

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TEXAS, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 141, Orig.  
 )  
 NEW MEXICO AND COLORADO, )  
 )  
 Defendants. )  
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Pages: 1 through 66

Place: Washington, D.C.

Date: January 8, 2018

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3       TEXAS,   )

4                                 Plaintiff,             )

5                                 v.                         ) No. 141, Orig.

6       NEW MEXICO AND COLORADO,                     )

7                                 Defendants.             )

8       - - - - -

9                                 Washington, D.C.

10                                Monday, January 8, 2018

11

12                         The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 10:06 a.m.

15

16       APPEARANCES:

17       ANN O'CONNELL, Assistant to the Solicitor General,  
18 Department of Justice, Washington, D.C.; on  
19       behalf of the United States as Intervenor.

20       SCOTT A. KELLER, Solicitor General of Texas,  
21       Austin, Texas; on behalf of the Plaintiff.

22       FREDERICK R. YARGER, Solicitor General of Colorado,  
23       Denver, Colorado; on behalf of Defendant Colorado.

24       MARCUS J. RAEL, JR., Albuquerque, New Mexico; on  
25       behalf of Defendant New Mexico.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ANN O'CONNELL	
4	On behalf of the United States	3
5	ORAL ARGUMENT OF:	
6	SCOTT A. KELLER	
7	On behalf of the Plaintiff	21
8	ORAL ARGUMENT OF:	
9	FREDERICK R. YARGER	
10	On behalf of the Defendant Colorado	32
11	ORAL ARGUMENT OF:	
12	MARCUS J. RAEL, JR.	
13	On behalf of the Defendant New Mexico	51
14	REBUTTAL ARGUMENT OF:	
15	ANN O'CONNELL	
16	On behalf of the United States	62
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in case -- the  
5 original case Number 141, Texas versus New  
6 Mexico and Colorado.

7 Ms. O'Connell.

8 ORAL ARGUMENT OF ANN O'CONNELL  
9 ON BEHALF OF THE UNITED STATES

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

12 The Rio Grande Compact is an unusual  
13 interstate compact in that it does not require  
14 New Mexico to deliver water to the Texas state  
15 line. Instead, when the compact was adopted in  
16 1939, it incorporated and relied upon an  
17 existing Bureau of Reclamation project as part  
18 of the equitable apportionment framework.

19 Because reclamation controls releases  
20 from the project for delivery to contract  
21 holders below the reservoir and in Mexico, the  
22 State of New Mexico asserted that this case  
23 could not go forward without the United States'  
24 participation as a party to be bound by this  
25 Court's decree.

1           To permit a full resolution of the  
2           dispute, the United States intervened as a  
3           plaintiff, filed a complaint that presented the  
4           federal government's interests that are at  
5           stake in this dispute, and explained how  
6           injunctive relief against New Mexico could be  
7           shaped to protect those interests.

8           In its complaint, the United States  
9           did not distinguish between claims brought  
10          pursuant to the compact and claims brought  
11          pursuant to other laws. That distinction is at  
12          issue because the Master, in his  
13          recommendation, distinguished between such  
14          claims.

15          JUSTICE SOTOMAYOR: I'd -- I'd like to  
16          know what they are. So could you identify them  
17          first and then tell me how any interests have  
18          not been addressed in the New Mexico state  
19          action? I know that's not an issue in this  
20          discrete question before us, but I still don't  
21          quite understand why you need this claim.  
22          What's different -- what's different from that  
23          New Mexico claim?

24          MS. O'CONNELL: You're asking about  
25          the difference between a compact claim and a

1 claim brought under reclamation law, for  
2 example?

3 JUSTICE SOTOMAYOR: The treaty or  
4 reclamation?

5 MS. O'CONNELL: I think the -- the  
6 problem we're trying to avoid here is that when  
7 the United States sues somebody for a violation  
8 of reclamation law, taking water from a  
9 reclamation project without a contract or  
10 acting in a way that undermines the United  
11 States' ability to comply with a treaty, it's  
12 typically suing the individual water users that  
13 are violating those laws or interfering with  
14 that obligation of the United States to deliver  
15 water under a treaty.

16 What we're trying to avoid here is a  
17 future motion to dismiss filed by New Mexico,  
18 which -- which indicates or insinuates on page  
19 14 of its reply brief that actions brought  
20 under reclamation law or under the treaty  
21 should be filed against individual water users.  
22 We think we can file these claims against New  
23 Mexico because of the compact. We can file  
24 them against the State of New Mexico because  
25 New Mexico has agreed in the compact to protect

1 the project and to protect water that's  
2 released from the project to meet its --

3 JUSTICE GINSBURG: Well, did you or  
4 did you not file a claim under the -- under  
5 reclamation law? The Special Master said he  
6 recognized a claim under that law, but did you  
7 make any claim under that law or were you  
8 staking your claim on your compact -- compact  
9 claim?

10 MS. O'CONNELL: Our complaint doesn't  
11 distinguish between claims brought under the  
12 compact and claims brought under reclamation  
13 law.

14 What -- what our complaint does, as  
15 we've done in other cases where we've  
16 intervened as a plaintiff, is set forth what  
17 the United States' interests are and then tell  
18 the Court how we think it can shape injunctive  
19 relief against New Mexico to protect those  
20 interests. So --

21 JUSTICE GINSBURG: Well, could you --  
22 can you explain at the outset, you're not  
23 claiming that every -- every time there's a  
24 compact approved by Congress, you would have a  
25 right to come into court as a party, right?

1 MS. O'CONNELL: That's correct.

2 We're --

3 JUSTICE GINSBURG: And so what's the  
4 dividing line between when you can come in as a  
5 party under a compact and when, despite a com  
6 -- compact, you can't come in?

7 MS. O'CONNELL: Where -- where the  
8 compact protects specific federal interests  
9 that are at stake in the dispute that's been  
10 filed in this Court, then we believe the United  
11 States can -- can intervene as a plaintiff and  
12 bring claims against New Mexico that are based  
13 on that compact.

14 JUSTICE SOTOMAYOR: Well, what's the  
15 federal interest that was in the compact? The  
16 compact does not make any reference to your  
17 treaty obligations or to how you meet those.

18 It doesn't appear to make any  
19 reference to any of the federal interests that  
20 you've been identifying. So do that for me.

21 MS. O'CONNELL: Okay. I --

22 JUSTICE SOTOMAYOR: Make the  
23 connection.

24 MS. O'CONNELL: I think it -- it very  
25 clearly does refer to our treaty obligations in



1 a way that protects them. This is -- in the  
2 compact, it's page A-3 of the appendix to the  
3 Master's report.

4 We're looking here at the -- the  
5 definitions of project storage and of usable  
6 water. So that's Article I(k) and l) of the  
7 compact. Article IV defines New Mexico's  
8 obligation to deliver water into Elephant Butte  
9 Reservoir, into the project.

10 Article I(k) defines project storage  
11 as the combined capacity of Elephant Butte  
12 Reservoir and the reservoirs below it. Those  
13 are all projects operated by reclamation.

14 In Article I(l), the definition of  
15 usable water says that all -- the usable water  
16 is all water exclusive of credit water which is  
17 in project storage and which is available for  
18 release in accordance with irrigation demands,  
19 including deliveries to Mexico.

20 Those -- those deliveries that Article  
21 I(l) refers to, what -- what the usable water  
22 that's delivered into the project is to be used  
23 for, are releases that the Bureau of  
24 Reclamation makes because it operates the  
25 project, it has contracts with irrigation

1 districts below the -- the project, and it has  
2 a treaty with Mexico saying how much -- how  
3 much water they are entitled to get.

4 JUSTICE SOTOMAYOR: What error in the  
5 format --

6 CHIEF JUSTICE ROBERTS: What -- what  
7 -- what difference does it make -- I mean, if  
8 -- if you are not entitled to raise this claim  
9 as a party, certainly you can participate as an  
10 amicus and make whatever arguments you want  
11 about how the compact should be properly  
12 construed, right?

13 MS. O'CONNELL: That's correct.

14 CHIEF JUSTICE ROBERTS: So what  
15 difference does it make to you which way we  
16 rule on the question whether or not you're  
17 entitled to raise these claims yourself?

18 MS. O'CONNELL: I think a couple of  
19 reasons. First of all, we -- we've intervened  
20 in this case because New Mexico asserted that  
21 the United States is a required party.

22 And the United States operates this  
23 reservoir that the Court will -- will be  
24 deciding what is Texas's compact apportionment,  
25 what is New Mex -- New Mexico's compact

1     apportionment under the reservoir.  And as New  
2     Mexico explained in -- in its -- its brief  
3     opposing Texas's motion for leave to even file  
4     this complaint in the first place, you need the  
5     United States to be bound by that decree  
6     because we are the entity that releases that  
7     water.

8             Additionally, we have interests that  
9     are at stake in delivering water to Mexico  
10    pursuant to a treaty that makes sense, where --  
11    where we would like to be a party presenting  
12    the federal interests, rather than being an  
13    amicus.

14            CHIEF JUSTICE ROBERTS:  This is a  
15    pretty basic question I suppose I should know,  
16    but can you compromise state rights in the  
17    negotiation and determination of a treaty?  
18    Could you negotiate a treaty with Mexico that  
19    says we're going to give you this many  
20    acre-feet of water that is already appropriated  
21    somewhere else?  And then that treaty  
22    obligation trumps whatever the prior  
23    allocations are?

24            MS. O'CONNELL:  I'm not totally sure.  
25    I -- I think probably yes.  In this case, it

1 doesn't matter because the treaty preexisted  
2 the compact. The treaty was enacted in 1906.  
3 The compact was enacted in -- in 1939. And so  
4 that treaty obligation predates the compact.

5 JUSTICE KENNEDY: Well, usually the  
6 latter in time prevails because Congress can  
7 pass a statute after a treaty. It's not --

8 MS. O'CONNELL: Well --

9 JUSTICE KENNEDY: -- this is not a  
10 completely clear area of the law, but there --  
11 there is a general working rule applied in some  
12 of the cases that the later-in-time controls,  
13 if there's a conflict between a treaty and a  
14 later federal statute.

15 MS. O'CONNELL: And -- and we don't  
16 think there's any kind of a conflict here. In  
17 fact, Article XVI of the treaty specifically  
18 disclaims any intent to affect the United  
19 States' treaty obligation to Mexico.

20 So we think that article should be  
21 read to mean that we're still going with 60,000  
22 acre feet, we're still going with the terms of  
23 the treaty obligation which Congress, as you  
24 say, Justice Kennedy, could change as a matter  
25 of domestic law.

1           But here the parties agreed in the  
2 compact that they would protect releases from  
3 the project, that that water delivered into the  
4 project becomes usable water that reclamation  
5 releases in accordance with irrigation demands  
6 and to satisfy its treaty obligation to Mexico.

7           JUSTICE KAGAN: Ms. O'Connell --

8           CHIEF JUSTICE ROBERTS: I don't  
9 understand what -- what you mean when you say  
10 that if you're not a party, you're not going to  
11 be bound by the decree.

12           I mean, if we determine that New  
13 Mexico is free to take additional water,  
14 whatever it is under the -- under -- between  
15 the end of the reservoir and -- and -- and the  
16 borderline, what does it mean to say you're not  
17 bound by that?

18           MS. O'CONNELL: Well, I think that's  
19 -- it's sort of the flip side of the argument  
20 that we're a required party. You -- you need  
21 the United States to implement that decree, and  
22 surely, I mean, if -- I don't know that if the  
23 Court said here is what Texas's compact  
24 apportionment is and here is what New Mexico's  
25 is, that the United States would sit back and

1 say: Well, our contracts still say a different  
2 amount, so we're going to go with a different  
3 amount, but I think that's what makes us a  
4 required party. That's why New Mexico is  
5 asserting that you need us here and that's why  
6 we're here trying to be helpful and -- and  
7 asserting in our complaint what the federal  
8 interests are that we are seeking to protect.

9 So since -- since the United States  
10 needs to be bound by that decree in order for  
11 -- in order for there to be complete relief  
12 against -- between the parties, we are here.  
13 We are -- we are willing to be bound by that  
14 decree. And all that we're asking is that we  
15 be permitted to proceed --

16 JUSTICE KAGAN: Would I be right,  
17 though, that -- that your argument would also  
18 allow you to have initiated the suit in the  
19 first place? In other words, even if there  
20 hadn't been a suit between the states, that you  
21 could have said: New Mexico is -- is taking  
22 too much water and is preventing us from  
23 meeting our obligations and -- and that you  
24 could have initiated a suit under the compact?

25 MS. O'CONNELL: Yes. We -- we do make

1 an argument at the end of our brief in  
2 opposition to New Mexico's motion to dismiss  
3 that, even if Texas's complaint were dismissed  
4 here, the United States' claims against New  
5 Mexico could go forward.

6 I don't think the Court needs to reach  
7 that, because Texas's complaint is going  
8 forward. This Court has denied New Mexico's  
9 motion to dismiss. But that --

10 JUSTICE KAGAN: Well, what's the  
11 difference? How could we say, yes, you have  
12 the rights to intervene, even though you don't  
13 have the rights to bring your own suit  
14 initially?

15 MS. O'CONNELL: The Court's standard  
16 for intervention is that intervention of the  
17 United States is appropriate where there is  
18 distinctive federal interests at stake that are  
19 best presented by the United States.

20 So, I mean, I guess the Court could  
21 say, you know, we don't have any claims, but we  
22 could be a defendant, something like that. We  
23 -- we need to be here in the case in order to  
24 -- to be able to present evidence and to be  
25 able to be bound by this decree.

1                   But our argument that we --

2                   JUSTICE GORSUCH: Ms. O'Connell, one  
3 of the federal interests you've asserted is the  
4 treaty with Mexico. And I'm curious how it  
5 interacts with this Court's decision in  
6 Medellin, where this Court distinguished  
7 between self-executing treaties and treaties  
8 that aren't self-executing.

9                   Is the treaty here self-executing?  
10 And if it's not, then how is it a federal  
11 interest to seek a binding enforceable judgment  
12 on the basis in domestic law of a treaty that  
13 isn't enforceable under domestic law?

14                   MS. O'CONNELL: I am not sure. I have  
15 not -- the State Department was not included in  
16 our, you know, our -- our corroboration in this  
17 case, so I don't -- I actually don't know the  
18 answer to whether it's a self-executing treaty.

19                   It was enacted in the public laws --

20                   JUSTICE GINSBURG: It has been  
21 executed for how many years?

22                   MS. O'CONNELL: It's been in existence  
23 since 1906. And the United States makes  
24 deliveries pursuant to -- in its -- in the  
25 Bureau of Reclamation's 2008 operating



1 agreement with the irrigation districts, it  
2 calculates what the portions are that are given  
3 to each of the states.

4 JUSTICE SOTOMAYOR: I'm sorry, you  
5 said it was a public law. Why don't you follow  
6 that up.

7 MS. O'CONNELL: I mean, it was enacted  
8 in -- in the -- the statutes at large. It's --  
9 you know, it is -- it is part of U.S. law.

10 JUSTICE BREYER: It is enacted, unlike  
11 some treaties, it's enacted as a statute?

12 MS. O'CONNELL: That's correct.

13 JUSTICE BREYER: Well, that's the end  
14 of that, isn't it?

15 MS. O'CONNELL: Okay. So it's -- it's  
16 been enacted.

17 JUSTICE GORSUCH: Is it -- do we know  
18 that that's the end of that? I mean, it sounds  
19 like you haven't studied the question of  
20 whether it's self-executing or not.

21 Does the government have a position on  
22 that?

23 MS. O'CONNELL: I don't.

24 JUSTICE GORSUCH: Okay.

25 MS. O'CONNELL: I don't.

1 JUSTICE GORSUCH: All right.

2 MS. O'CONNELL: Justice Kagan, to get  
3 back to your question, the reason why we think  
4 that we can bring a claim to enforce this  
5 compact against New Mexico is based on this  
6 Court's line of cases, that we've cited a few  
7 in our briefs, Sanitary District of Chicago  
8 versus United States, and a Fourth Circuit  
9 case, the County of Arlington versus United  
10 States, where this Court and the Fourth Circuit  
11 in that case have held that the United States  
12 can bring suits for injunctive relief to  
13 protect federal interests that are at stake in  
14 a dispute.

15 In Sanitary District of Chicago, the  
16 United States sued an Illinois corporation that  
17 was using too much water, water in excess of  
18 its permit allocation. And the United States  
19 brought a suit directly against the  
20 corporation.

21 This Court said there's no statutory  
22 cause of action that's required. The United  
23 States can just bring that claim for injunctive  
24 relief to protect.

25 JUSTICE KAGAN: And if I could return

1 -- I'm sorry -- to Justice Sotomayor's question  
2 to make sure I understood the answer to it.

3 I know you're afraid that if this goes  
4 forward under reclamation law, you might be  
5 subject to this motion to dismiss on the ground  
6 that you can't sue a state under that law.

7 But putting that aside, is the content  
8 of the two suits, if you had brought the -- the  
9 suit under reclamation law, and if you had  
10 brought the suit under the compact, is the  
11 content of the suits different or the same?

12 MS. O'CONNELL: I think it's -- it's  
13 the same, because -- and that's part of the  
14 reason why we are filing an exception here to  
15 the Master's recommendation that our complaint  
16 has to be dismissed to the extent it states a  
17 compact claim, is that the reason we think New  
18 Mexico is bound by these obligations to protect  
19 the project and to have its water users not  
20 violate reclamation law or undermine the treaty  
21 is because New Mexico has signed onto the  
22 compact agreeing to protect the project.

23 CHIEF JUSTICE ROBERTS: Your -- your  
24 -- your argument really is like an implied  
25 right of action argument, isn't it? I mean,

1 the compact doesn't give you any rights and yet  
2 you say because it affects your interests, you  
3 have a right to sue.

4 And you make the third-party  
5 beneficiary argument, which is an argument  
6 that's often made to support an implied right  
7 of action. But you have to approve a compact,  
8 you, the Federal Government, before it goes  
9 into effect.

