted. But they said the way to  
11 figure out whether this water is coming in or not is  
12 this formula.

13 Why shouldn't they be held to that formula?  
14 That -- that was the deal.

15 MR. COOKSON: Because in Section I F of the  
16 Final Settlement Stipulations, the parties made it clear  
17 that the RRCA could modify the accounting procedures at  
18 any time through its process, which, as the SG's office  
19 correctly noted, we did. We went through the RRCA.  
20 Kansas objected. We went through nonbinding  
21 arbitration. The master agreed the mistake occurred,  
22 sent it back to the RRCA to develop a solution. This  
23 was all presented to Kansas in 2007.

24 But under -- to your point, Your Honor, the  
25 deal we made was not to count imported water. Kansas'

1 own expert testified that the purposes of the accounting  
2 procedure and the groundwater model are to effectuate  
3 the terms of the Final Settlement Stipulation. The  
4 master agreed. And it's undisputed between all of the  
5 parties that the accounting procedures are acting in  
6 direct conflict to both Section IV F of the Final  
7 Settlement Stipulation, and to Article III of the  
8 Compact, which allocates water originating --

9 JUSTICE KENNEDY: Do you agree that ordinary  
10 principles of contract law should guide our decision on  
11 the reformation issue, or is this something that's not  
12 an ordinary contract? If this were a stipulation in  
13 ongoing litigation, I could understand that we want to  
14 give the court substantial power to alter the  
15 stipulation. But this stipulation was reached as part  
16 of a final judgment that was made and that case is  
17 closed. So isn't it just like a contract or is it  
18 subject to revision more easily than a contract because  
19 it was a stipulation? It's a stipulation that's closed;  
20 it's just like a contract, isn't it?

21 MR. COOKSON: In this instance, Your Honor,  
22 the Technical Appendix is more like the ongoing matter  
23 because the parties specifically bargained in  
24 Section I F of the Final Settlement Stipulation that we  
25 would be able to modify the accounting procedures --

1           JUSTICE SCALIA:           Well, that -- well, that's  
2 just like saying the parties can amend this contract,  
3 right? I mean, those procedures take the consent of  
4 each one of the parties. So that amounts to saying  
5 nothing except what is obvious and would be the law even  
6 if it were not said, that the parties, by mutual  
7 agreement, can amend the contract. Does it mean  
8 anything different from that?

9           MR. COOKSON:           It does, Your Honor, because  
10 there's -- in the Final Settlement Stipulation, the  
11 parties agree we're not going to change it. That --  
12 there is a non-severability clause. That is the bargain  
13 that occurred between the parties.

14          JUSTICE BREYER:          How does it work? I mean,  
15 this can't be the first time this came up. The  
16 contract, to me, is more like the antique dealer and the  
17 customer promised to buy all of the Ming vases, and  
18 they'll determine if it's a Ming vase according to a  
19 technical method in the appendix, and the appendix  
20 happens to throw in not only the Ming vases but all the  
21 Tang vases and nobody thinks they should get the Tang  
22 vases. Okay.

23           So that's the deal.           So we go to the judge.  
24 And one way is reformation, but they say no, no, it's a  
25 contracts deal, it's all closed, you can't -- another

1 way is rescission. Okay. Rescission, apparently nobody  
2 wants that. Because there was a mutual mistake, they  
3 rescind. Okay. You must have read -- there must be  
4 thousands of cases with algorithms. I mean, we live in  
5 a world where there are algorithms, there are computers,  
6 there is the Internet, there is this formula, that  
7 formula.

8 It can't be the first time that somebody in  
9 a contract has made a technical mistake about the  
10 algorithm to be used for determining the object. So  
11 what do the contract courts do?

12 MR. COOKSON: Well, specifically the special  
13 master referred to two cases that -- before this Court.  
14 In Texas v. New Mexico the parties determined that the  
15 1947 version of an algorithm, the inflow/outflow steady  
16 plan to the Pecos River Compact, was completely  
17 unreliable. And this Court approved special master  
18 Brightenstein's reformulation of the inflow/outflow and  
19 that was an appendix to the compact. Here we're only  
20 talking about an appendix to a settlement stipulation  
21 that this Court approved.