10 Couldn't you have protected your  
11 interests at that time?

12 MS. O'CONNELL: Well, our --

13 CHIEF JUSTICE ROBERTS: By saying  
14 we're not going to approve -- we're not going  
15 to approve it unless we have the right to  
16 bring, you know, claims to enforce it? And you  
17 could imagine a group of states or two states  
18 saying: All right, I'm happy to agree with  
19 this, but we don't want the United States  
20 coming in and -- and, you know, mucking  
21 everything up.

22 And so long as you're okay with that,  
23 and -- and -- and, you know, you give your  
24 consent, I don't know why you should be allowed  
25 to litigate as a party.

1           MS. O'CONNELL: I'm -- I'm not aware  
2 of any compacts where the United States has  
3 preserved that right for itself to intervene  
4 and bring suits to bring people into compliance  
5 with a compact.

6           I think here, I wouldn't necessarily  
7 think of it so much as a compact claim but a  
8 suit for equitable relief where the relief  
9 we're asking for is that New Mexico be required  
10 to comply with its compact obligations.

11           That's where this -- the implied right  
12 of action is coming, just from this Court's  
13 cases like Sanitary District, In re Debs, the  
14 San Jacinto Tin Company, it's more of just an  
15 equitable action.

16           And because this Court is -- is acting  
17 in equity when it's interpreting interstate  
18 compacts, the relief that we're seeking is that  
19 New Mexico be brought into compliance with its  
20 compact obligations.

21           If I could, I'd like to reserve my  
22 time for rebuttal.

23           CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25           General Keller.

1 ORAL ARGUMENT OF SCOTT A. KELLER,  
2 SOLICITOR GENERAL OF TEXAS,  
3 ON BEHALF OF THE PLAINTIFF

4 MR. KELLER: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 The U.S. can raise its own compact  
7 claims because the compact creates a statutory  
8 duty for the U.S. to distribute water to Texas.  
9 This statutory duty arises from three key  
10 facts.

11 First, the U.S. owns and operates the  
12 Rio Grande Project. Second, that project is a  
13 necessary predicate for the compact's equitable  
14 apportionment, to quote Nebraska versus  
15 Wyoming. And, third, that project is the sole  
16 means to actually distribute the equitable  
17 apportionment to Texas.

18 And so, to put it succinctly and quote  
19 the Special Master, the signatory states  
20 intended to use the project as the vehicle to  
21 guarantee delivery of Texas's equitable  
22 apportionment. The U.S. can, therefore, sue  
23 New Mexico if New Mexico's actions are  
24 preventing the U.S. from fulfilling this  
25 statutory duty to distribute Texas's equitable

1 apportionment.

2 JUSTICE KENNEDY: Could the United  
3 States file, General Keller, an action in the  
4 district court in the absence of a dispute  
5 between Texas and New Mexico, and the suit  
6 would say there's a violation of -- of the  
7 compact even though there's no dispute between  
8 the states?

9 MR. KELLER: Yes, because of the  
10 nature of this unique compact. Because the  
11 water that New Mexico delivers to the federal  
12 government is in the middle of New Mexico  
13 instead of at the state line, the United States  
14 then as a carrier or a distributor has a duty  
15 to ensure that there's an equitable  
16 apportionment. And so this goes to the heart  
17 of the Special Master's correct conclusion that  
18 when New Mexico deposits water at Elephant  
19 Butte Reservoir, they must relinquish control.

20 Now, when New Mexico is relinquishing  
21 control, they're relinquishing control to the  
22 Federal Government. There'd be no other way  
23 for this compact to work. And that's precisely  
24 why the compact itself refers directly or  
25 indirectly over 50 times to the project. And

1 that is the federal project operated by the  
2 Bureau of Reclamation.

3 And so, Justice Kennedy, the United  
4 States could sue New Mexico to enforce its  
5 ability to ensure that Texas receives its  
6 equitable apportionment, just like the compact  
7 does provide for the usable water definition  
8 and the irrigation demands including what is  
9 also being delivered to Mexico. And it is the  
10 long-standing practice of the parties -- and  
11 this is in the Master's report at page 209 --  
12 that there's a -- generally 60,000 acre-feet of  
13 water being delivered to New Mexico. And  
14 that's coming off the top before we get into  
15 the parties' accepted 57 to 43 percent split  
16 between the water.

17 But all those issues about how exactly  
18 and what quantities of water will actually  
19 occur, of course, will be litigated in due  
20 course. But for now, the issue before the  
21 Court is fairly narrow. It's under this  
22 particular compact, when the water is being  
23 delivered in the middle of another state and  
24 yet a downstream state has an equitable  
25 apportionment, can the United States bring its



1 own claims as a carrier and distributor of the  
2 water? And it can.

3 JUSTICE SOTOMAYOR: Could you tell  
4 me --

5 JUSTICE KENNEDY: Excuse me. Is that  
6 different from saying they can -- that they're  
7 bringing an action under the terms of the  
8 compact?

9 MR. KELLER: No, that would be a --

10 JUSTICE KENNEDY: Or is that the same  
11 -- is that just another way of saying the same  
12 thing?

13 MR. KELLER: I believe it is another  
14 way of saying the same thing. Their claims  
15 arise under the compact itself because the  
16 compact is doing an interstate equitable  
17 apportionment between New Mexico, Colorado, and  
18 Texas.

19 Now, my friends on the other side have  
20 spoken often about treaty claims and  
21 reclamation law claims that would invoke state  
22 law. But the central focus of this lawsuit  
23 that Texas has raised here is about the compact  
24 and the interstate equitable apportionment as  
25 opposed to any intra-state allotment.

1           And so the Reclamation Act claims that  
2           the Special Master said could go forward that  
3           the United States has raised, those may not  
4           necessarily be claims against another state as  
5           a sovereign, and so there would be potential  
6           confusion if the United States' claims were not  
7           compact claims in an original action between  
8           sovereigns but, rather, instead were somehow  
9           reclamation law claims that were invoking state  
10          law against particular water users.

11           And so I think for judicial economy,  
12          the proper way for this lawsuit to go forward  
13          is indeed to allow the United States and Texas  
14          to bring compact interstate equitable  
15          apportionment claims. And if those are  
16          resolved --

17           JUSTICE SOTOMAYOR: Now I understand.  
18          You are actually taking the position that the  
19          federal government can't sue another state for  
20          reclamation claims. They would have to sue the  
21          farmers who are diverting the water.

22           MR. KELLER: That -- that is -- that  
23          is probably correct because there would not  
24          necessarily be a -- a state law basis under the  
25          Reclamation Act to -- to invoke a lawsuit

1 against a sovereign state.

2 JUSTICE SOTOMAYOR: So unless the  
3 government can claim that New Mexico has an  
4 obligation and it can, therefore, sue under the  
5 compact, that's why -- now I understand.

6 MR. KELLER: And -- and not only that  
7 but also under Hinderlider and that line of  
8 cases, when there are these disputes between  
9 states, it is going to be New Mexico's duty to  
10 prevent diversions of water. So even if there  
11 were particular water users, under this  
12 compact, New Mexico cannot allow diversions  
13 that would interfere with Texas's equitable  
14 apportionment, which is exactly what we're  
15 pleading.

16 JUSTICE SOTOMAYOR: Your brief says  
17 let the U.S. intervene but not beyond  
18 addressing any legal matter beyond the compact  
19 claims. I wasn't quite sure what you  
20 envisioned they might try to do and -- and why  
21 we would at this early stage opine on that  
22 issue.

23 MR. KELLER: No, and --

24 JUSTICE SOTOMAYOR: Seems like an  
25 advisory opinion to the Special Master.

1           MR. KELLER: Well, you would not  
2 necessarily have to opine on precisely how the  
3 litigation will go forward; however, the -- the  
4 crux of this lawsuit is an interstate equitable  
5 apportionment compact claim. And I believe,  
6 Justice Sotomayor, that's precisely why the  
7 United States is here wanting to raise those  
8 compact claims.

9           But for purposes of how that would  
10 operate, knowing whether the suit would be  
11 against a sovereign state or knowing if it  
12 would be against individual water users, that  
13 would certainly affect the interests involved  
14 in how the case would proceed.

15           CHIEF JUSTICE ROBERTS: Why is that?  
16 I -- I mean, is this really just a question of  
17 timing? I mean, they're saying the United  
18 States can't raise these claims because of our  
19 view about how the compact applies. But, I  
20 mean, is there any reason not to go forward  
21 with the -- the litigation or at the end, if --  
22 if the Master thinks they don't have a claim  
23 under the Compact Clause, then they can say  
24 that at that time?

25           But -- but at this point, we now have

1 to make determinations that I'm concerned about  
2 the impact on other compacts and -- and what's  
3 involved besides simply the timing.

4 MR. KELLER: And, Mr. Chief Justice,  
5 from our perspective, the practical difference  
6 is going to be minimal. The State of Texas  
7 will continue to bring its compact claims, and  
8 the equitable apportionment is at the center of  
9 that dispute.

10 At the same time, the Court can rule  
11 that the United States can bring its own  
12 compact claims here because of the unique  
13 nature of this compact, given that the delivery  
14 of water occurs in the middle of New Mexico,  
15 and then the United States is the distributor  
16 and carrier, to use the language of the 1945  
17 Nebraska versus Wyoming decision, to ensure  
18 that that -- that Texas's equitable apportioned  
19 water, while it is being relinquished control  
20 in the middle of New Mexico instead of the  
21 state line, does reach Texas and indeed to New  
22 Mexico.

23 JUSTICE KAGAN: I think I should have  
24 asked Ms. O'Connell this, but do you view the  
25 United States' interests as diverging from

1 Texas's interests in any way?

2 MR. KELLER: We -- yes, we will have  
3 some disputes, and this will come up later in  
4 the litigation, over precisely how the  
5 equitable apportionment should be calculated,  
6 but for purposes of the question presented to  
7 this Court today, we do not diverge and we  
8 believe the United States should be able to  
9 raise its own compact claims.

10 JUSTICE KAGAN: No, but I meant as the  
11 litigation proceeds, would there be a  
12 difference if only you were in the lawsuit  
13 as -- you know, and with presumably the United  
14 States as an amicus versus having the United  
15 States in as a party?

16 MR. KELLER: Well, potentially,  
17 Justice Kagan, just based on the -- the  
18 arguments that would be raised as to whether  
19 the equitable apportionment was actually being  
20 fulfilled. But as far as the -- the main  
21 thrust of the argument, the United States  
22 agrees with Texas that New Mexico is allowing  
23 diversions of water and therefore interfering  
24 with the equitable apportioned water to Texas.  
25 We're agreeing on that.

1 JUSTICE SOTOMAYOR: I'm not sure  
2 you're answering Justice Kagan. She's asked go  
3 to the end of the litigation. Where would the  
4 -- you and the U.S. differ?

5 MR. KELLER: Well, one issue --

6 JUSTICE SOTOMAYOR: What -- what  
7 issues? Are there issues in which there can be  
8 a difference?

9 MR. KELLER: Possibly. One issue, for  
10 instance, there was an -- a settlement  
11 agreement, an operating agreement, that the  
12 State of Texas never entered into and so it  
13 could not be bound by.

14 But the current practice is to use a  
15 regression analysis that was looking at dates  
16 from the 1950s to the 1970s to calculate return  
17 flows, which is going to affect the amount of  
18 water that is going to be part of the project  
19 lands, the usable water.

20 Now, our position is that it's the  
21 compact in -- in the time of 1938 when the  
22 compact was entered into that should control  
23 that analysis, rather than a regression  
24 analysis years later. That is one example of  
25 an issue where the State of Texas and the

1 United States are not exactly going to be  
2 raising the same arguments.

3 However, these are going to be  
4 arguments that will play out in the remainder  
5 of the litigation. But for purposes of the  
6 issue today, we agree that the United States  
7 can raise its own compact claims.

8 JUSTICE SOTOMAYOR: And I presume  
9 you'd be happier if those issues were settled  
10 in one litigation rather than to have to start  
11 an action against the United States?

12 MR. KELLER: Yes. And we believe that  
13 this lawsuit should continue forward and -- and  
14 the State of Texas be allowed to raise these  
15 compact claims and -- and settle this  
16 interstate equitable apportionment as soon as  
17 practicable.

18 If there are no further questions.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 General.

21 MR. KELLER: Thank you, Mr. Chief  
22 Justice.

23 CHIEF JUSTICE ROBERTS: General  
24 Yarger.

25



1 ORAL ARGUMENT OF FREDERICK R. YARGER,  
2 SOLICITOR GENERAL OF COLORADO,  
3 ON BEHALF OF THE DEFENDANT COLORADO

4 MR. YARGER: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 I'd like to begin, if I can, by  
7 discussing the United States' exception to the  
8 Special Master's report and turn later to  
9 Colorado's first exception. Regarding the  
10 United States' exception, what the United  
11 States is asking for here is both incorrect and  
12 unprecedented.

13 Colorado is a party to nine interstate  
14 compacts. Many of them apportion water on  
15 rivers with significant federal projects.  
16 Several of those compacts express -- expressly  
17 mention those projects in the compacts' text.  
18 Yet in a century of Colorado negotiating,  
19 administering, and litigating compacts like  
20 those, including those, the United States has  
21 never asserted, and this Court has never  
22 recognized, the right of the United States to  
23 bring an independent action under a compact --

24 JUSTICE GINSBURG: Well, if -- if the  
25 United States didn't assert it, then, of

1 course, there would be no reason for this Court  
2 to pass on it. But the fact that the United  
3 States didn't assert it in the past doesn't  
4 mean that it couldn't assert --

5 MR. YARGER: Well, it's -- it's true  
6 this Court has never foreclosed such a claim,  
7 but if you look back through cases, including  
8 Kansas versus Nebraska, which is perhaps the  
9 best, most recent example, that was a case  
10 between states that resulted in a settlement  
11 agreement among states. The United States  
12 wasn't a party to that settlement agreement.

13 In fact, if you read the settlement  
14 agreement, the United States is sort of  
15 relegated to amicus status in future disputes  
16 under that settlement agreement. If the United  
17 States has the authority to bring independent  
18 claims under a compact, how do the states have  
19 the ability to settle claims once and for all  
20 under a compact that the United States is not a  
21 party to?

22 JUSTICE GINSBURG: Did that -- did  
23 that case involve -- what seems to me special  
24 about this case is the prominence of the  
25 federal facility.

1           MR. YARGER: And -- and I don't agree  
2           that the prominence of the federal facility in  
3           this compact is substantially less than the  
4           prominence of federal facilities on, for  
5           example, the Republican River. If you review  
6           the briefing of the United States in the  
7           Republican River case from 2015, they said,  
8           look, the groundwater pumping from New Mexico  
9           could impede this project to the point where  
10          people will start defaulting on contracts.

11           That's a pretty significant interest  
12          the United States asserted there. Very similar  
13          to the interests it's asserting here, and yet  
14          the United States was amicus in the Republican  
15          River case, not a party.

16           JUSTICE KENNEDY: But I'm not sure  
17          they're the same because, as the government  
18          pointed out in its argument, one, is it I(l)  
19          and I(k) make specific -- in the compact, make  
20          specific reference that this has to be  
21          available for release in accordance with  
22          irrigation demands, including deliveries to  
23          Mexico.

24           This is an international law  
25          obligation on the United States that the United

1 States would be remiss if -- if -- if it  
2 ignored.

3 MR. YARGER: Absolutely. And that's  
4 why we think it is perfectly appropriate for  
5 the United States to bring a treaty claim in  
6 this case.

7 But what the compact does not do is,  
8 within the context of the apportionment among  
9 the states, give the United States a right  
10 under this compact. In this compact, the  
11 preamble --

12 JUSTICE KENNEDY: Well, but we're used  
13 to reconciling laws that -- I'm sure the United  
14 States takes the position that the compact is  
15 consistent with, indeed furthers, its  
16 obligations under the compact.

17 MR. YARGER: The treaty does.

18 JUSTICE KENNEDY: Yes.

19 MR. YARGER: Well, I think it's a  
20 question of there are multiple layers of laws  
21 that are issued in interstate water cases,  
22 obviously.

23 You have state water rights. The  
24 United States must obtain those state water  
25 rights to operate the project. That's as far

1 back as the Reclamation Act of 1902 which  
2 preceded this compact. There's the treaty  
3 claim. There's reclamation issues.

4 The question that got Colorado's  
5 attention, what we're concerned about is -- is  
6 this very new argument in our mind of the  
7 United States being able to sue against  
8 signatory states for relief, and now they're  
9 even saying they can initiate litigation in  
10 district courts, perhaps this Court, when --  
11 when the states are perhaps negotiating a  
12 solution to a dispute.

13 JUSTICE SOTOMAYOR: I'm sorry. Isn't  
14 that Nebraska versus Wyoming? There the U.S.  
15 wasn't seeking an apportionment of rights. It  
16 was seeking a declaratory judgment. Basically  
17 like in this case, as an operator of the  
18 facility at issue.

19 Now, it was Wyoming who sued the  
20 United States, but it was -- they're pretty  
21 much mirrors of each other.

22 MR. YARGER: I -- I don't necessarily  
23 think they're mirrors of each other. I -- I do  
24 acknowledge there's some ambiguity in the way  
25 those -- I think there are four or five

1 separate opinions that the Special Master  
2 discusses and the briefing discusses.

3 A couple of points of difference.  
4 One, the United States was made a party to that  
5 equitable apportionment decree. I think that  
6 is significant. The United States is not a  
7 signatory to this compact.

8 So I don't think Nebraska on that  
9 issue is necessarily dispositive here. I also  
10 -- the Special Master found it very significant  
11 that the United States never sought affirmative  
12 relief. It never -- it sought defensive  
13 summary judgment relief in the '93 opinion, but  
14 I don't think it ever sought affirmative relief  
15 under that decree. And, in fact, it disclaimed  
16 that it had any obligations under that decree.

17 And in earlier decisions by this Court  
18 in that same ongoing dispute, the Court said:  
19 Look, federal reclamation water rights come  
20 from state law. The apportionment will  
21 encompass that state law.

22 And so it's sort of -- it's the tail  
23 wagging the dog to say that the United States  
24 by virtue of state water rights to operate a  
25 project gets to sue a state outside the context

1 of a ongoing equitable apportionment case at  
2 this point.