22 Likewise, in Wisconsin v. Michigan this  
23 Court entered a consent decree dealing with islands in  
24 the Lake Michigan between Wisconsin and Michigan, but  
25 neglected to address an issue regarding where is the

1 boundary in Green Bay.

2 JUSTICE KENNEDY: Is there any authority  
3 that a settlement agreement is more subject to  
4 reformation than a regular contract? Is there any  
5 authority for that proposition?

6 MR. COOKSON: Not that I'm aware of, Your  
7 Honor.

8 CHIEF JUSTICE ROBERTS: You agree, don't  
9 you, that you couldn't -- the special master couldn't  
10 have revised the formula if it had been part of the  
11 compact itself?

12 MR. COOKSON: That's correct.

13 CHIEF JUSTICE ROBERTS: Why is that?

14 MR. COOKSON: Because the compact is  
15 approved by Congress and it is not for the parties, and  
16 as this Court said in Alabama v. North Carolina, for  
17 this Court to add terms to the compact that's been  
18 approved by Congress without congressional  
19 authorization.

20 JUSTICE SCALIA: Was the appendix included  
21 in it when it was submitted to Congress?

22 MR. COOKSON: No, Your Honor, it was not.

23 JUSTICE SCALIA: That was just added  
24 afterwards?

25 MR. COOKSON: In 1943 when the compact was



1 complied, article 9 provides that at some point the  
2 States, the compact administration, which we now know as  
3 the RRCA, would meet and establish rules and regulations  
4 that were not inconsistent with the compact. That  
5 actually did not occur until 1961.

6 CHIEF JUSTICE ROBERTS: I do think, though,  
7 it is still, the FSS is an agreement between two  
8 sovereigns, and I think, putting aside what contract  
9 principles may provide as a general matter, that the  
10 idea of a special master or this Court changing the  
11 nature of that agreement is a pretty radical one.

12 MR. COOKSON: But we're not changing that  
13 agreement. The agreement in the final settlement  
14 stipulation is do not count imported Platte River  
15 water --

16 JUSTICE KAGAN: Mr. Cookson, suppose the  
17 following: The parties are there and they're around the  
18 table and everybody agrees: We should not count Platte  
19 River water, we should only count Republican River  
20 water. But everybody also agrees that that's easier  
21 said than done and the devil is in the details. And  
22 there are three different plans for -- three different  
23 formulas for how not to count Platte River water and  
24 instead only to count Republican River water.

25 And each of these the parties think -- you

1 know, the parties first, how accurate is that formula,  
2 but those formulas also do a range of other things that  
3 the parties may care about. And so there's a bargain  
4 and a negotiation about which of these three formulas to  
5 use in order to reach the result of not counting Platte  
6 River water and in order also to further the parties'  
7 other objectives, and one is chosen. Why isn't that one  
8 the one that continues to govern under the agreement?

9 MR. COOKSON: Because the parties recognized  
10 in negotiating the agreement, and this was recognized by  
11 both Special Master McKusick in the first generation and  
12 Special Master Kayatta that we were proceeding with the  
13 notion that, as the technical appendix, Appendix C, the  
14 accounting procedures, moved forward, we would make  
15 changes. We've made roughly 14 changes to the  
16 accounting procedure through the process of the RRCA and  
17 agreement of the compact administrators.

18 And what we have here is a Texas v. New  
19 Mexico situation, where Kansas has exercised its veto  
20 right, and in that case this Court said that the States  
21 may come to this Court, and in this case a special  
22 master, to seek vindication of its rights to correct  
23 what everyone agrees is a mistake that's not only in  
24 violation of the final settlement stipulation, but  
25 expanding the terms of the compact beyond what

1 Congress intended.

2 CHIEF JUSTICE ROBERTS: What about the  
3 general rule that the specific controls the general?  
4 You have the general statement here, okay, we're not  
5 going to count imported water, but then you have a very  
6 specific calculation about how you're going to achieve  
7 that result. So why doesn't that control?