3 JUSTICE KAGAN: I take it --

4 JUSTICE BREYER: Now, it's not -- it's  
5 not surprising that in some cases the United  
6 States could be a party to such a suit. The  
7 Constitution says that no state shall, without  
8 the consent of Congress, enter into any  
9 compact. And, therefore, we need the consent  
10 of Congress.

11 Obviously, the founders who wrote this  
12 wouldn't want three or four or five or six  
13 states to enter into some compact that might  
14 wreck the Union.

15 So doesn't that suggest that they do  
16 have a right, the United States, to intervene,  
17 at least where there is a federal interest?  
18 And now here you have seen the federal interest  
19 listed, the third-party beneficiary interest,  
20 the interests that they have to deal with this  
21 water, the interests that they have in terms of  
22 the treaty of Mexico.

23 So it seemed to me quite simple. The  
24 Constitution foresees that they can intervene  
25 where there's an interest. They have several

1 interests. End of case, unless there is  
2 something that I don't see.

3 MR. YARGER: Well, I hope there's not  
4 because I disagree with -- with -- with that.

5 JUSTICE BREYER: There is something I  
6 don't see?

7 MR. YARGER: The United States  
8 absolutely has to approve a compact, but what  
9 it approves is the terms of that compact.

10 And the terms of this compact give  
11 substantive rights to Texas, and the  
12 commissioners who have voting rights, the  
13 United States does not have a voting right on  
14 this Commission, to demand releases of water  
15 to -- to carry out the equitable apportionment  
16 of the compact.

17 What I will say is I think there is a  
18 difference that the United States doesn't draw  
19 in its briefing between legislation carried out  
20 under the commerce clause or under the treaty  
21 power and choosing to go a different route,  
22 which is to say telling New Mexico and Colorado  
23 and Texas back in the early -- early '20s:  
24 Negotiate this compact and decide the  
25 apportionment among yourselves, and that will



1 be the way that we determine how this water is  
2 apportioned.

3 That's very different from the United  
4 States saying we will exercise our commerce  
5 power or treaty power to determine the  
6 equitable apportionment of this river and  
7 impose it on the states.

8 JUSTICE KAGAN: Well, I take it,  
9 General, I mean, you don't disagree, do you, or  
10 tell me if you do, that the United States has  
11 important interests here?

12 And, you know, part of those interests  
13 are international, having to do with the  
14 relationship with Mexico, but part of them are  
15 domestic because the United States is and was  
16 even prior to this compact in a set of  
17 contractual agreements that -- that give it  
18 duties with respect to this water.

19 So do you agree that the interests are  
20 pretty strong here?

21 MR. YARGER: Yes.

22 JUSTICE KAGAN: Okay. So how in your  
23 view does the United States protect those  
24 interests?

25 MR. YARGER: Well, I think it -- it --

1 two ways: First of all, with respect to the  
2 treaty interests, absolutely, we think that  
3 it's appropriate to include treaty claims in  
4 this case.

5 Second of all, with respect to all of  
6 those interests, which are identical to those  
7 that are at issue in cases like Kansas versus  
8 Nebraska, it does what it's always done, which  
9 is --

10 JUSTICE KAGAN: I don't know what that  
11 means. Do those mean the domestic issues?

12 MR. YARGER: Yes, the domestic issues  
13 which Congress has said for 130 years, project  
14 rights are state law water rights that are  
15 subsumed within an equitable apportionment that  
16 the states either negotiate or this Court sets.  
17 So it's no different from the many cases that  
18 the United States has participated in, either  
19 as amicus, which I think is a pretty strong  
20 indication that in past cases at least, the  
21 United States hasn't saw fit to try to  
22 establish the precedent of being able to take  
23 states in litigation when they're not in  
24 litigation, and -- and it can assert those  
25 interests and make all the arguments that it

1 needs to make.

2 And I think it gets back to the --

3 JUSTICE GORSUCH: But -- - but, Mr.  
4 Yarger, I'm still stuck on this. I understand  
5 your -- your carving out of the treaty  
6 interests, but the United States has  
7 preexisting contract obligations to two water  
8 districts to provide a certain amount of water.

9 And the resolution of this compact  
10 dispute could affect the United States' ability  
11 to fulfill its contractual obligations. I  
12 think you'd agree with that.

13 MR. YARGER: I -- I would agree with  
14 that.

15 JUSTICE GORSUCH: Then why isn't --  
16 why isn't that significant federal interest  
17 right there?

18 MR. YARGER: It's -- it's not that  
19 it's not a significant federal interest. It's  
20 a question of what is the substantive right the  
21 United States is asserting here. And it's just  
22 like Hinderlider.

23 The United States' rights to this  
24 water arise under New Mexico law, in fact New  
25 Mexico territorial law back in '06 and '08. To

1 the extent the equitable apportionment of the  
2 compact affects those rights, that was  
3 consistent with the scheme that Congress put in  
4 place when it said, U.S., go to state court and  
5 get water rights.

6 That's how we will affect these  
7 projects.

8 JUSTICE SOTOMAYOR: I'm sorry, let's  
9 take a situation in which the contract is  
10 clear. All right? Forget about surface water.  
11 You have to deliver X cubic feet of water every  
12 year. And the compact is just like this one.  
13 It authorizes the United States to -- or  
14 there's a federal law that authorizes the  
15 United States to distribute that water in a  
16 certain way.

17 Now you breach. It's your position  
18 that the government couldn't come in and say to  
19 you: Deliver the water because I have a  
20 federal interest in ensuring that the contracts  
21 that I signed, dependent on your clear  
22 contractual obligation, doesn't give me a right  
23 either to sue you or to bring a claim under  
24 that contract --

25 MR. YARGER: Well, we're --

1                   JUSTICE SOTOMAYOR: -- and obligated  
2 you to do something to the -- for -- to the --  
3 for the United States?

4                   MR. YARGER: Justice Sotomayor, we're  
5 not taking a position on any other type of  
6 claim the United States may or may not have  
7 under other substantive bodies of law,  
8 including state law, treaties, and reclamation  
9 law.

10                   All we're saying is that this, as  
11 Texas said I think several times during  
12 argument, at the heart of this case is an  
13 apportionment between the states.

14                   JUSTICE KAGAN: But think about this.  
15 This goes back -- Justice Breyer said, look,  
16 Congress approved this compact. Now, it did so  
17 against a backdrop in which the United States  
18 already had obligations, obligations to Mexico,  
19 but also contractual obligations to domestic  
20 parties.

21                   Now, how could it have approved that  
22 compact unless it said we took a look at this  
23 compact and we think it will allow us to  
24 fulfill all of our obligations, both domestic  
25 and international? You have to think in a case

1     like this that the approval of the compact was  
2     premised on an understanding that it would  
3     protect the United States' own interests, which  
4     is exactly what the United States is trying to  
5     assert here.

6             MR. YARGER:  And -- and I think the  
7     question is how does the United States protect  
8     that interest, because the premise of the  
9     compact was also the 1902 Reclamation Act,  
10    which was in effect for 36 years before this  
11    compact was signed and said very clearly,  
12    Federal Government, go to state court, go to  
13    state administrative mechanisms to get your  
14    water right.  And then this Court in  
15    Hinderlider said:  And by the way, whatever  
16    right you get under state law will always be  
17    subservient to and contained within either a  
18    compact or a decree set by this Court.

19            So I think it's a question of where --  
20    how does the Court -- does the United States  
21    protect those interests and what is the  
22    substantive body of law under which it can do  
23    so?

24            We don't object to the United States  
25    bringing arguments under this case or

1 participating, but we want to be very careful  
2 about what precedent this sets for other  
3 compact disputes in the future. We're very  
4 concerned about that.

5 And --

6 CHIEF JUSTICE ROBERTS: Well, the --  
7 United States says one reason they need to  
8 participate as a party, rather than as an  
9 amicus, is otherwise they would not be bound by  
10 the decree. Aren't you worried about that?

11 MR. YARGER: I -- I --

12 CHIEF JUSTICE ROBERTS: In other  
13 words, you're going -- if -- if you prevail,  
14 it's not going to mean much, because the United  
15 States doesn't feel bound by it.

16 MR. YARGER: I think that again flips  
17 the -- the legal regime on its head. Of  
18 course, they'll be bound. They have a state  
19 law water right that rises no higher than this  
20 compact.

21 And so, they will certainly be bound  
22 to the extent that this compact informs the  
23 scope of water rights that New Mexico can grant  
24 and administer under its law and same with  
25 Texas.

1                   One of the things that I --

2                   JUSTICE KENNEDY: Seems to me that's  
3 the best argument -- argument you can make for  
4 the fact that the United States has a vital  
5 interest here.

6                   MR. YARGER: And we don't dispute it  
7 has an interest in this case and ought to  
8 participate in this case. Our concern is under  
9 what substantive law and what it -- what it  
10 will be able to do in the future.

11                   JUSTICE GINSBURG: In this case --

12                   MR. YARGER: Bring the states into --

13                   JUSTICE GINSBURG: -- if -- if -- if a  
14 party is bound, but not permitted to be a  
15 party, that -- there's something wrong with  
16 that.

17                   MR. YARGER: Well, I don't think so,  
18 Justice Ginsburg. It's not just the United  
19 States who has -- have rights at stake in this  
20 case. Every water user in Texas and New Mexico  
21 that receives project water is very keen on  
22 this case and will ultimately be bound by it  
23 under *parens patriae*. And that's, of course,  
24 the whole point of this regime. The states  
25 apportion water among themselves. Water rights



1 within those states must be administered  
2 consistent with that --

3 JUSTICE KAGAN: Well, it's one --

4 MR. YARGER: -- and what Congress --

5 JUSTICE KAGAN: -- it's one thing to  
6 say that state litigation can bind its own  
7 citizens; and it's another thing to say that  
8 state litigation can bind the Federal  
9 Government without the Federal Government being  
10 allowed to participate in that litigation.

11 MR. YARGER: Well, and -- and the  
12 United States, for many years, litigating these  
13 cases, has participated in these suits despite  
14 strong federal interests without being a party  
15 and asserting claims under the compact.

16 JUSTICE GINSBURG: But as was pointed  
17 out by Ms. O'Connell, the United States was  
18 told what -- wasn't there -- I don't know if it  
19 was a Colorado jointed or it was just New  
20 Mexico, that said the United States is a  
21 necessary party to this litigation. And you're  
22 saying not only are they not necessary, they're  
23 not even permitted to be a party.

24 MR. YARGER: No, that -- that's  
25 certainly not what we're saying. We certainly

1 think that they are a necessary party here, at  
2 least under the treaty claims. And that  
3 question has been decided. The United States  
4 is a party to this case. The intervention has  
5 been granted. We don't dispute that and never  
6 have. The question is: What substantive right  
7 is the United States asserting?

8 I -- I would like to go back to the  
9 Chief Justice's question, if I could, and the  
10 question is: What difference does it make here  
11 to recognize for the first time this right  
12 which Colorado is very concerned about in this  
13 litigation?

14 We don't necessarily think that's  
15 necessary. We think the Court can reserve the  
16 question. I think that some of the justices  
17 have observed here the issue of deliveries to  
18 Texas will be litigated through Texas's compact  
19 claim. The issue of deliveries to Mexico will  
20 be litigated through the treaty claim. So to  
21 recognize this right for the first time here,  
22 in the context of a case where we don't think  
23 it's necessary, I think establishes precedent  
24 that -- that just simply isn't necessary to  
25 establish in -- in the context of this case.

1           I -- if I could turn very briefly to  
2 Colorado's first exception, our point here is  
3 -- is just really an echo of what the other  
4 states have raised concerns about, which is  
5 that this is an apportionment case.  
6 Reclamation law claims can introduce a lot of  
7 extraneous issues into this litigation that  
8 aren't necessarily needed for the apportionment  
9 decision to -- to be accomplished by this  
10 Court.

11           What I would point you to is to look  
12 at New Mexico's district court complaint that  
13 they brought against the U.S. and the water  
14 districts in 2011, raising reclamation law  
15 claims regarding the 2008 operating agreement.

16           There are all kind of claims in that  
17 case. I -- I think if the apportionment is  
18 decided by this Court, that will certainly  
19 inform state law water rights in the state  
20 adjudication. It will also inform reclamation  
21 law claims that can then be sorted out in the  
22 lower courts as necessary.

23           If there are no further questions.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 General.

1 Mr. Rael.

2 ORAL ARGUMENT OF MARCUS J. RAEL, JR.,  
3 ON BEHALF OF THE DEFENDANT NEW MEXICO

4 MR. RAEL: Mr. Chief Justice, and may  
5 it please the Court:

6 I have three points -- main points  
7 that I'd like to make on behalf of the State of  
8 New Mexico today, the first of which is that  
9 New Mexico agrees with the Special Master and  
10 Colorado that the United States cannot raise  
11 compact claims in this matter.

12 Secondly, New Mexico has not taken  
13 exception to the Special Master's  
14 recommendation that the United States be  
15 allowed to raise a claim under reclamation law  
16 in order to protect its interests.

17 Finally, New Mexico does not dispute  
18 that the United States can bring a claim for  
19 alleged interference with its 1906 treaty with  
20 Mexico. It's just that that claim also arises  
21 -- does not arise under the -- under the  
22 compact, but under the treaty itself.

23 JUSTICE SOTOMAYOR: Are you --

24 JUSTICE KAGAN: And how do you think  
25 those claims would differ from claims that are

1 brought under the compact?

2 MR. RAEL: Well, Justice Kagan, the --  
3 the -- the treaty itself has a mechanism which  
4 allows the United States to enforce the  
5 treaty -- its treaty obligations at any time.

6 And the -- and the -- I think the main  
7 difference is that if you -- if you -- and as  
8 this Court has already deemed, if the United  
9 States is allowed to enforce its treaty  
10 obligation of the 60,000 acre-feet a year under  
11 the treaty, then you don't open that door under  
12 the compact claim that my colleague was just  
13 speaking about, which would allow the United  
14 States to -- to -- to, for the first time ever,  
15 raise a -- a compact claim in a -- in a compact  
16 under which it receives no allocation of water.

17 JUSTICE KAGAN: And -- and what about  
18 these other obligations that the United States  
19 has? You said that you can bring reclamation  
20 law claims for those. What's the difference  
21 there?

22 I mean, I'm trying to figure out why  
23 everybody cares so much that this is a claim  
24 under the compact, rather than under these  
25 other bodies of law.

1           MR. RAEL: I -- Justice Kagan, I -- I  
2 think everybody cares so much because the --  
3 the Reclamation Act of 1902 is a very  
4 comprehensive body of law, and it allows the  
5 United States to accomplish almost anything  
6 that it's looking to do here.

7           It's important to note that there's no  
8 claim -- there's no remedy that the United  
9 States is seeking in this litigation that it  
10 can't -- under the compact, that it can't  
11 receive under that comprehensive body of law  
12 that is the Reclamation Act. But the reason  
13 why, I think, New Mexico cares, and I think --  
14 and Colorado as well, is this Court has never  
15 allowed the United States to raise a claim  
16 under a compact to which it was not a party --  
17 I mean to which it was -- received no  
18 allocation of water and to which it was not a  
19 signatory.

20           JUSTICE GINSBURG: This --

21           JUSTICE KAGAN: Right, but --

22           JUSTICE GINSBURG: -- this Court has  
23 never had occasion to pass on that question.  
24 You said "never allowed." It didn't disallow.  
25 It just hasn't ruled on it.

1           MR. RAEL: Well, Your Honor, I think  
2           that's -- that's correct, but I think -- I  
3           think what the danger that we're facing here is  
4           that if you -- if you read an -- an implicit  
5           right here for the United States to raise a  
6           claim under a compact which -- which provides  
7           it no explicit protections, if you -- if you  
8           allow them to -- to -- if you allow the United  
9           States to read that implicit right, then I  
10          think you're -- you're opening up a dangerous  
11          door in which the United States can raise --  
12          can try to raise implicit rights not only in --  
13          in this compact but in every compact across the  
14          country.

15                 JUSTICE KAGAN: How --

16                 CHIEF JUSTICE ROBERTS: I suppose one  
17          reason the United States may be interested is  
18          if it has compact claims that -- that are  
19          litigated here. If they're under the  
20          Reclamation Act, they're litigated in a complex  
21          proceeding in state court, right?

22                 MR. RAEL: No, Your Honor. I -- I  
23          think the -- the Special Master in this case  
24          found a very elegant solution, and that's why  
25          we don't oppose it. In -- in allowing them to

1 participate in this case under the Reclamation  
2 Act, as I said, there's no remedy that they've  
3 sought in their complaint in this case that --  
4 that they can't get under the Reclamation Act  
5 of 1902 that they can get under the compact.

6 And so it would be litigated here, in  
7 this Court, for purposes of judicial economy  
8 and to avoid inconsistent rules.

9 JUSTICE KAGAN: And not under state  
10 law, but under federal law?

11 MR. RAEL: Under the -- under the  
12 McCarran Amendment, the -- the -- the United  
13 States' water rights are subject to state law,  
14 but New Mexico would -- would -- and -- and any  
15 -- any compacting state administers the water  
16 rights, but we can't do so in a manner which is  
17 inconsistent with the compact.

18 Therefore, this Court has already  
19 placed those protections in place, so -- so  
20 that the United States reclamation law claim  
21 and -- and, indeed, in this case, its  
22 reclamation project, is protected in the sense  
23 that we cannot administer our state water  
24 rights, our sovereign water in such a manner  
25 that it interferes with the compact.



1 JUSTICE SOTOMAYOR: I'm sorry, let's  
2 go --

3 JUSTICE GINSBURG: Am I right that --  
4 that New Mexico had argued at an earlier stage  
5 that the United States was a necessary party to  
6 this litigation?

7 MR. RAEL: Yes, Your Honor, we did  
8 argue that.

9 JUSTICE GINSBURG: And I will ask you  
10 the same question I asked before. You argued  
11 that the United States was a necessary party in  
12 this very litigation. And now you're saying  
13 they are not even a permitted party.

14 MR. RAEL: Justice Ginsburg, I -- I  
15 apologize. I'm not saying that. What I'm  
16 saying is that New Mexico is arguing that the  
17 United States is a necessary party, but their  
18 claims arise under the Reclamation Act of 1902  
19 and not under the compact.

20 And so the Special Master was correct  
21 in his recommendation that the United States  
22 should participate in order to enforce its  
23 treaty obligations, but it does so under the  
24 treaty, which it can bring in this litigation.

25 And as far as rights it's trying to

1 enforce as far as its water rights and other  
2 interests, those would be brought under the  
3 Reclamation Act of 1902 in this litigation.

4 So they are a necessary party, just  
5 not -- not a -- not -- they're just not allowed  
6 to bring Compact claims in our opinion.

7 I'd like to point real quickly to the  
8 third --

9 JUSTICE GINSBURG: But the -- but when  
10 you made that claim it was only a compact, this  
11 case was about a compact between New Mexico and  
12 Texas, and it was in that setting that you said  
13 the United States was necessary.

14 MR. RAEL: You -- you are correct,  
15 Justice Ginsburg. New Mexico backed away from  
16 that position when we acceded to the fact that  
17 the project is incorporated into the -- into  
18 the compact.

19 It's just in the incorporation of that  
20 project. We're not acceding to the fact that  
21 -- that the United States, who's not a  
22 signatory and whose apportionment of water has any  
23 claims or rights, rights of enforcement, under  
24 the compact itself. That's between three  
25 sovereign entities: the State of Texas, the

1 State of New Mexico, and the State of Colorado.

2 What we're saying is that we -- we --  
3 we -- the Special Master found a very elegant  
4 solution which we support and think that they  
5 still need to participate, but participating  
6 under the Reclamation Act and under the treaty  
7 itself is -- is the manner in which the United  
8 States can -- can find its remedies.

9 JUSTICE SOTOMAYOR: Are you differing  
10 from Texas and acknowledging that the U.S.  
11 could sue New Mexico for a reclamation claim so  
12 that it doesn't have to sue the individual  
13 water users?

14 MR. RAEL: I -- I -- I am, Your Honor,  
15 in -- in the sense that -- that the -- the  
16 Reclamation Act of 1902 is so comprehensive  
17 that the United States under -- under all of  
18 the different portions of the Reclamation Act  
19 can sue, in our opinion, the State of New  
20 Mexico.

21 And I think it's important to note  
22 that in -- in -- in Nebraska v. Wyoming, the  
23 United States was saying -- actually said we --  
24 we can't be sued because we weren't apportioned  
25 any water. And yet here the United States is

1 saying we can sue New Mexico even though we  
2 haven't been apportioned any water.

3 And so that -- that -- that's  
4 inconsistent in my opinion. When they -- when  
5 they sought their defensive motion for summary  
6 judgment, that -- that was their -- their  
7 argument.

8 JUSTICE KAGAN: Do you think a state  
9 could sue the United States under this compact,  
10 if the United States started acting in a way  
11 that was inconsistent with its terms?

12 MR. RAEL: Justice Kagan, yes, I do --  
13 I do believe so. I believe that -- that a  
14 state has the -- the opportunity to try and sue  
15 the United States, for example, if we were to  
16 say, if New Mexico was to say your -- your  
17 operation of the project is interfering with  
18 our ability to meet our compact obligations to  
19 the State of Texas, I believe that we could do  
20 that.

21 JUSTICE KAGAN: So, if the United  
22 States is so integrally a part of this system  
23 that a state could sue the federal government,  
24 why can't the same be true back again the other  
25 way?

1           MR. RAEL: Because the United States  
2 doesn't own any -- any right -- any water, any  
3 rights under -- under the compact, or even  
4 under the project. Those water rights are  
5 owned by the landowners themselves who are  
6 represented by their individual states as  
7 *parens patriae*.

8           And so the United States has an  
9 interest in the -- in the project, and they can  
10 certainly sue to enforce to make sure that  
11 we're meeting our -- our -- that we're not  
12 interfering with its project obligations, but  
13 it -- it -- it can't sue us -- under the  
14 compact, that's being done by Texas right now.

15           And -- and the -- the -- it's  
16 important to note that both Texas' claims and  
17 the United States' claims arise under the same  
18 operative facts. And -- and so Texas will be  
19 able to -- and I believe both Texas and the  
20 United States agree that, later in the  
21 litigation, they're not sure, as you -- as you  
22 heard the -- the General say, they're not sure  
23 whether or not their interests are going to be  
24 the same at the -- at the end of this. But to  
25 the --

1 JUSTICE SOTOMAYOR: I'm sorry, did you  
2 say the United States could sue under the  
3 project?

4 MR. RAEL: They can -- they can sue to  
5 enforce, in -- in my opinion, if -- if -- if  
6 New Mexico is interfering with their project  
7 obligations, they can certainly sue to -- to --

8 JUSTICE SOTOMAYOR: But not under the  
9 contact -- I mean, not under the compact?

10 MR. RAEL: Correct. They're not a  
11 party --

12 JUSTICE SOTOMAYOR: I just don't  
13 understand that. If the compact requires New  
14 Mexico to deliver a certain amount of water to  
15 the United States and not to touch that water,  
16 that's the government's action, you -- you're  
17 -- you're not acceding that that's what the  
18 compact says, and it's breaching -- and that  
19 lack of delivery is breaching other federal  
20 contracts, why can't they sue under the  
21 project?

22 MR. RAEL: Mr. Chief Justice, may I?

23 JUSTICE SOTOMAYOR: I mean, under the  
24 compact?

25 CHIEF JUSTICE ROBERTS: Sure. Please.

1 MR. RAEL: The -- the -- the United --  
2 the compact doesn't require the United -- I  
3 mean, New Mexico to deliver any portion of  
4 water to -- to the United States. The -- the  
5 -- the -- the project is simply a delivery  
6 vehicle.

7 The water is already allocated amongst  
8 the three states itself. And while the United  
9 States uses the -- the vehicle as a means to  
10 meet its -- its treaty obligations with the  
11 Republic of Mexico, it's important to note that  
12 they have first entitlement to that water and  
13 they deliver that water first every year.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 MR. RAEL: Thank you for this honor.

17 CHIEF JUSTICE ROBERTS: Ms. O'Connell,  
18 you have four minutes remaining.

19 REBUTTAL ARGUMENT OF ANN O'CONNELL

20 ON BEHALF OF UNITED STATES AS INTERVENOR

21 MS. O'CONNELL: Thank you, Mr. Chief  
22 Justice. Three points in rebuttal.

23 The first is in response to Colorado's  
24 argument that the complaint filed by the United  
25 States in this case is unprecedented. It's

1 not.

2 The case that Colorado is -- is  
3 relying upon, Kansas versus Nebraska, was a  
4 case where there was an admitted violation of a  
5 compact by Nebraska. The states were just  
6 talking about what the damages were. The  
7 United States' operations of any projects in  
8 that region were not going to be affected by  
9 what the damages were. That's why we  
10 participated in this case as an amicus.

11 In other cases, we've cited some in  
12 our briefs, Texas versus New Mexico, the Pecos  
13 River case, and also Texas and New Mexico  
14 versus Colorado, a prior case brought in order  
15 to enforce this same compact, the Rio Grande  
16 Compact, in both of those cases the defendant  
17 state, so in the Pecos River case, New Mexico,  
18 and in -- in Texas versus Colorado, Colorado,  
19 asserted that the United States was a required  
20 party to the action.

21 And so, to be helpful, we intervened  
22 as a plaintiff in each of those cases,  
23 presented what the United States' interests  
24 were, and then asked for general equitable  
25 relief, whatever relief would protect our



1 interests.

2 In the Texas versus Colorado, the  
3 United States specifically explained that even  
4 though it has no apportionment of water under  
5 the Rio Grande Compact, it acknowledged that  
6 the compact could be interpreted in such a way  
7 as to affect the United States' interests and  
8 it believed its interests would be protected by  
9 Colorado's compliance with the compact.

10 JUSTICE SOTOMAYOR: You weren't  
11 signatures in either of those two cases, right?

12 MS. O'CONNELL: No.

13 JUSTICE SOTOMAYOR: To the compacts I  
14 mean?

15 MS. O'CONNELL: That's correct. And  
16 in both cases, we were permitted to intervene.  
17 We filed complaints against the defendant  
18 state.

19 The second point, just reiterating  
20 that -- or answering the question whether there  
21 is a difference between the claims asserted by  
22 Texas and the United States, their interests  
23 are not necessarily completely aligned in this  
24 case. This is an interstate project that has  
25 delivery obligations both in New Mexico and

1 Texas. So the United States couldn't be  
2 expected to rely on Texas to assert its  
3 interests here.

4 The project also has international  
5 obligations to Mexico, as we have discussed  
6 quite a bit, and I'll point out that under  
7 Article II of that treaty with Mexico, if  
8 there's not enough water for the irrigation  
9 districts in the United States, the -- the  
10 amount that we send to Mexico becomes less.

11 And so the United States has quite an  
12 interest that we couldn't be expected to rely  
13 on Texas to protect, in making sure that --  
14 that Mexico is not being shorted because of the  
15 way that the compact is interpreted.

16 Finally, just on this point of, as  
17 Justice Kagan put it, why everybody cares so  
18 much about whether these are compact claims or  
19 reclamation law claims, the Master said that we  
20 could bring reclamation law claims. We're not  
21 totally sure that that's enough to bring claims  
22 against the State of New Mexico.

23 The reason why New Mexico is a proper  
24 defendant against such claims is because of the  
25 compact, because the compact has bound New

1 Mexico to protect the project and to allow the  
2 United States to release water in order to --  
3 to meet its contract obligations and its treaty  
4 obligations to Mexico.

5 And so we don't want there to be any  
6 confusion going forward when the United -- when  
7 the Master says the United States' complaint  
8 has to be dismissed to the extent it brings  
9 claims under the compact, what that means. We  
10 think we sort of need the compact to make those  
11 other claims work. Thank you.

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

14 (Whereupon, at 11:04 a.m., the case  
15 was submitted.)

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## Official - Subject to Final Review

<b>0</b>	<b>accordance</b> [3] 8:18 12:5 34:21 <b>acknowledge</b> [1] 36:24 <b>acknowledged</b> [1] 64:5 <b>acknowledging</b> [1] 58:10 <b>acre</b> [1] 11:22 <b>acre-feet</b> [3] 10:20 23:12 52:10 <b>across</b> [1] 54:13 <b>Act</b> [14] 25:1,25 36:1 45:9 53:3,12 54:20 55:2,4 56:18 57:3 58:6,16, 18 <b>acting</b> [3] 5:10 20:16 59:10 <b>action</b> [13] 4:19 17:22 18:25 19:7 20:12,15 22:3 24:7 25:7 31:11 32: 23 61:16 63:20 <b>actions</b> [2] 5:19 21:23 <b>actually</b> [6] 15:17 21:16 23:18 25: 18 29:19 58:23 <b>additional</b> [1] 12:13 <b>Additionally</b> [1] 10:8 <b>addressed</b> [1] 4:18 <b>addressing</b> [1] 26:18 <b>adjudication</b> [1] 50:20 <b>administer</b> [2] 46:24 55:23 <b>administered</b> [1] 48:1 <b>administering</b> [1] 32:19 <b>administrators</b> [1] 55:15 <b>administrative</b> [1] 45:13 <b>admitted</b> [1] 63:4 <b>adopted</b> [1] 3:15 <b>advisory</b> [1] 26:25 <b>affect</b> [6] 11:18 27:13 30:17 42:10 43:6 64:7 <b>affected</b> [1] 63:8 <b>affects</b> [2] 19:2 43:2 <b>affirmative</b> [2] 37:11,14 <b>afraid</b> [1] 18:3 <b>agree</b> [7] 19:18 31:6 34:1 40:19 42: 12,13 60:20 <b>agreed</b> [2] 5:25 12:1 <b>agreeing</b> [2] 18:22 29:25 <b>agreement</b> [8] 16:1 30:11,11 33: 11,12,14,16 50:15 <b>agreements</b> [1] 40:17 <b>agrees</b> [2] 29:22 51:9 <b>Albuquerque</b> [1] 1:24 <b>aligned</b> [1] 64:23 <b>alleged</b> [1] 51:19 <b>allocated</b> [1] 62:7 <b>allocation</b> [3] 17:18 52:16 53:18 <b>allocations</b> [1] 10:23 <b>allotment</b> [1] 24:25 <b>allow</b> [8] 13:18 25:13 26:12 44:23 52:13 54:8,8 66:1 <b>allowed</b> [8] 19:24 31:14 48:10 51: 15 52:9 53:15,24 57:5 <b>allowing</b> [2] 29:22 54:25 <b>allows</b> [2] 52:4 53:4 <b>almost</b> [1] 53:5 <b>already</b> [5] 10:20 44:18 52:8 55:18 62:7 <b>ambiguity</b> [1] 36:24 <b>Amendment</b> [1] 55:12 <b>amicus</b> [8] 9:10 10:13 29:14 33:15 34:14 41:19 46:9 63:10	<b>among</b> [4] 33:11 35:8 39:25 47:25 <b>amongst</b> [1] 62:7 <b>amount</b> [6] 13:2,3 30:17 42:8 61: 14 65:10 <b>analysis</b> [3] 30:15,23,24 <b>ANN</b> [5] 1:17 2:3,15 3:8 62:19 <b>another</b> [6] 23:23 24:11,13 25:4, 19 48:7 <b>answer</b> [2] 15:18 18:2 <b>answering</b> [2] 30:2 64:20 <b>apologize</b> [1] 56:15 <b>appear</b> [1] 7:18 <b>APPEARANCES</b> [1] 1:16 <b>appendix</b> [1] 8:2 <b>applied</b> [1] 11:11 <b>applies</b> [1] 27:19 <b>apportion</b> [3] 32:14 47:25 57:22 <b>apportioned</b> [5] 28:18 29:24 40:2 58:24 59:2 <b>apportionment</b> [35] 3:18 9:24 10: 1 12:24 21:14,17,22 22:1,16 23:6, 25 24:17,24 25:15 26:14 27:5 28: 8 29:5,19 31:16 35:8 36:15 37:5, 20 38:1 39:15,25 40:6 41:15 43:1 44:13 50:5,8,17 64:4 <b>appropriate</b> [3] 14:17 35:4 41:3 <b>appropriated</b> [1] 10:20 <b>approval</b> [1] 45:1 <b>approve</b> [4] 19:7,14,15 39:8 <b>approved</b> [3] 6:24 44:16,21 <b>approves</b> [1] 39:9 <b>area</b> [1] 11:10 <b>aren't</b> [3] 15:8 46:10 50:8 <b>argue</b> [1] 56:8 <b>argued</b> [2] 56:4,10 <b>arguing</b> [1] 56:16 <b>argument</b> [28] 1:13 2:2,5,8,11,14 3:4,8 12:19 13:17 14:1 15:1 18:24, 25 19:5,5 21:1 29:21 32:1 34:18 36:6 44:12 47:3,3 51:2 59:7 62:19, 24 <b>arguments</b> [6] 9:10 29:18 31:2,4 41:25 45:25 <b>arise</b> [5] 24:15 42:24 51:21 56:18 60:17 <b>arises</b> [2] 21:9 51:20 <b>Arlington</b> [1] 17:9 <b>Article</b> [8] 8:6,7,10,14,20 11:17,20 65:7 <b>aside</b> [1] 18:7 <b>assert</b> [6] 32:25 33:3,4 41:24 45:5 65:2 <b>asserted</b> [7] 3:22 9:20 15:3 32:21 34:12 63:19 64:21 <b>asserting</b> [6] 13:5,7 34:13 42:21 48:15 49:7 <b>Assistant</b> [1] 1:17 <b>attention</b> [1] 36:5 <b>Austin</b> [1] 1:21 <b>authority</b> [1] 33:17 <b>authorizes</b> [2] 43:13,14 <b>available</b> [2] 8:17 34:21 <b>avoid</b> [3] 5:6,16 55:8 <b>aware</b> [1] 20:1	<b>away</b> [1] 57:15 <hr/> <b>B</b> <b>back</b> [10] 12:25 17:3 33:7 36:1 39: 23 42:2,25 44:15 49:8 59:24 <b>backdrop</b> [1] 44:17 <b>backed</b> [1] 57:15 <b>based</b> [3] 7:12 17:5 29:17 <b>basic</b> [1] 10:15 <b>Basically</b> [1] 36:16 <b>basis</b> [2] 15:12 25:24 <b>becomes</b> [2] 12:4 65:10 <b>begin</b> [1] 32:6 <b>behalf</b> [15] 1:19,21,23,25 2:4,7,10, 13,16 3:9 21:3 32:3 51:3,7 62:20 <b>believe</b> [9] 7:10 24:13 27:5 29:8 31:12 59:13,13,19 60:19 <b>believed</b> [1] 64:8 <b>below</b> [3] 3:21 8:12 9:1 <b>beneficiary</b> [2] 19:5 38:19 <b>besides</b> [1] 28:3 <b>best</b> [3] 14:19 33:9 47:3 <b>between</b> [22] 4:9,13,25 6:11 7:4 11:13 12:14 13:12,20 15:7 22:5,7 23:16 24:17 25:7 26:8 33:10 39: 19 44:13 57:11,24 64:21 <b>beyond</b> [2] 26:17,18 <b>bind</b> [2] 48:6,8 <b>binding</b> [1] 15:11 <b>bit</b> [1] 65:6 <b>bodies</b> [2] 44:7 52:25 <b>body</b> [3] 45:22 53:4,11 <b>borderline</b> [1] 12:16 <b>both</b> [7] 32:11 44:24 60:16,19 63: 16 64:16,25 <b>bound</b> [16] 3:24 10:5 12:11,17 13: 10,13 14:25 18:18 30:13 46:9,15, 18,21 47:14,22 65:25 <b>breach</b> [1] 43:17 <b>breaching</b> [2] 61:18,19 <b>BREYER</b> [5] 16:10,13 38:4 39:5 44:15 <b>brief</b> [4] 5:19 10:2 14:1 26:16 <b>briefing</b> [3] 34:6 37:2 39:19 <b>briefly</b> [1] 50:1 <b>briefs</b> [2] 17:7 63:12 <b>bring</b> [23] 7:12 14:13 17:4,12,23 19:16 20:4,4 23:25 25:14 28:7,11 32:23 33:17 35:5 43:23 47:12 51: 18 52:19 56:24 57:6 65:20,21 <b>bringing</b> [2] 24:7 45:25 <b>brings</b> [1] 66:8 <b>brought</b> [14] 4:9,10 5:1,19 6:11,12 17:19 18:8,10 20:19 50:13 52:1 57:2 63:14 <b>Bureau</b> [4] 3:17 8:23 15:25 23:2 <b>Butte</b> [3] 8:8,11 22:19 <hr/> <b>C</b> <b>calculate</b> [1] 30:16 <b>calculated</b> [1] 29:5 <b>calculates</b> [1] 16:2 <b>came</b> [1] 1:12 <b>cannot</b> [3] 26:12 51:10 55:23
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## Official - Subject to Final Review