8 MR. COOKSON: Because in this instance the  
9 specific statement in the deal is we're not going to  
10 count imported water supply. The accounting procedures,  
11 as all parties testified including Kansas, was simply  
12 the means, the tools, if you will, to effectuate the  
13 specific agreement of the parties.

14 JUSTICE SOTOMAYOR: Counsel, but it was  
15 clear that you shouldn't count it because that's what  
16 the provision says. But then it says any imported water  
17 supply credit shall be calculated in accordance with the  
18 RRCA accounting procedures and by using the RRCA  
19 groundwater model.

20 So they -- it's incorporated directly in  
21 that procedure that this is only a credit and that  
22 it's going to be -- any credit shall be calculated in  
23 accordance with the procedures set forth therein. What  
24 gives us the right to, the special master or anyone,  
25 under reformation principles to create a new procedure

1 because the 5-run mile protocol is a new procedure that  
2 they never agreed to.

3 There's no argument that this is a procedure  
4 you put forth. It wasn't part of the original  
5 negotiations. This is a reformation that's one-sided.  
6 It's what you want. Or two; maybe Colorado does.

7 So how do we get there? Under contract  
8 principles, under equitable principles, how do we get to  
9 do that?

10 MR. COOKSON: I think if you look at each of  
11 the accounting provisions or each of the provisions of  
12 the final settlement stipulation that deal with  
13 accounting you will find that same language that you  
14 just quoted. In other words, the parties understood  
15 that they were not baking into the final settlement  
16 stipulation how they were going to do the accounting.  
17 They were going to refer to the technical appendix,  
18 which it is, it's an appendix to the final settlement  
19 stipulation, that this is how we'll do it and this is  
20 how the model will do it, understanding that at the time  
21 the final settlement stipulation and the accounting  
22 procedures were agreed to, the parties -- the States had  
23 still not agreed to the groundwater model, which is the  
24 fundamental principle that will do it and, in fact, came  
25 back to this Court roughly 6 months later for approval

1 of the groundwater model. So again --

2 JUSTICE SOTOMAYOR: All right. You haven't  
3 answered my question.

4 MR. COOKSON: I believe --

5 JUSTICE SOTOMAYOR: -- which is what  
6 contract principle or equitable principle permits us to  
7 create a procedure that they haven't agreed to?

8 MR. COOKSON: Because it's the exact same  
9 situation that this Court exercised in Texas v. New  
10 Mexico with the appendix to that compact with the  
11 inflow/outflow model that the special master referred  
12 to.

13 JUSTICE KENNEDY: Do you read Texas v. New  
14 Mexico as reforming the compact?

15 MR. COOKSON: No. And I don't read what the  
16 special master has done here as reforming the compact.  
17 This is a technical appendix --

18 JUSTICE KENNEDY: Well, or reforming the  
19 accounting procedures, I should say. Do you read Texas  
20 v. New Mexico as reforming anything?

21 MR. COOKSON: It reforms the inflow and  
22 outflow steady plan to conform to the intent of the  
23 parties in the Pecos River Compact.

24 JUSTICE KENNEDY: Just by appointing a  
25 special master to monitor it over time, correct?

1           MR. COOKSON:           That was over a different  
2 issue other than the original reformation of the  
3 inflow/outflow study that was done at, I believe 446  
4 U.S.

5           JUSTICE BREYER:           This is a slightly  
6 extraneous question but I'm curious in light of the --  
7 part of this argument is about money. We can deal with  
8 that. But this part about the accounting, my instinct  
9 is that farmers and others who use the water have to  
10 know, and it hurts them when another 5 years goes by  
11 without anybody understanding what the procedure is.

12           Both sides say that, you know, you should be  
13 able to work this out. It looks as if what you're  
14 facing are nine people -- I'm not speaking for the other  
15 eight I'm just speaking for myself -- who couldn't know  
16 less about it, all right, and we're supposed to decide  
17 whether some system here is going to work or not. And  
18 that can be another 5 years. Is there any chance that  
19 you all could work this out?

20           MR. COOKSON:           I think, Your Honor, that what  
21 the special master has presented is not something that  
22 requires 5 years to work out.

23           JUSTICE BREYER:           That's true, but they've  
24 made an argument that if you look at the contract law,  
25 you will see that rescission is the normal remedy for

1 this kind of a mistake rather than reformation. And you  
2 apparently, at some level, agree with that because what  
3 you've pointed to are not normal contract cases. You  
4 pointed to two cases involving State compacts in this  
5 Court.

6 And suppose that I think that that is  
7 actually a difficult question.

8 MR. COOKSON: I would suggest, Your Honor,  
9 that it is appropriate beyond contract principles, as  
10 you did in Texas v. New Mexico, to conform the terms of  
11 the accounting procedures to the final settlement so  
12 that they are consistent with both the compact and the  
13 final settlement stipulation.

14 And to -- Mr. Chief Justice, to your  
15 question, this is significant. As the special master  
16 found, had he chosen to apply this retroactively, it  
17 would have reduced Nebraska's violation in 2006 by 20  
18 percent. And ongoing forward into the future is a  
19 significant amount. So it was both material, it was  
20 mutual, and it was significant.

21 JUSTICE ALITO: Now, this may be an unfair  
22 question, so if you are not prepared to answer it,  
23 that's fine. But just out of curiosity, which would you  
24 prefer, a decision that agrees with the special master  
25 on both reformation and disgorgement or a decision that

1 disagrees with the special master on both reformation  
2 and disgorgement?

3 MR. COOKSON: I would agree with your  
4 characterization, Your Honor, that from my perspective  
5 that is probably not fair because we believe --

6 (Laughter.)

7 MR. COOKSON: -- the law and the facts  
8 justify reformation, they do not justify disgorgement,  
9 and they should not -- and there is no inherent or  
10 implied linkage of the two.

11 And if I might turn to the disgorgement  
12 issue, obviously Nebraska excepted to the award of  
13 disgorgement because it did not act deliberately to  
14 violate the compact. Nor was --

15 JUSTICE KAGAN: Can I ask what that means  
16 exactly? You know, because the special master said,  
17 well, it wasn't a deliberate breach. But the special  
18 master also said essentially what the SG -- how the SG  
19 characterized it, that you were a conscious wrongdoer,  
20 that you failed to act, refused to act in the face of a  
21 known risk and that the quite foreseeable effect of your  
22 actions was going to be, unless there was some very  
23 lucky fortuitous thing that happened, the quite  
24 foreseeable effect of your actions was going to be that  
25 Kansas didn't have enough water.



1           MR. COOKSON:           Your Honor, I would point  
2 to -- I would respond to that in two ways. One, the  
3 master not only found there was not a deliberate intent  
4 to violate at page 111 of his report, but he also said  
5 Nebraska did not exercise a consciously opportunistic  
6 breach in the nature of an efficient breach at page 131  
7 of his report.

8           But factually we have excepted to his  
9 finding of knowing and the findings that Nebraska  
10 somehow did nothing. Nebraska seized control of its  
11 consumptive use in 2002 while it was still negotiating  
12 the compact, and through 2006 reduced its pumping by  
13 over 500 million -- or 500,000 acre-feet, a 35 percent  
14 reduction.

15           At the same time, however, Nebraska could  
16 not reasonably foresee that its allocations were going  
17 to fall even below the historical low period of record  
18 in this basin, which was the Dust Bowl.

19           JUSTICE GINSBURG:           Didn't the special master  
20 say that was the risk that Nebraska should have known,  
21 so -- and he said they did this and that, but it wasn't  
22 enough and it wasn't until 2007 that they came into  
23 compliance in a way that didn't put Kansas in jeopardy.  
24 But he said all along Nebraska knew that Kansas  
25 might well be the loser, because Nebraska didn't take

1 adequate steps. It was aware of the risk to Kansas,  
2 right?