<p><b>capacity</b> [1] 8:11  <b>careful</b> [1] 46:1  <b>cares</b> [4] 52:23 53:2,13 65:17  <b>carried</b> [1] 39:19  <b>carrier</b> [3] 22:14 24:1 28:16  <b>carry</b> [1] 39:15  <b>carving</b> [1] 42:5  <b>case</b> [48] 3:4,5,22 9:20 10:25 14:23 15:17 17:9,11 27:14 33:9,23, 24 34:7,15 35:6 36:17 38:1 39:1 41:4 44:12,25 45:25 47:7,8,11,20, 22 49:4,22,25 50:5,17 54:23 55:1, 3,21 57:11 62:25 63:2,4,10,13,14, 17 64:24 66:13,14  <b>cases</b> [17] 6:15 11:12 17:6 20:13 26:8 33:7 35:21 38:5 41:7,17,20 48:13 63:11,16,22 64:11,16  <b>cause</b> [1] 17:22  <b>center</b> [1] 28:8  <b>central</b> [1] 24:22  <b>century</b> [1] 32:18  <b>certain</b> [3] 42:8 43:16 61:14  <b>certainly</b> [8] 9:9 27:13 46:21 48:25,25 50:18 60:10 61:7  <b>change</b> [1] 11:24  <b>Chicago</b> [2] 17:7,15  <b>CHIEF</b> [28] 3:3,10 9:6,14 10:14 12:8 18:23 19:13 20:23 21:4 27:15 28:4 31:19,21,23 32:4 46:6,12 49:9 50:24 51:4 54:16 61:22,25 62:14,17,21 66:12  <b>choosing</b> [1] 39:21  <b>Circuit</b> [2] 17:8,10  <b>cited</b> [2] 17:6 63:11  <b>citizens</b> [1] 48:7  <b>claim</b> [36] 4:21,23,25 5:1 6:4,6,7,8, 9 9:8 17:4,23 18:17 20:7 26:3 27:5,22 33:6 35:5 36:3 43:23 44:6 49:19,20 51:15,18,20 52:12,15,23 53:8,15 54:6 55:20 57:10 58:11  <b>claiming</b> [1] 6:23  <b>claims</b> [58] 4:9,10,14 5:22 6:11,12 7:12 9:17 14:4,21 19:16 21:7 24:1, 14,20,21 25:1,4,6,7,9,15,20 26:19 27:8,18 28:7,12 29:9 31:7,15 33:18,19 41:3 48:15 49:2 50:6,15,16, 21 51:11,25,25 52:20 54:18 56:18 57:6,23 60:16,17 64:21 65:18,19, 20,21,24 66:9,11  <b>Clause</b> [2] 27:23 39:20  <b>clear</b> [3] 11:10 43:10,21  <b>clearly</b> [2] 7:25 45:11  <b>colleague</b> [1] 52:12  <b>COLORADO</b> [22] 1:6,22,23,23 2:10 3:6 24:17 32:2,3,13,18 39:22 48:19 49:12 51:10 53:14 58:1 63:2,14,18,18 64:2  <b>Colorado's</b> [5] 32:9 36:4 50:2 62:23 64:9  <b>com</b> [1] 7:5  <b>combined</b> [1] 8:11  <b>come</b> [6] 6:25 7:4,6 29:3 37:19 43:18  <b>coming</b> [3] 19:20 20:12 23:14</p>	<p><b>commerce</b> [2] 39:20 40:4  <b>Commission</b> [1] 39:14  <b>commissioners</b> [1] 39:12  <b>Compact</b> [144] 3:12,13,15 4:10,25 5:23,25 6:8,12,24 7:5,6,8,13,15,16 8:2,7 9:11,24,25 11:2,3,4 12:2,23 13:24 17:5 18:10,17,22 19:1,7 20:5,7,10,20 21:6,7 22:7,10,23,24 23:6,22 24:8,15,16,23 25:7,14 26:5, 12,18 27:5,8,19,23 28:7,12,13 29:9 30:21,22 31:7,15 32:23 33:18, 20 34:3,19 35:7,10,10,14,16 36:2 37:7 38:9,13 39:8,9,10,16,24 40:16 42:9 43:2,12 44:16,22,23 45:1, 9,11,18 46:3,20,22 48:15 49:18 51:11,22 52:1,12,15,15,24 53:10, 16 54:6,13,13,18 55:5,17,25 56:19 57:6,10,11,18,24 59:9,18 60:3,14 61:9,13,18,24 62:2 63:5,15,16 64:5,6,9 65:15,18,25,25 66:9,10  <b>compact's</b> [1] 21:13  <b>compacting</b> [1] 55:15  <b>compacts</b> [7] 20:2,18 28:2 32:14, 16,19 64:13  <b>compacts'</b> [1] 32:17  <b>Company</b> [1] 20:14  <b>complaint</b> [13] 4:3,8 6:10,14 10:4 13:7 14:3,7 18:15 50:12 55:3 62:24 66:7  <b>complaints</b> [1] 64:17  <b>complete</b> [1] 13:11  <b>completely</b> [2] 11:10 64:23  <b>complex</b> [1] 54:20  <b>compliance</b> [3] 20:4,19 64:9  <b>comply</b> [2] 5:11 20:10  <b>comprehensive</b> [3] 53:4,11 58:16  <b>compromise</b> [1] 10:16  <b>concern</b> [1] 47:8  <b>concerned</b> [4] 28:1 36:5 46:4 49:12  <b>concerns</b> [1] 50:4  <b>conclusion</b> [1] 22:17  <b>conflict</b> [2] 11:13,16  <b>confusion</b> [2] 25:6 66:6  <b>Congress</b> [9] 6:24 11:6,23 38:8, 10 41:13 43:3 44:16 48:4  <b>connection</b> [1] 7:23  <b>consent</b> [3] 19:24 38:8,9  <b>consistent</b> [3] 35:15 43:3 48:2  <b>Constitution</b> [2] 38:7,24  <b>construed</b> [1] 9:12  <b>contact</b> [2] 6:8 61:9  <b>contained</b> [1] 45:17  <b>content</b> [2] 18:7,11  <b>context</b> [4] 35:8 37:25 49:22,25  <b>continue</b> [2] 28:7 31:13  <b>contract</b> [6] 3:20 5:9 42:7 43:9,24 66:3  <b>contracts</b> [5] 8:25 13:1 34:10 43:20 61:20  <b>contractual</b> [4] 40:17 42:11 43:22 44:19  <b>control</b> [5] 22:19,21,21 28:19 30:22</p>	<p><b>controls</b> [2] 3:19 11:12  <b>corporation</b> [2] 17:16,20  <b>correct</b> [10] 7:1 9:13 16:12 22:17 25:23 54:2 56:20 57:14 61:10 64:15  <b>corroboration</b> [1] 15:16  <b>Couldn't</b> [5] 19:10 33:4 43:18 65:1, 12  <b>counsel</b> [3] 20:24 62:15 66:13  <b>country</b> [1] 54:14  <b>County</b> [1] 17:9  <b>couple</b> [2] 9:18 37:3  <b>course</b> [5] 23:19,20 33:1 46:18 47:23  <b>COURT</b> [44] 1:1,13 3:11 6:18,25 7:10 9:23 12:23 14:6,8,20 15:6 17:10,21 20:16 21:5 22:4 23:21 28:10 29:7 32:5,21 33:1,6 36:10 37:17,18 41:16 43:4 45:12,14,18,20 49:15 50:10,12,18 51:5 52:8 53:14,22 54:21 55:7,18  <b>Court's</b> [5] 3:25 14:15 15:5 17:6 20:12  <b>courts</b> [2] 36:10 50:22  <b>creates</b> [1] 21:7  <b>credit</b> [1] 8:16  <b>crux</b> [1] 27:4  <b>cubic</b> [1] 43:11  <b>curious</b> [1] 15:4  <b>current</b> [1] 30:14</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D.C</b> [2] 1:9,18  <b>damages</b> [2] 63:6,9  <b>danger</b> [1] 54:3  <b>dangerous</b> [1] 54:10  <b>dates</b> [1] 30:15  <b>deal</b> [1] 38:20  <b>Debs</b> [1] 20:13  <b>decide</b> [1] 39:24  <b>decided</b> [2] 49:3 50:18  <b>deciding</b> [1] 9:24  <b>decision</b> [3] 15:5 28:17 50:9  <b>decisions</b> [1] 37:17  <b>declaratory</b> [1] 36:16  <b>decree</b> [12] 3:25 10:5 12:11,21 13:10,14 14:25 37:5,15,16 45:18 46:10  <b>deemed</b> [1] 52:8  <b>defaulting</b> [1] 34:10  <b>Defendant</b> [10] 1:23,25 2:10,13 14:22 32:3 51:3 63:16 64:17 65:24  <b>Defendants</b> [1] 1:7  <b>defensive</b> [2] 37:12 59:5  <b>defines</b> [2] 8:7,10  <b>definition</b> [2] 8:14 23:7  <b>definitions</b> [1] 8:5  <b>deliver</b> [8] 3:14 5:14 8:8 43:11,19 61:14 62:3,13  <b>delivered</b> [5] 8:22 12:3 23:9,13,23 49:17,19  <b>deliveries</b> [6] 8:19,20 15:24 34:22  <b>delivering</b> [1] 10:9  <b>delivers</b> [1] 22:11</p>	<p><b>delivery</b> [6] 3:20 21:21 28:13 61:19 62:5 64:25  <b>demand</b> [1] 39:14  <b>demands</b> [4] 8:18 12:5 23:8 34:22  <b>denied</b> [1] 14:8  <b>Denver</b> [1] 1:23  <b>Department</b> [2] 1:18 15:15  <b>dependent</b> [1] 43:21  <b>deposits</b> [1] 22:18  <b>despite</b> [2] 7:5 48:13  <b>determination</b> [1] 10:17  <b>determinations</b> [1] 28:1  <b>determine</b> [3] 12:12 40:1,5  <b>differ</b> [2] 30:4 51:25  <b>difference</b> [13] 4:25 9:7,15 14:11 28:5 29:12 30:8 37:3 39:18 49:10 52:7,20 64:21  <b>different</b> [10] 4:22,22 13:1,2 18:11 24:6 39:21 40:3 41:17 58:18  <b>differing</b> [1] 58:9  <b>directly</b> [2] 17:19 22:24  <b>disagree</b> [2] 39:4 40:9  <b>disallow</b> [1] 53:24  <b>disclaimed</b> [1] 37:15  <b>disclaims</b> [1] 11:18  <b>discrete</b> [1] 4:20  <b>discussed</b> [1] 65:5  <b>discusses</b> [2] 37:2,2  <b>discussing</b> [1] 32:7  <b>dismiss</b> [4] 5:17 14:2,9 18:5  <b>dismissed</b> [3] 14:3 18:16 66:8  <b>dispositive</b> [1] 37:9  <b>dispute</b> [13] 4:2,5 7:9 17:14 22:4,7 28:9 36:12 37:18 42:10 47:6 49:5 51:17  <b>disputes</b> [4] 26:8 29:3 33:15 46:3  <b>distinction</b> [1] 4:11  <b>distinctive</b> [1] 14:18  <b>distinguish</b> [2] 4:9 6:11  <b>distinguished</b> [2] 4:13 15:6  <b>distribute</b> [4] 21:8,16,25 43:15  <b>distributor</b> [3] 22:14 24:1 28:15  <b>District</b> [6] 17:7,15 20:13 22:4 36:10 50:12  <b>districts</b> [5] 9:1 16:1 42:8 50:14 65:9  <b>diverge</b> [1] 29:7  <b>diverging</b> [1] 28:25  <b>diversions</b> [3] 26:10,12 29:23  <b>diverting</b> [1] 25:21  <b>dividing</b> [1] 7:4  <b>dog</b> [1] 37:23  <b>doing</b> [1] 24:16  <b>domestic</b> [8] 11:25 15:12,13 40:15 41:11,12 44:19,24  <b>done</b> [3] 6:15 41:8 60:14  <b>door</b> [2] 52:11 54:11  <b>downstream</b> [1] 23:24  <b>draw</b> [1] 39:18  <b>due</b> [1] 23:19  <b>during</b> [1] 44:11  <b>duties</b> [1] 40:18  <b>duty</b> [5] 21:8,9,25 22:14 26:9</p>
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## Official - Subject to Final Review