3 MR. COOKSON: No, we would not agree with  
4 the master's characterization of what was reasonably  
5 foreseeable, Your Honor.

6 JUSTICE KAGAN: Well, but assume that the  
7 master's characterization as to that holds, that that's  
8 a matter of fact that we're not going to overturn; that  
9 he said that you knew that there was a risk and that the  
10 risk was a substantial one, that Kansas would end up on  
11 the short end of the stick in violation of the compact.  
12 I mean if that's the case, what does it even mean to say  
13 that you did not deliberately breach?

14 MR. COOKSON: If you look at the master's  
15 report on page 111, he outlines the significant steps  
16 that Nebraska took from the beginning, including a  
17 substantial rewrite of its State water laws to ensure  
18 that its regulatory actions going forward -- and we did  
19 that in 2004 after this Court approved the final  
20 settlement stipulation in 2003. We started reducing  
21 pumping in 2002 and in 2003 and 2004.

22 But, again, to get to the characterization  
23 of being reasonably foreseeable, understand that the  
24 compact allocations that you find in the compact before  
25 you were based on a 10-year period of the Dust Bowl, the

1 historic low period. It was reasonable for Nebraska to  
2 rely that it would not go below the period of the Dust  
3 Bowl. And yet in '05 and '06, our allocations  
4 significantly fell below the Dust Bowl, and had they  
5 simply stayed at the Dust Bowl level, Nebraska would  
6 have been in compliance in 2005 and 2006 with the added  
7 water given to Nebraska by the special master under the  
8 imported water supply and the Harlan County event.  
9 There was nothing in the historical record to suggest  
10 that we would go below the period of the Dust Bowl at  
11 the time we were taking action to comply with the  
12 compact.

13         And we acted reasonably in measuring our  
14 efforts, and we continued our efforts when it was clear  
15 that we fell short in 2006. We conceded that we  
16 violated the compact. We offered to pay Kansas its  
17 actual expectation loss, its actual damages. And we  
18 moved forward with additional tools so that the next  
19 time this occurred, Nebraska would be in a position  
20 where it could stay in compliance. And as the master  
21 found, with the tools in place now, had we had those in  
22 2002 to 2006, Nebraska would have been in compliance  
23 even in the driest condition now of record in the basin.  
24 And we've added additional tools, should it get dryer,  
25 to address it.

1           So for these reasons, disgorgement is not  
2 appropriate. There is no reason to incentivize  
3 Nebraska. There is no need to deter Nebraska.  
4 Moreover, there is no need for an injunctive relief, as  
5 the U.S. and Nebraska agree with the special master on  
6 this interest. We believe the Court should conform the  
7 accounting procedures to meet the compact. And it  
8 should not award disgorgement absent a deliberate act,  
9 which is not to be found in this case.

10           JUSTICE SCALIA:           Does disgorgement and  
11 injunction -- do the two go together?

12           MR. COOKSON:           No, Your Honor.

13           JUSTICE SCALIA:           If it's inappropriate to  
14 issue an injunction, is it always inappropriate to  
15 require disgorgement? Are they both looking to the  
16 future, so that if there is no realistic possibility of  
17 future violation, you cannot issue an injunction and you  
18 should not require disgorgement? Is that a correct  
19 statement?

20           MR. COOKSON:           In our view, yes, disgorgement  
21 should not be used as a future-looking tool. Injunctive  
22 relief is the appropriate remedy, and in this case the  
23 facts don't justify it.

24           JUSTICE SCALIA:           I'm not sure you've  
25 answered my question. You say it should not be used as

1 a future tool. So it can be used even though it's not  
2 being imposed in order to deter future action.

3 MR. COOKSON: Well, in the context that  
4 Kansas sought in this case, they were seeking to -- from  
5 the initial arbitration through the trial with the  
6 master, Kansas sought unjust enrichment as a means of  
7 disgorging gain to Nebraska, and they also sought  
8 specific injunctive relief, more specific than what they  
9 have accepted to the Court now. So they sought both in  
10 the context of this litigation.

11 CHIEF JUSTICE ROBERTS: But do I understand  
12 your answer to be that disgorgement serves at least an  
13 additional function beyond the injunction, sort of an  
14 unjust enrichment element? You've got to disgorge your  
15 profit in a typical contract case?

16 MR. COOKSON: Yes, it does serve that  
17 function in a case where, as this Court suggested, there  
18 is a deliberate act, yes.

19 JUSTICE SCALIA: Can you get in a normal  
20 contract case both your damages and disgorgement? I  
21 always thought you were put to the choice.

22 MR. COOKSON: This Court --

23 JUSTICE SCALIA: You either sue for your  
24 damages or you sue for unjust enrichment. Can you do  
25 both? You get your damages plus the other guy's

1 profits.

2 MR. COOKSON: It's our belief, Your Honor,  
3 that no, it's -- that you are correct, that it's --

4 JUSTICE SCALIA: One --

5 MR. COOKSON: -- you get contract damages,  
6 your expectation interest.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 Mr. McAllister, 2 minutes.

9 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

10 ON BEHALF OF THE PLAINTIFF

11 MR. McALLISTER: Thank you, Mr. Chief  
12 Justice, and may it please the Court:

13 I wanted to go back to something  
14 Justice Kagan correctly identified as that when these  
15 procedures were negotiated there were lots of options on  
16 the table. In fact, the groundwater model option the  
17 parties chose was not Kansas's first choice. It was  
18 Nebraska's first choice. And these kind of trade-offs  
19 were being made, and I think this case is directly  
20 analogous to New Hampshire v. Maine, which is talked  
21 about in the briefs, where those two States reached a  
22 boundary agreement. And the Court said, well, your  
23 agreement may not be perfect, but you were dealing with  
24 some vague terms, some uncertainties, you've done  
25 something reasonable, we bless it. 25 years later New

1 Hampshire came back and said: You know, we made a bad  
2 deal. We'd like you to undo it because we shouldn't  
3 have agreed to that 25 years ago.

4 And the Court gave New Hampshire the answer  
5 we think you should give Nebraska today, which is:  
6 Sorry; you made the deal, and just because you now think  
7 you have a better way of doing it doesn't mean we should  
8 rewrite the contract.

9 If the Court rewrites the contract here, the  
10 compact -- well, the procedures which are part and  
11 parcel, as the United States recognizes of the FSS --  
12 there is no clear black and white distinction between  
13 the procedures and the settlement agreement, they don't  
14 work unless they are both present. If you rewrite them  
15 now, it opens the door -- if Kansas comes up with a  
16 better way 2 years from now to measure this, then we  
17 would be able to come back. And if Nebraska says no,  
18 we'd come all the way to this Court again, saying: You  
19 know, there was a mistake because there was a better way  
20 than the 5-run solution to do this.

21 JUSTICE SOTOMAYOR: Mr. McAllister, how much  
22 more are you going to get under the accounting  
23 procedures as they exist without the 5-mile run?

24 MR. McALLISTER: Yeah, I believe on an  
25 annual basis the difference is on the order of 8 to

1 10,000 acre feet. So that's the difference in what --  
2 Nebraska wants that much more taken out of its  
3 consumptive use.

4 JUSTICE SOTOMAYOR: Give me money?

5 MR. McALLISTER: Oh, what it's worth in  
6 money? Well, that's a big dispute. I mean, the master  
7 when he valued the gain used some figures from Nebraska  
8 evidence that was \$362 per acre foot. There are other  
9 ways to try to value the water, and we haven't tried to  
10 quantify that amount. The reason it matters to us is it  
11 affects actually the total amount we get.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 The case is submitted.

14 (Whereupon, at 11:05 a.m., the case in the  
15 above-entitled matter was submitted.)

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