<p><b>E</b></p> <p><b>each</b> [4] 16:3 36:21,23 63:22</p> <p><b>earlier</b> [2] 37:17 56:4</p> <p><b>early</b> [3] 26:21 39:23,23</p> <p><b>echo</b> [1] 50:3</p> <p><b>economy</b> [2] 25:11 55:7</p> <p><b>effect</b> [2] 19:9 45:10</p> <p><b>either</b> [5] 41:16,18 43:23 45:17 64:11</p> <p><b>elegant</b> [2] 54:24 58:3</p> <p><b>Elephant</b> [3] 8:8,11 22:18</p> <p><b>enacted</b> [7] 11:2,3 15:19 16:7,10,11,16</p> <p><b>encompass</b> [1] 37:21</p> <p><b>end</b> [8] 12:15 14:1 16:13,18 27:21 30:3 39:1 60:24</p> <p><b>enforce</b> [10] 17:4 19:16 23:4 52:4,9 56:22 57:1 60:10 61:5 63:15</p> <p><b>enforceable</b> [2] 15:11,13</p> <p><b>enforcement</b> [1] 57:23</p> <p><b>enough</b> [2] 65:8,21</p> <p><b>ensure</b> [3] 22:15 23:5 28:17</p> <p><b>ensuring</b> [1] 43:20</p> <p><b>enter</b> [2] 38:8,13</p> <p><b>entered</b> [2] 30:12,22</p> <p><b>entities</b> [1] 57:25</p> <p><b>entitled</b> [3] 9:3,8,17</p> <p><b>entitlement</b> [1] 62:12</p> <p><b>entity</b> [1] 10:6</p> <p><b>envisioned</b> [1] 26:20</p> <p><b>equitable</b> [28] 3:18 20:8,15 21:13,16,21,25 22:15 23:6,24 24:16,24 25:14 26:13 27:4 28:8,18 29:5,19,24 31:16 37:5 38:1 39:15 40:6 41:15 43:1 63:24</p> <p><b>equity</b> [1] 20:17</p> <p><b>error</b> [1] 9:4</p> <p><b>establish</b> [2] 41:22 49:25</p> <p><b>establishes</b> [1] 49:23</p> <p><b>even</b> [13] 10:3 13:19 14:3,12 22:7 26:10 36:9 40:16 48:23 56:13 59:1 60:3 64:3</p> <p><b>everybody</b> [3] 52:23 53:2 65:17</p> <p><b>everything</b> [1] 19:21</p> <p><b>evidence</b> [1] 14:24</p> <p><b>exactly</b> [4] 23:17 26:14 31:1 45:4</p> <p><b>example</b> [5] 5:2 30:24 33:9 34:5 59:15</p> <p><b>exception</b> [6] 18:14 32:7,9,10 50:2 51:13</p> <p><b>excess</b> [1] 17:17</p> <p><b>exclusive</b> [1] 8:16</p> <p><b>Excuse</b> [1] 24:5</p> <p><b>executed</b> [1] 15:21</p> <p><b>exercise</b> [1] 40:4</p> <p><b>existence</b> [1] 15:22</p> <p><b>existing</b> [1] 3:17</p> <p><b>expected</b> [2] 65:2,12</p> <p><b>explain</b> [1] 6:22</p> <p><b>explained</b> [3] 4:5 10:2 64:3</p> <p><b>explicit</b> [1] 54:7</p> <p><b>express</b> [1] 32:16</p> <p><b>expressly</b> [1] 32:16</p>	<p><b>extent</b> [4] 18:16 43:1 46:22 66:8</p> <p><b>extraneous</b> [1] 50:7</p> <p><b>F</b></p> <p><b>facilities</b> [1] 34:4</p> <p><b>facility</b> [3] 33:25 34:2 36:18</p> <p><b>facing</b> [1] 54:3</p> <p><b>fact</b> [8] 11:17 33:2,13 37:15 42:24 47:4 57:16,20</p> <p><b>facts</b> [2] 21:10 60:18</p> <p><b>fairly</b> [1] 23:21</p> <p><b>far</b> [4] 29:20 35:25 56:25 57:1</p> <p><b>farmers</b> [1] 25:21</p> <p><b>federal</b> [34] 4:4 7:8,15,19 10:12 11:14 13:7 14:18 15:3,10 17:13 19:8 22:11,22 23:1 25:19 32:15 33:25 34:2,4 37:19 38:17,18 42:16,19 43:14,20 45:12 48:8,9,14 55:10 59:23 61:19</p> <p><b>feel</b> [1] 46:15</p> <p><b>feet</b> [2] 11:22 43:11</p> <p><b>few</b> [1] 17:6</p> <p><b>figure</b> [1] 52:22</p> <p><b>file</b> [5] 5:22,23 6:4 10:3 22:3</p> <p><b>filed</b> [6] 4:3 5:17,21 7:10 62:24 64:17</p> <p><b>filing</b> [1] 18:14</p> <p><b>Finally</b> [2] 51:17 65:16</p> <p><b>find</b> [1] 58:8</p> <p><b>first</b> [16] 3:4 4:17 9:19 10:4 13:19 21:11 32:9 41:1 49:11,21 50:2 51:8 52:14 62:12,13,23</p> <p><b>fit</b> [1] 41:21</p> <p><b>five</b> [2] 36:25 38:12</p> <p><b>flip</b> [1] 12:19</p> <p><b>flips</b> [1] 46:16</p> <p><b>flows</b> [1] 30:17</p> <p><b>focus</b> [1] 24:22</p> <p><b>follow</b> [1] 16:5</p> <p><b>foreclosed</b> [1] 33:6</p> <p><b>foresees</b> [1] 38:24</p> <p><b>Forget</b> [1] 43:10</p> <p><b>format</b> [1] 9:5</p> <p><b>forth</b> [1] 6:16</p> <p><b>forward</b> [10] 3:23 14:5,8 18:4 25:2,12 27:3,20 31:13 66:6</p> <p><b>found</b> [3] 37:10 54:24 58:3</p> <p><b>founders</b> [1] 38:11</p> <p><b>four</b> [3] 36:25 38:12 62:18</p> <p><b>Fourth</b> [2] 17:8,10</p> <p><b>framework</b> [1] 3:18</p> <p><b>FREDERICK</b> [3] 1:22 2:9 32:1</p> <p><b>free</b> [1] 12:13</p> <p><b>friends</b> [1] 24:19</p> <p><b>fulfill</b> [2] 42:11 44:24</p> <p><b>fulfilled</b> [1] 29:20</p> <p><b>fulfilling</b> [1] 21:24</p> <p><b>full</b> [1] 4:1</p> <p><b>further</b> [2] 31:18 50:23</p> <p><b>further</b> [1] 35:15</p> <p><b>future</b> [4] 5:17 33:15 46:3 47:10</p> <p><b>G</b></p> <p><b>General</b> [14] 1:17,20,22 11:11 20:</p>	<p>25 21:2 22:3 31:20,23 32:2 40:9 50:25 60:22 63:24</p> <p><b>generally</b> [1] 23:12</p> <p><b>gets</b> [2] 37:25 42:2</p> <p><b>GINSBURG</b> [17] 6:3,21 7:3 15:20 32:24 33:22 47:11,13,18 48:16 53:20,22 56:3,9,14 57:9,15</p> <p><b>give</b> [7] 10:19 19:1,23 35:9 39:10 40:17 43:22</p> <p><b>given</b> [2] 16:2 28:13</p> <p><b>GORSUCH</b> [6] 15:2 16:17,24 17:1 42:3,15</p> <p><b>got</b> [1] 36:4</p> <p><b>government</b> [12] 16:21 19:8 22:12,22 25:19 26:3 34:17 43:18 45:12 48:9,9 59:23</p> <p><b>government's</b> [2] 4:4 61:16</p> <p><b>Grande</b> [4] 3:12 21:12 63:15 64:5</p> <p><b>grant</b> [1] 46:23</p> <p><b>granted</b> [1] 49:5</p> <p><b>ground</b> [1] 18:5</p> <p><b>groundwater</b> [1] 34:8</p> <p><b>group</b> [1] 19:17</p> <p><b>guarantee</b> [1] 21:21</p> <p><b>guess</b> [1] 14:20</p> <p><b>H</b></p> <p><b>happier</b> [1] 31:9</p> <p><b>happy</b> [1] 19:18</p> <p><b>head</b> [1] 46:17</p> <p><b>hear</b> [1] 3:3</p> <p><b>heard</b> [1] 60:22</p> <p><b>heart</b> [2] 22:16 44:12</p> <p><b>held</b> [1] 17:11</p> <p><b>helpful</b> [2] 13:6 63:21</p> <p><b>higher</b> [1] 46:19</p> <p><b>Hinderluder</b> [3] 26:7 42:22 45:15</p> <p><b>holders</b> [1] 3:21</p> <p><b>Honor</b> [5] 54:1,22 56:7 58:14 62:16</p> <p><b>hope</b> [1] 39:3</p> <p><b>however</b> [2] 27:3 31:3</p> <p><b>I</b></p> <p><b>I(k</b> [3] 8:6,10 34:19</p> <p><b>I(l</b> [3] 8:14,21 34:18</p> <p><b>identical</b> [1] 41:6</p> <p><b>identify</b> [1] 4:16</p> <p><b>identifying</b> [1] 7:20</p> <p><b>ignored</b> [1] 35:2</p> <p><b>Il</b> [1] 65:7</p> <p><b>Illinois</b> [1] 17:16</p> <p><b>imagine</b> [1] 19:17</p> <p><b>impact</b> [1] 28:2</p> <p><b>impede</b> [1] 34:9</p> <p><b>implement</b> [1] 12:21</p> <p><b>implicit</b> [3] 54:4,9,12</p> <p><b>implied</b> [3] 18:24 19:6 20:11</p> <p><b>important</b> [5] 40:11 53:7 58:21 60:16 62:11</p> <p><b>impose</b> [1] 40:7</p> <p><b>include</b> [1] 41:3</p> <p><b>included</b> [1] 15:15</p> <p><b>including</b> [6] 8:19 23:8 32:20 33:7</p>	<p>34:22 44:8</p> <p><b>inconsistent</b> [4] 55:8,17 59:4,11</p> <p><b>incorporated</b> [2] 3:16 57:17</p> <p><b>incorporation</b> [1] 57:19</p> <p><b>incorrect</b> [1] 32:11</p> <p><b>indeed</b> [4] 25:13 28:21 35:15 55:21</p> <p><b>independent</b> [2] 32:23 33:17</p> <p><b>indicates</b> [1] 5:18</p> <p><b>indication</b> [1] 41:20</p> <p><b>indirectly</b> [1] 22:25</p> <p><b>individual</b> [5] 5:12,21 27:12 58:12 60:6</p> <p><b>inform</b> [2] 50:19,20</p> <p><b>informs</b> [1] 46:22</p> <p><b>initially</b> [1] 14:14</p> <p><b>initiate</b> [1] 36:9</p> <p><b>initiated</b> [2] 13:18,24</p> <p><b>injunctive</b> [4] 4:6 6:18 17:12,23</p> <p><b>insinuates</b> [1] 5:18</p> <p><b>instance</b> [1] 30:10</p> <p><b>Instead</b> [4] 3:15 22:13 25:8 28:20</p> <p><b>integrally</b> [1] 59:22</p> <p><b>intended</b> [1] 21:20</p> <p><b>intent</b> [1] 11:18</p> <p><b>interacts</b> [1] 15:5</p> <p><b>interest</b> [15] 7:15 15:11 34:11 38:17,18,19,25 42:16,19 43:20 45:8 47:5,7 60:9 65:12</p> <p><b>interested</b> [1] 54:17</p> <p><b>interests</b> [42] 4:4,7,17 6:17,20 7:8,19 10:8,12 13:8 14:18 15:3 17:13 19:2,11 27:13 28:25 29:1 34:13 38:20,21 39:1 40:11,12,19,24 41:2,6,25 42:6 45:3,21 48:14 51:16 57:2 60:23 63:23 64:1,7,8,22 65:3</p> <p><b>interfere</b> [1] 26:13</p> <p><b>interference</b> [1] 51:19</p> <p><b>interferes</b> [1] 55:25</p> <p><b>interfering</b> [5] 5:13 29:23 59:17 60:12 61:6</p> <p><b>international</b> [4] 34:24 40:13 44:25 65:4</p> <p><b>interpreted</b> [2] 64:6 65:15</p> <p><b>interpreting</b> [1] 20:17</p> <p><b>interstate</b> [10] 3:13 20:17 24:16,24 25:14 27:4 31:16 32:13 35:21 64:24</p> <p><b>intervene</b> [7] 7:11 14:12 20:3 26:17 38:16,24 64:16</p> <p><b>intervened</b> [4] 4:2 6:16 9:19 63:21</p> <p><b>Intervenor</b> [2] 1:19 62:20</p> <p><b>intervention</b> [3] 14:16,16 49:4</p> <p><b>intra-state</b> [1] 24:25</p> <p><b>introduce</b> [1] 50:6</p> <p><b>invoke</b> [2] 24:21 25:25</p> <p><b>invoking</b> [1] 25:9</p> <p><b>involve</b> [1] 33:23</p> <p><b>involved</b> [2] 27:13 28:3</p> <p><b>irrigation</b> [7] 8:18,25 12:5 16:1 23:8 34:22 65:8</p> <p><b>isn't</b> [7] 15:13 16:14 18:25 36:13 42:15,16 49:24</p>
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## Official - Subject to Final Review

<p><b>issue</b> <sup>[13]</sup> 4:12,19 23:20 26:22 30:5,9,25 31:6 36:18 37:9 41:7 49:17,19</p> <p><b>issued</b> <sup>[1]</sup> 35:21</p> <p><b>issues</b> <sup>[8]</sup> 23:17 30:7,7 31:9 36:3 41:11,12 50:7</p> <p><b>itself</b> <sup>[8]</sup> 20:3 22:24 24:15 51:22 52:3 57:24 58:7 62:8</p> <p><b>IV</b> <sup>[1]</sup> 8:7</p>	<p>25 15:12,13 16:5,9 18:4,6,9,20 24:21,22 25:9,10,24 34:24 37:20,21 41:14 42:24,25 43:14 44:7,8,9 45:16,22 46:19,24 47:9 50:6,14,19,21 51:15 52:20,25 53:4,11 55:10,10,13,20 65:19,20</p> <p><b>laws</b> <sup>[5]</sup> 4:11 5:13 15:19 35:13,20</p> <p><b>lawsuit</b> <sup>[6]</sup> 24:22 25:12,25 27:4 29:12 31:13</p> <p><b>layers</b> <sup>[1]</sup> 35:20</p> <p><b>least</b> <sup>[3]</sup> 38:17 41:20 49:2</p> <p><b>leave</b> <sup>[1]</sup> 10:3</p> <p><b>legal</b> <sup>[2]</sup> 26:18 46:17</p> <p><b>legislation</b> <sup>[1]</sup> 39:19</p> <p><b>less</b> <sup>[2]</sup> 34:3 65:10</p> <p><b>line</b> <sup>[6]</sup> 3:15 7:4 17:6 22:13 26:7 28:21</p> <p><b>listed</b> <sup>[1]</sup> 38:19</p> <p><b>litigate</b> <sup>[1]</sup> 19:25</p> <p><b>litigated</b> <sup>[6]</sup> 23:19 49:18,20 54:19,20 55:6</p> <p><b>litigating</b> <sup>[2]</sup> 32:19 48:12</p> <p><b>litigation</b> <sup>[22]</sup> 27:3,21 29:4,11 30:3 31:5,10 36:9 41:23,24 48:6,8,10,21 49:13 50:7 53:9 56:6,12,24 57:3 60:21</p> <p><b>long</b> <sup>[1]</sup> 19:22</p> <p><b>long-standing</b> <sup>[1]</sup> 23:10</p> <p><b>look</b> <sup>[6]</sup> 33:7 34:8 37:19 44:15,22 50:11</p> <p><b>looking</b> <sup>[3]</sup> 8:4 30:15 53:6</p> <p><b>lot</b> <sup>[1]</sup> 50:6</p> <p><b>lower</b> <sup>[1]</sup> 50:22</p>	<p>19 7:12 8:19 9:2,20 10:2,9,18 11:19 12:6,13 13:4,21 14:5 15:4 17:5 18:18,21 20:9,19 21:23 22:5,11,12,18,20 23:4,9,13 24:17 26:3,12 28:14,20,22 29:22 34:8,23 38:22 39:22 40:14 42:24,25 44:18 46:23 47:20 48:20 49:19 51:3,8,9,12,17,20 53:13 55:14 56:4,16 57:11,15 58:1,11,20 59:1,16 61:6,14 62:3,11 63:12,13,17 64:25 65:5,7,10,14,22,23 66:1,4</p> <p><b>Mexico's</b> <sup>[8]</sup> 8:7 9:25 12:24 14:2,8 21:23 26:9 50:12</p> <p><b>middle</b> <sup>[4]</sup> 22:12 23:23 28:14,20</p> <p><b>might</b> <sup>[3]</sup> 18:4 26:20 38:13</p> <p><b>mind</b> <sup>[1]</sup> 36:6</p> <p><b>minimal</b> <sup>[1]</sup> 28:6</p> <p><b>minutes</b> <sup>[1]</sup> 62:18</p> <p><b>mirrors</b> <sup>[2]</sup> 36:21,23</p> <p><b>Monday</b> <sup>[1]</sup> 1:10</p> <p><b>morning</b> <sup>[1]</sup> 3:4</p> <p><b>most</b> <sup>[1]</sup> 33:9</p> <p><b>motion</b> <sup>[6]</sup> 5:17 10:3 14:2,9 18:5 59:5</p> <p><b>Ms</b> <sup>[36]</sup> 3:7,10 4:24 5:5 6:10 7:1,7,21,24 9:13,18 10:24 11:8,15 12:7,18 13:25 14:15 15:2,14,22 16:7,12,15,23,25 17:2 18:12 19:12 20:1 28:24 48:17 62:17,21 64:12,15</p> <p><b>much</b> <sup>[10]</sup> 9:2,3 13:22 17:17 20:7 36:21 46:14 52:23 53:2 65:18</p> <p><b>mucking</b> <sup>[1]</sup> 19:20</p> <p><b>multiple</b> <sup>[1]</sup> 35:20</p> <p><b>must</b> <sup>[3]</sup> 22:19 35:24 48:1</p>	<p>63:12,13,17 64:25 65:22,23,25</p> <p><b>nine</b> <sup>[1]</sup> 32:13</p> <p><b>note</b> <sup>[4]</sup> 53:7 58:21 60:16 62:11</p> <p><b>Number</b> <sup>[1]</sup> 3:5</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O'CONNELL</b> <sup>[41]</sup> 1:17 2:3,15 3:7,8,10 4:24 5:5 6:10 7:1,7,21,24 9:13,18 10:24 11:8,15 12:7,18 13:25 14:15 15:2,14,22 16:7,12,15,23,25 17:2 18:12 19:12 20:1 28:24 48:17 62:17,19,21 64:12,15</p> <p><b>object</b> <sup>[1]</sup> 45:24</p> <p><b>obligated</b> <sup>[1]</sup> 44:1</p> <p><b>obligation</b> <sup>[11]</sup> 5:14 8:8 10:22 11:4,19,23 12:6 26:4 34:25 43:22 52:10</p> <p><b>obligations</b> <sup>[25]</sup> 7:17,25 13:23 18:18 20:10,20 35:16 37:16 42:7,11 44:18,18,19,24 52:5,18 56:23 59:18 60:12 61:7 62:10 64:25 65:5 66:3,4</p> <p><b>observed</b> <sup>[1]</sup> 49:17</p> <p><b>obtain</b> <sup>[1]</sup> 35:24</p> <p><b>obviously</b> <sup>[2]</sup> 35:22 38:11</p> <p><b>occasion</b> <sup>[1]</sup> 53:23</p> <p><b>occur</b> <sup>[1]</sup> 23:19</p> <p><b>occurs</b> <sup>[1]</sup> 28:14</p> <p><b>often</b> <sup>[2]</sup> 19:6 24:20</p> <p><b>Okay</b> <sup>[5]</sup> 7:21 16:15,24 19:22 40:22</p> <p><b>once</b> <sup>[1]</sup> 33:19</p> <p><b>one</b> <sup>[13]</sup> 15:2 30:5,9,24 31:10 34:18 37:4 43:12 46:7 47:1 48:3,5 54:16</p> <p><b>ongoing</b> <sup>[2]</sup> 37:18 38:1</p> <p><b>only</b> <sup>[5]</sup> 26:6 29:12 48:22 54:12 57:10</p> <p><b>open</b> <sup>[1]</sup> 52:11</p> <p><b>opening</b> <sup>[1]</sup> 54:10</p> <p><b>operate</b> <sup>[3]</sup> 27:10 35:25 37:24</p> <p><b>operated</b> <sup>[2]</sup> 8:13 23:1</p> <p><b>operates</b> <sup>[3]</sup> 8:24 9:22 21:11</p> <p><b>operating</b> <sup>[3]</sup> 15:25 30:11 50:15</p> <p><b>operation</b> <sup>[1]</sup> 59:17</p> <p><b>operations</b> <sup>[1]</sup> 63:7</p> <p><b>operative</b> <sup>[1]</sup> 60:18</p> <p><b>operator</b> <sup>[1]</sup> 36:17</p> <p><b>opine</b> <sup>[2]</sup> 26:21 27:2</p> <p><b>opinion</b> <sup>[6]</sup> 26:25 37:13 57:6 58:19 59:4 61:5</p> <p><b>opinions</b> <sup>[1]</sup> 37:1</p> <p><b>opportunity</b> <sup>[1]</sup> 59:14</p> <p><b>oppose</b> <sup>[1]</sup> 54:25</p> <p><b>opposed</b> <sup>[1]</sup> 24:25</p> <p><b>opposing</b> <sup>[1]</sup> 10:3</p> <p><b>opposition</b> <sup>[1]</sup> 14:2</p> <p><b>oral</b> <sup>[9]</sup> 1:12 2:2,5,8,11 3:8 21:1 32:1 51:2</p> <p><b>order</b> <sup>[7]</sup> 13:10,11 14:23 51:16 56:22 63:14 66:2</p> <p><b>original</b> <sup>[2]</sup> 3:5 25:7</p> <p><b>other</b> <sup>[20]</sup> 4:11 6:15 13:19 22:22 24:19 28:2 36:21,23 44:5,7 46:2,</p>
<p style="text-align: center;"><b>J</b></p> <hr/> <p><b>Jacinto</b> <sup>[1]</sup> 20:14</p> <p><b>January</b> <sup>[1]</sup> 1:10</p> <p><b>jointed</b> <sup>[1]</sup> 48:19</p> <p><b>JR</b> <sup>[3]</sup> 1:24 2:12 51:2</p> <p><b>judgment</b> <sup>[4]</sup> 15:11 36:16 37:13 59:6</p> <p><b>judicial</b> <sup>[2]</sup> 25:11 55:7</p> <p><b>Justice</b> <sup>[123]</sup> 1:18 3:3,10 4:15 5:3 6:3,21 7:3,14,22 9:4,6,14 10:14 11:5,9,24 12:7,8 13:16 14:10 15:2,20 16:4,10,13,17,24 17:1,2,25 18:1,23 19:13 20:23 21:5 22:2 23:3 24:3,5,10 25:17 26:2,16,24 27:6,15 28:4,23 29:10,17 30:1,2,6 31:8,19,22,23 32:5,24 33:22 34:16 35:12,18 36:13 38:3,4 39:5 40:8,22 41:10 42:3,15 43:8 44:1,4,14,15 46:6,12 47:2,11,13,18 48:3,5,16 50:24 51:4,23,24 52:2,17 53:1,20,21,22 54:15,16 55:9 56:1,3,9,14 57:9,15 58:9 59:8,12,21 61:1,8,12,22,23,25 62:14,17,22 64:10,13 65:17 66:12</p> <p><b>Justice's</b> <sup>[1]</sup> 49:9</p> <p><b>justices</b> <sup>[1]</sup> 49:16</p>	<p><b>layers</b> <sup>[1]</sup> 35:20</p> <p><b>least</b> <sup>[3]</sup> 38:17 41:20 49:2</p> <p><b>leave</b> <sup>[1]</sup> 10:3</p> <p><b>legal</b> <sup>[2]</sup> 26:18 46:17</p> <p><b>legislation</b> <sup>[1]</sup> 39:19</p> <p><b>less</b> <sup>[2]</sup> 34:3 65:10</p> <p><b>line</b> <sup>[6]</sup> 3:15 7:4 17:6 22:13 26:7 28:21</p> <p><b>listed</b> <sup>[1]</sup> 38:19</p> <p><b>litigate</b> <sup>[1]</sup> 19:25</p> <p><b>litigated</b> <sup>[6]</sup> 23:19 49:18,20 54:19,20 55:6</p> <p><b>litigating</b> <sup>[2]</sup> 32:19 48:12</p> <p><b>litigation</b> <sup>[22]</sup> 27:3,21 29:4,11 30:3 31:5,10 36:9 41:23,24 48:6,8,10,21 49:13 50:7 53:9 56:6,12,24 57:3 60:21</p> <p><b>long</b> <sup>[1]</sup> 19:22</p> <p><b>long-standing</b> <sup>[1]</sup> 23:10</p> <p><b>look</b> <sup>[6]</sup> 33:7 34:8 37:19 44:15,22 50:11</p> <p><b>looking</b> <sup>[3]</sup> 8:4 30:15 53:6</p> <p><b>lot</b> <sup>[1]</sup> 50:6</p> <p><b>lower</b> <sup>[1]</sup> 50:22</p>	<p><b>Mexico's</b> <sup>[8]</sup> 8:7 9:25 12:24 14:2,8 21:23 26:9 50:12</p> <p><b>middle</b> <sup>[4]</sup> 22:12 23:23 28:14,20</p> <p><b>might</b> <sup>[3]</sup> 18:4 26:20 38:13</p> <p><b>mind</b> <sup>[1]</sup> 36:6</p> <p><b>minimal</b> <sup>[1]</sup> 28:6</p> <p><b>minutes</b> <sup>[1]</sup> 62:18</p> <p><b>mirrors</b> <sup>[2]</sup> 36:21,23</p> <p><b>Monday</b> <sup>[1]</sup> 1:10</p> <p><b>morning</b> <sup>[1]</sup> 3:4</p> <p><b>most</b> <sup>[1]</sup> 33:9</p> <p><b>motion</b> <sup>[6]</sup> 5:17 10:3 14:2,9 18:5 59:5</p> <p><b>Ms</b> <sup>[36]</sup> 3:7,10 4:24 5:5 6:10 7:1,7,21,24 9:13,18 10:24 11:8,15 12:7,18 13:25 14:15 15:2,14,22 16:7,12,15,23,25 17:2 18:12 19:12 20:1 28:24 48:17 62:17,21 64:12,15</p> <p><b>much</b> <sup>[10]</sup> 9:2,3 13:22 17:17 20:7 36:21 46:14 52:23 53:2 65:18</p> <p><b>mucking</b> <sup>[1]</sup> 19:20</p> <p><b>multiple</b> <sup>[1]</sup> 35:20</p> <p><b>must</b> <sup>[3]</sup> 22:19 35:24 48:1</p>	<p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O'CONNELL</b> <sup>[41]</sup> 1:17 2:3,15 3:7,8,10 4:24 5:5 6:10 7:1,7,21,24 9:13,18 10:24 11:8,15 12:7,18 13:25 14:15 15:2,14,22 16:7,12,15,23,25 17:2 18:12 19:12 20:1 28:24 48:17 62:17,19,21 64:12,15</p> <p><b>object</b> <sup>[1]</sup> 45:24</p> <p><b>obligated</b> <sup>[1]</sup> 44:1</p> <p><b>obligation</b> <sup>[11]</sup> 5:14 8:8 10:22 11:4,19,23 12:6 26:4 34:25 43:22 52:10</p> <p><b>obligations</b> <sup>[25]</sup> 7:17,25 13:23 18:18 20:10,20 35:16 37:16 42:7,11 44:18,18,19,24 52:5,18 56:23 59:18 60:12 61:7 62:10 64:25 65:5 66:3,4</p> <p><b>observed</b> <sup>[1]</sup> 49:17</p> <p><b>obtain</b> <sup>[1]</sup> 35:24</p> <p><b>obviously</b> <sup>[2]</sup> 35:22 38:11</p> <p><b>occasion</b> <sup>[1]</sup> 53:23</p> <p><b>occur</b> <sup>[1]</sup> 23:19</p> <p><b>occurs</b> <sup>[1]</sup> 28:14</p> <p><b>often</b> <sup>[2]</sup> 19:6 24:20</p> <p><b>Okay</b> <sup>[5]</sup> 7:21 16:15,24 19:22 40:22</p> <p><b>once</b> <sup>[1]</sup> 33:19</p> <p><b>one</b> <sup>[13]</sup> 15:2 30:5,9,24 31:10 34:18 37:4 43:12 46:7 47:1 48:3,5 54:16</p> <p><b>ongoing</b> <sup>[2]</sup> 37:18 38:1</p> <p><b>only</b> <sup>[5]</sup> 26:6 29:12 48:22 54:12 57:10</p> <p><b>open</b> <sup>[1]</sup> 52:11</p> <p><b>opening</b> <sup>[1]</sup> 54:10</p> <p><b>operate</b> <sup>[3]</sup> 27:10 35:25 37:24</p> <p><b>operated</b> <sup>[2]</sup> 8:13 23:1</p> <p><b>operates</b> <sup>[3]</sup> 8:24 9:22 21:11</p> <p><b>operating</b> <sup>[3]</sup> 15:25 30:11 50:15</p> <p><b>operation</b> <sup>[1]</sup> 59:17</p> <p><b>operations</b> <sup>[1]</sup> 63:7</p> <p><b>operative</b> <sup>[1]</sup> 60:18</p> <p><b>operator</b> <sup>[1]</sup> 36:17</p> <p><b>opine</b> <sup>[2]</sup> 26:21 27:2</p> <p><b>opinion</b> <sup>[6]</sup> 26:25 37:13 57:6 58:19 59:4 61:5</p> <p><b>opinions</b> <sup>[1]</sup> 37:1</p> <p><b>opportunity</b> <sup>[1]</sup> 59:14</p> <p><b>oppose</b> <sup>[1]</sup> 54:25</p> <p><b>opposed</b> <sup>[1]</sup> 24:25</p> <p><b>opposing</b> <sup>[1]</sup> 10:3</p> <p><b>opposition</b> <sup>[1]</sup> 14:2</p> <p><b>oral</b> <sup>[9]</sup> 1:12 2:2,5,8,11 3:8 21:1 32:1 51:2</p> <p><b>order</b> <sup>[7]</sup> 13:10,11 14:23 51:16 56:22 63:14 66:2</p> <p><b>original</b> <sup>[2]</sup> 3:5 25:7</p> <p><b>other</b> <sup>[20]</sup> 4:11 6:15 13:19 22:22 24:19 28:2 36:21,23 44:5,7 46:2,</p>
<p style="text-align: center;"><b>K</b></p> <hr/> <p><b>KAGAN</b> <sup>[27]</sup> 12:7 13:16 14:10 17:2,25 28:23 29:10,17 30:2 38:3 40:8,22 41:10 44:14 48:3,5 51:24 52:2,17 53:1,21 54:15 55:9 59:8,12,21 65:17</p> <p><b>Kansas</b> <sup>[3]</sup> 33:8 41:7 63:3</p> <p><b>keen</b> <sup>[1]</sup> 47:21</p> <p><b>KELLER</b> <sup>[20]</sup> 1:20 2:6 20:25 21:1,4 22:3,9 24:9,13 25:22 26:6,23 27:1 28:4 29:2,16 30:5,9 31:12,21</p> <p><b>KENNEDY</b> <sup>[11]</sup> 11:5,9,24 22:2 23:3 24:5,10 34:16 35:12,18 47:2</p> <p><b>key</b> <sup>[1]</sup> 21:9</p> <p><b>kind</b> <sup>[2]</sup> 11:16 50:16</p> <p><b>knowing</b> <sup>[2]</sup> 27:10,11</p>	<p style="text-align: center;"><b>M</b></p> <hr/> <p><b>made</b> <sup>[3]</sup> 19:6 37:4 57:10</p> <p><b>main</b> <sup>[3]</sup> 29:20 51:6 52:6</p> <p><b>manner</b> <sup>[3]</sup> 55:16,24 58:7</p> <p><b>many</b> <sup>[5]</sup> 10:19 15:21 32:14 41:17 48:12</p> <p><b>MARCUS</b> <sup>[3]</sup> 1:24 2:12 51:2</p> <p><b>Master</b> <sup>[14]</sup> 4:12 6:5 21:19 25:2 26:25 27:22 37:1,10 51:9 54:23 56:20 58:3 65:19 66:7</p> <p><b>Master's</b> <sup>[6]</sup> 8:3 18:15 22:17 23:11 32:8 51:13</p> <p><b>matter</b> <sup>[5]</sup> 1:12 11:1,24 26:18 51:11</p> <p><b>McCarran</b> <sup>[1]</sup> 55:12</p> <p><b>mean</b> <sup>[23]</sup> 9:7 11:21 12:9,12,16,22 14:20 16:7,18 18:25 27:16,17,20 33:4 40:9 41:11 46:14 52:22 53:17 61:9,23 62:3 64:14</p> <p><b>means</b> <sup>[4]</sup> 21:16 41:11 62:9 66:9</p> <p><b>meant</b> <sup>[1]</sup> 29:10</p> <p><b>mechanism</b> <sup>[1]</sup> 52:3</p> <p><b>mechanisms</b> <sup>[1]</sup> 45:13</p> <p><b>Medellin</b> <sup>[1]</sup> 15:6</p> <p><b>meet</b> <sup>[5]</sup> 6:2 7:17 59:18 62:10 66:3</p> <p><b>meeting</b> <sup>[2]</sup> 13:23 60:11</p> <p><b>mention</b> <sup>[1]</sup> 32:17</p> <p><b>Mex</b> <sup>[1]</sup> 9:25</p> <p><b>MEXICO</b> <sup>[96]</sup> 1:6,24,25 2:13 3:6,14,21,22 4:6,18,23 5:17,23,24,25 6:</p>	<p style="text-align: center;"><b>N</b></p> <hr/> <p><b>narrow</b> <sup>[1]</sup> 23:21</p> <p><b>nature</b> <sup>[2]</sup> 22:10 28:13</p> <p><b>Nebraska</b> <sup>[9]</sup> 21:14 28:17 33:8 36:14 37:8 41:8 58:22 63:3,5</p> <p><b>necessarily</b> <sup>[9]</sup> 20:6 25:4,24 27:2 36:22 37:9 49:14 50:8 64:23</p> <p><b>necessary</b> <sup>[13]</sup> 21:13 48:21,22 49:1,15,23,24 50:22 56:5,11,17 57:4,13</p> <p><b>need</b> <sup>[9]</sup> 4:21 10:4 12:20 13:5 14:23 38:9 46:7 58:5 66:10</p> <p><b>needed</b> <sup>[1]</sup> 50:8</p> <p><b>needs</b> <sup>[3]</sup> 13:10 14:6 42:1</p> <p><b>negotiate</b> <sup>[3]</sup> 10:18 39:24 41:16</p> <p><b>negotiating</b> <sup>[2]</sup> 32:18 36:11</p> <p><b>negotiation</b> <sup>[1]</sup> 10:17</p> <p><b>never</b> <sup>[10]</sup> 30:12 32:21,21 33:6 37:11,12 49:5 53:14,23,24</p> <p><b>NEW</b> <sup>[85]</sup> 1:6,24,25 2:13 3:5,14,22 4:6,18,23 5:17,22,24,25 6:19 7:12 8:7 9:20,25,25 10:1 12:12,24 13:4,21 14:2,4,8 17:5 18:17,21 20:9,19 21:23,23 22:5,11,12,18,20 23:4,13 24:17 26:3,9,12 28:14,20,21 29:22 34:8 36:6 39:22 42:24,24 46:23 47:20 48:19 50:12 51:3,8,9,12,17 53:13 55:14 56:4,16 57:11,15 58:1,11,19 59:1,16 61:6,13 62:3</p>	<p style="text-align: center;"><b>N</b></p> <hr/> <p><b>narrow</b> <sup>[1]</sup> 23:21</p> <p><b>nature</b> <sup>[2]</sup> 22:10 28:13</p> <p><b>Nebraska</b> <sup>[9]</sup> 21:14 28:17 33:8 36:14 37:8 41:8 58:22 63:3,5</p> <p><b>necessarily</b> <sup>[9]</sup> 20:6 25:4,24 27:2 36:22 37:9 49:14 50:8 64:23</p> <p><b>necessary</b> <sup>[13]</sup> 21:13 48:21,22 49:1,15,23,24 50:22 56:5,11,17 57:4,13</p> <p><b>need</b> <sup>[9]</sup> 4:21 10:4 12:20 13:5 14:23 38:9 46:7 58:5 66:10</p> <p><b>needed</b> <sup>[1]</sup> 50:8</p> <p><b>needs</b> <sup>[3]</sup> 13:10 14:6 42:1</p> <p><b>negotiate</b> <sup>[3]</sup> 10:18 39:24 41:16</p> <p><b>negotiating</b> <sup>[2]</sup> 32:18 36:11</p> <p><b>negotiation</b> <sup>[1]</sup> 10:17</p> <p><b>never</b> <sup>[10]</sup> 30:12 32:21,21 33:6 37:11,12 49:5 53:14,23,24</p> <p><b>NEW</b> <sup>[85]</sup> 1:6,24,25 2:13 3:5,14,22 4:6,18,23 5:17,22,24,25 6:19 7:12 8:7 9:20,25,25 10:1 12:12,24 13:4,21 14:2,4,8 17:5 18:17,21 20:9,19 21:23,23 22:5,11,12,18,20 23:4,13 24:17 26:3,9,12 28:14,20,21 29:22 34:8 36:6 39:22 42:24,24 46:23 47:20 48:19 50:12 51:3,8,9,12,17 53:13 55:14 56:4,16 57:11,15 58:1,11,19 59:1,16 61:6,13 62:3</p>

## Official - Subject to Final Review

<p>12 50:3 52:18,25 57:1 59:24 61:19 63:11 66:11</p> <p><b>otherwise</b> [1] 46:9</p> <p><b>ought</b> [1] 47:7</p> <p><b>out</b> [9] 31:4 34:18 39:15,19 42:5 48:17 50:21 52:22 65:6</p> <p><b>outset</b> [1] 6:22</p> <p><b>outside</b> [1] 37:25</p> <p><b>over</b> [2] 22:25 29:4</p> <p><b>own</b> [9] 14:13 21:6 24:1 28:11 29:9 31:7 45:3 48:6 60:2</p> <p><b>owned</b> [1] 60:5</p> <p><b>owns</b> [1] 21:11</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>PAGE</b> [4] 2:2 5:18 8:2 23:11</p> <p><b>parens</b> [2] 47:23 60:7</p> <p><b>part</b> [7] 3:17 16:9 18:13 30:18 40:12,14 59:22</p> <p><b>participate</b> [7] 9:9 46:8 47:8 48:10 55:1 56:22 58:5</p> <p><b>participated</b> [3] 41:18 48:13 63:10</p> <p><b>participating</b> [2] 46:1 58:5</p> <p><b>participation</b> [1] 3:24</p> <p><b>particular</b> [3] 23:22 25:10 26:11</p> <p><b>parties</b> [4] 12:1 13:12 23:10 44:20</p> <p><b>parties'</b> [1] 23:15</p> <p><b>party</b> [33] 3:24 6:25 7:5 9:9,21 10:11 12:10,20 13:4 19:25 29:15 32:13 33:12,21 34:15 37:4 38:6 46:8 47:14,15 48:14,21,23 49:1,4 53:16 56:5,11,13,17 57:4 61:11 63:20</p> <p><b>pass</b> [3] 11:7 33:2 53:23</p> <p><b>past</b> [2] 33:3 41:20</p> <p><b>patriae</b> [2] 47:23 60:7</p> <p><b>Pecos</b> [2] 63:12,17</p> <p><b>people</b> [2] 20:4 34:10</p> <p><b>percent</b> [1] 23:15</p> <p><b>perfectly</b> [1] 35:4</p> <p><b>perhaps</b> [3] 33:8 36:10,11</p> <p><b>permit</b> [2] 4:1 17:18</p> <p><b>permitted</b> [5] 13:15 47:14 48:23 56:13 64:16</p> <p><b>perspective</b> [1] 28:5</p> <p><b>place</b> [4] 10:4 13:19 43:4 55:19</p> <p><b>placed</b> [1] 55:19</p> <p><b>Plaintiff</b> [8] 1:4,21 2:7 4:3 6:16 7:11 21:3 63:22</p> <p><b>play</b> [1] 31:4</p> <p><b>pleading</b> [1] 26:15</p> <p><b>please</b> [5] 3:11 21:5 32:5 51:5 61:25</p> <p><b>point</b> [10] 27:25 34:9 38:2 47:24 50:2,11 57:7 64:19 65:6,16</p> <p><b>pointed</b> [2] 34:18 48:16</p> <p><b>points</b> [4] 37:3 51:6,6 62:22</p> <p><b>portion</b> [1] 62:3</p> <p><b>portions</b> [2] 16:2 58:18</p> <p><b>position</b> [7] 16:21 25:18 30:20 35:14 43:17 44:5 57:16</p> <p><b>Possibly</b> [1] 30:9</p> <p><b>potential</b> [1] 25:5</p>	<p><b>potentially</b> [1] 29:16</p> <p><b>power</b> [3] 39:21 40:5,5</p> <p><b>practicable</b> [1] 31:17</p> <p><b>practical</b> [1] 28:5</p> <p><b>practice</b> [2] 23:10 30:14</p> <p><b>preamble</b> [1] 35:11</p> <p><b>preceded</b> [1] 36:2</p> <p><b>precedent</b> [3] 41:22 46:2 49:23</p> <p><b>precisely</b> [4] 22:23 27:2,6 29:4</p> <p><b>predates</b> [1] 11:4</p> <p><b>predicate</b> [1] 21:13</p> <p><b>preexisted</b> [1] 11:1</p> <p><b>preexisting</b> [1] 42:7</p> <p><b>premise</b> [1] 45:8</p> <p><b>premised</b> [1] 45:2</p> <p><b>present</b> [1] 14:24</p> <p><b>presented</b> [4] 4:3 14:19 29:6 63:23</p> <p><b>presenting</b> [1] 10:11</p> <p><b>preserved</b> [1] 20:3</p> <p><b>presumably</b> [1] 29:13</p> <p><b>presume</b> [1] 31:8</p> <p><b>pretty</b> [5] 10:15 34:11 36:20 40:20 41:19</p> <p><b>prevail</b> [1] 46:13</p> <p><b>prevails</b> [1] 11:6</p> <p><b>prevent</b> [1] 26:10</p> <p><b>preventing</b> [2] 13:22 21:24</p> <p><b>prior</b> [3] 10:22 40:16 63:14</p> <p><b>probably</b> [2] 10:25 25:23</p> <p><b>problem</b> [1] 5:6</p> <p><b>proceed</b> [2] 13:15 27:14</p> <p><b>proceeding</b> [1] 54:21</p> <p><b>proceeds</b> [1] 29:11</p> <p><b>project</b> [42] 3:17,20 5:9 6:1,2 8:5,9,10,17,22,25 9:1 12:3,4 18:19,22 21:12,12,15,20 22:25 23:1 30:18 34:9 35:25 37:25 41:13 47:21 55:22 57:17,20 59:17 60:4,9,12 61:3,6,21 62:5 64:24 65:4 66:1</p> <p><b>projects</b> [5] 8:13 32:15,17 43:7 63:7</p> <p><b>prominence</b> [3] 33:24 34:2,4</p> <p><b>proper</b> [2] 25:12 65:23</p> <p><b>properly</b> [1] 9:11</p> <p><b>protect</b> [18] 4:7 5:25 6:1,19 12:2 13:8 17:13,24 18:18,22 40:23 45:3,7,21 51:16 63:25 65:13 66:1</p> <p><b>protected</b> [3] 19:10 55:22 64:8</p> <p><b>protections</b> [2] 54:7 55:19</p> <p><b>protects</b> [2] 7:8 8:1</p> <p><b>provide</b> [2] 23:7 42:8</p> <p><b>provides</b> [1] 54:6</p> <p><b>public</b> [2] 15:19 16:5</p> <p><b>pumping</b> [1] 34:8</p> <p><b>purposes</b> [4] 27:9 29:6 31:5 55:7</p> <p><b>pursuant</b> [4] 4:10,11 10:10 15:24</p> <p><b>put</b> [3] 21:18 43:3 65:17</p> <p><b>putting</b> [1] 18:7</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>quantities</b> [1] 23:18</p> <p><b>question</b> [21] 4:20 9:16 10:15 16:19 17:3 18:1 27:16 29:6 35:20 36:</p>	<p>4 42:20 45:7,19 49:3,6,9,10,16 53:23 56:10 64:20</p> <p><b>questions</b> [2] 31:18 50:23</p> <p><b>quickly</b> [1] 57:7</p> <p><b>quite</b> [5] 4:21 26:19 38:23 65:6,11</p> <p><b>quote</b> [2] 21:14,18</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>RAEL</b> [21] 1:24 2:12 51:1,2,4 52:2 53:1 54:1,22 55:11 56:7,14 57:14 58:14 59:12 60:1 61:4,10,22 62:1,16</p> <p><b>raise</b> [15] 9:8,17 21:6 27:7,18 29:9 31:7,14 51:10,15 52:15 53:15 54:5,11,12</p> <p><b>raised</b> [4] 24:23 25:3 29:18 50:4</p> <p><b>raising</b> [2] 31:2 50:14</p> <p><b>rather</b> [6] 10:12 25:8 30:23 31:10 46:8 52:24</p> <p><b>re</b> [1] 20:13</p> <p><b>reach</b> [2] 14:6 28:21</p> <p><b>read</b> [4] 11:21 33:13 54:4,9</p> <p><b>real</b> [1] 57:7</p> <p><b>really</b> [3] 18:24 27:16 50:3</p> <p><b>reason</b> [9] 17:3 18:14,17 27:20 33:1 46:7 53:12 54:17 65:23</p> <p><b>reasons</b> [1] 9:19</p> <p><b>REBUTTAL</b> [4] 2:14 20:22 62:19,22</p> <p><b>receive</b> [1] 53:11</p> <p><b>received</b> [1] 53:17</p> <p><b>receives</b> [3] 23:5 47:21 52:16</p> <p><b>recent</b> [1] 33:9</p> <p><b>Reclamation</b> [46] 3:17,19 5:1,4,8,9,20 6:5,12 8:13,24 12:4 18:4,9,20 23:2 24:21 25:1,9,20,25 36:1,3 37:19 44:8 45:9 50:6,14,20 51:15 52:19 53:3,12 54:20 55:1,4,20,22 56:18 57:3 58:6,11,16,18 65:19,20</p> <p><b>Reclamation's</b> [1] 15:25</p> <p><b>recognize</b> [2] 49:11,21</p> <p><b>recognized</b> [2] 6:6 32:22</p> <p><b>recommendation</b> [4] 4:13 18:15 51:14 56:21</p> <p><b>reconciling</b> [1] 35:13</p> <p><b>refer</b> [1] 7:25</p> <p><b>reference</b> [3] 7:16,19 34:20</p> <p><b>refers</b> [2] 8:21 22:24</p> <p><b>Regarding</b> [2] 32:9 50:15</p> <p><b>regime</b> [2] 46:17 47:24</p> <p><b>region</b> [1] 63:8</p> <p><b>regression</b> [2] 30:15,23</p> <p><b>reiterating</b> [1] 64:19</p> <p><b>relationship</b> [1] 40:14</p> <p><b>release</b> [3] 8:18 34:21 66:2</p> <p><b>released</b> [1] 6:2</p> <p><b>releases</b> [6] 3:19 8:23 10:6 12:2,5 39:14</p> <p><b>relegated</b> [1] 33:15</p> <p><b>relied</b> [1] 3:16</p> <p><b>relief</b> [14] 4:6 6:19 13:11 17:12,24 20:8,8,18 36:8 37:12,13,14 63:25,25</p>	<p><b>relinquish</b> [1] 22:19</p> <p><b>relinquished</b> [1] 28:19</p> <p><b>relinquishing</b> [2] 22:20,21</p> <p><b>rely</b> [2] 65:2,12</p> <p><b>relying</b> [1] 63:3</p> <p><b>remainder</b> [1] 31:4</p> <p><b>remaining</b> [1] 62:18</p> <p><b>remedies</b> [1] 58:8</p> <p><b>remedy</b> [2] 53:8 55:2</p> <p><b>remiss</b> [1] 35:1</p> <p><b>reply</b> [1] 5:19</p> <p><b>report</b> [3] 8:3 23:11 32:8</p> <p><b>represented</b> [1] 60:6</p> <p><b>Republic</b> [1] 62:11</p> <p><b>Republican</b> [3] 34:5,7,14</p> <p><b>require</b> [2] 3:13 62:2</p> <p><b>required</b> [6] 9:21 12:20 13:4 17:22 20:9 63:19</p> <p><b>requires</b> [1] 61:13</p> <p><b>reserve</b> [2] 20:21 49:15</p> <p><b>reservoir</b> [7] 3:21 8:9,12 9:23 10:1 12:15 22:19</p> <p><b>reservoirs</b> [1] 8:12</p> <p><b>resolution</b> [2] 4:1 42:9</p> <p><b>resolved</b> [1] 25:16</p> <p><b>respect</b> [3] 40:18 41:1,5</p> <p><b>response</b> [1] 62:23</p> <p><b>resulted</b> [1] 33:10</p> <p><b>return</b> [2] 17:25 30:16</p> <p><b>review</b> [1] 34:5</p> <p><b>rights</b> [30] 10:16 14:12,13 19:1 35:23,25 36:15 37:19,24 39:11,12 41:14,14 42:23 43:2,5 46:23 47:19,25 50:19 54:12 55:13,16,24 56:25 57:1,23,23 60:3,4</p> <p><b>Rio</b> [4] 3:12 21:12 63:15 64:5</p> <p><b>rises</b> [1] 46:19</p> <p><b>River</b> [6] 34:5,7,15 40:6 63:13,17</p> <p><b>rivers</b> [1] 32:15</p> <p><b>ROBERTS</b> [19] 3:3 9:6,14 10:14 12:8 18:23 19:13 20:23 27:15 31:19,23 46:6,12 50:24 54:16 61:25 62:14,17 66:12</p> <p><b>route</b> [1] 39:21</p> <p><b>rule</b> [3] 9:16 11:11 28:10</p> <p><b>ruled</b> [1] 53:25</p> <p><b>rules</b> [1] 55:8</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>same</b> [15] 18:11,13 24:10,11,14 28:10 31:2 34:17 37:18 46:24 56:10 59:24 60:17,24 63:15</p> <p><b>San</b> [1] 20:14</p> <p><b>Sanitary</b> [3] 17:7,15 20:13</p> <p><b>satisfy</b> [1] 12:6</p> <p><b>saw</b> [1] 41:21</p> <p><b>saying</b> [18] 9:2 19:13,18 24:6,11,14 27:17 36:9 40:4 44:10 48:22,25 56:12,15,16 58:2,23 59:1</p> <p><b>says</b> [7] 8:15 10:19 26:16 38:7 46:7 61:18 66:7</p> <p><b>scheme</b> [1] 43:3</p> <p><b>scope</b> [1] 46:23</p> <p><b>SCOTT</b> [3] 1:20 2:6 21:1</p>
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## Official - Subject to Final Review

<p><b>Second</b> <sup>[3]</sup> 21:12 41:5 64:19  <b>Secondly</b> <sup>[1]</sup> 51:12  <b>see</b> <sup>[2]</sup> 39:2,6  <b>seek</b> <sup>[1]</sup> 15:11  <b>seeking</b> <sup>[5]</sup> 13:8 20:18 36:15,16 53:9  <b>seemed</b> <sup>[1]</sup> 38:23  <b>Seems</b> <sup>[3]</sup> 26:24 33:23 47:2  <b>seen</b> <sup>[1]</sup> 38:18  <b>self-executing</b> <sup>[5]</sup> 15:7,8,9,18 16:20  <b>send</b> <sup>[1]</sup> 65:10  <b>sense</b> <sup>[3]</sup> 10:10 55:22 58:15  <b>separate</b> <sup>[1]</sup> 37:1  <b>set</b> <sup>[3]</sup> 6:16 40:16 45:18  <b>sets</b> <sup>[2]</sup> 41:16 46:2  <b>setting</b> <sup>[1]</sup> 57:12  <b>settle</b> <sup>[2]</sup> 31:15 33:19  <b>settled</b> <sup>[1]</sup> 31:9  <b>settlement</b> <sup>[5]</sup> 30:10 33:10,12,13,16  <b>Several</b> <sup>[3]</sup> 32:16 38:25 44:11  <b>shall</b> <sup>[1]</sup> 38:7  <b>shape</b> <sup>[1]</sup> 6:18  <b>shaped</b> <sup>[1]</sup> 4:7  <b>She's</b> <sup>[1]</sup> 30:2  <b>shorted</b> <sup>[1]</sup> 65:14  <b>side</b> <sup>[2]</sup> 12:19 24:19  <b>signatory</b> <sup>[5]</sup> 21:19 36:8 37:7 53:19 57:22  <b>signatures</b> <sup>[1]</sup> 64:11  <b>signed</b> <sup>[3]</sup> 18:21 43:21 45:11  <b>significant</b> <sup>[6]</sup> 32:15 34:11 37:6,10 42:16,19  <b>similar</b> <sup>[1]</sup> 34:12  <b>simple</b> <sup>[1]</sup> 38:23  <b>simply</b> <sup>[3]</sup> 28:3 49:24 62:5  <b>since</b> <sup>[3]</sup> 13:9,9 15:23  <b>sit</b> <sup>[1]</sup> 12:25  <b>situation</b> <sup>[1]</sup> 43:9  <b>six</b> <sup>[1]</sup> 38:12  <b>sole</b> <sup>[1]</sup> 21:15  <b>Solicitor</b> <sup>[5]</sup> 1:17,20,22 21:2 32:2  <b>solution</b> <sup>[3]</sup> 36:12 54:24 58:4  <b>somebody</b> <sup>[1]</sup> 5:7  <b>somehow</b> <sup>[1]</sup> 25:8  <b>somewhere</b> <sup>[1]</sup> 10:21  <b>soon</b> <sup>[1]</sup> 31:16  <b>sorry</b> <sup>[6]</sup> 16:4 18:1 36:13 43:8 56:1 61:1  <b>sort</b> <sup>[4]</sup> 12:19 33:14 37:22 66:10  <b>sorted</b> <sup>[1]</sup> 50:21  <b>SOTOMAYOR</b> <sup>[28]</sup> 4:15 5:3 7:14,22 9:4 16:4 24:3 25:17 26:2,16,24 27:6 30:1,6 31:8 36:13 43:8 44:1,4 51:23 56:1 58:9 61:1,8,12,23 64:10,13  <b>Sotomayor's</b> <sup>[1]</sup> 18:1  <b>sought</b> <sup>[5]</sup> 37:11,12,14 55:3 59:5  <b>sounds</b> <sup>[1]</sup> 16:18  <b>sovereign</b> <sup>[5]</sup> 25:5 26:1 27:11 55:24 57:25  <b>sovereigns</b> <sup>[1]</sup> 25:8  <b>speaking</b> <sup>[1]</sup> 52:13</p>	<p><b>Special</b> <sup>[14]</sup> 6:5 21:19 22:17 25:2 26:25 32:8 33:23 37:1,10 51:9,13 54:23 56:20 58:3  <b>specific</b> <sup>[3]</sup> 7:8 34:19,20  <b>specifically</b> <sup>[2]</sup> 11:17 64:3  <b>split</b> <sup>[1]</sup> 23:15  <b>spoken</b> <sup>[1]</sup> 24:20  <b>stage</b> <sup>[2]</sup> 26:21 56:4  <b>stake</b> <sup>[6]</sup> 4:5 7:9 10:9 14:18 17:13 47:19  <b>staking</b> <sup>[1]</sup> 6:8  <b>standard</b> <sup>[1]</sup> 14:15  <b>start</b> <sup>[2]</sup> 31:10 34:10  <b>started</b> <sup>[1]</sup> 59:10  <b>state</b> <sup>[57]</sup> 3:14,22 4:18 5:24 10:16 15:15 18:6 22:13 23:23,24 24:21 25:4,9,19,24 26:1 27:11 28:6,21 30:12,25 31:14 35:23,24 37:20,21,24,25 38:7 41:14 43:4 44:8 45:12,13,16 46:18 48:6,8 50:19,19 51:7 54:21 55:9,13,15,23 57:25 58:1,1,19 59:8,14,19,23 63:17 64:18 65:22  <b>STATES</b> <sup>[171]</sup> 1:1,13,19 2:4,16 3:9 4:2,8 5:7,14 7:11 9:21,22 10:5 12:21,25 13:9,20 14:17,19 15:23 16:3 17:8,10,11,16,18,23 18:16 19:17,17,19 20:2 21:19 22:3,8,13 23:4,25 25:3,13 26:9 27:7,18 28:11,15 29:8,14,15,21 31:1,6,11 32:11,20,22,25 33:3,10,11,14,17,18,20 34:6,12,14,25 35:1,5,9,9,14,24 36:7,8,11,20 37:4,6,11,23 38:6,13,16 39:7,13,18 40:4,7,10,15,23 41:16,18,21,23 42:6,21 43:13,15 44:3,6,13,17 45:4,7,20,24 46:7,15 47:4,12,19,24 48:1,12,17,20 49:3,7 50:4 51:10,14,18 52:4,9,14,18 53:5,9,15 54:5,9,11,17 55:20 56:5,11,17,21 57:13,21 58:8,17,23,25 59:9,10,15,22 60:1,6,8,20 61:2,15 62:4,8,9,20,25 63:5,19 64:3,22 65:1,9,11 66:2  <b>States'</b> <sup>[18]</sup> 3:23 5:11 6:17 11:19 14:4 25:6 28:25 32:7,10 42:10,23 45:3 55:13 60:17 63:7,23 64:7 66:7  <b>status</b> <sup>[1]</sup> 33:15  <b>statute</b> <sup>[3]</sup> 11:7,14 16:11  <b>statutes</b> <sup>[1]</sup> 16:8  <b>statutory</b> <sup>[4]</sup> 17:21 21:7,9,25  <b>still</b> <sup>[6]</sup> 4:20 11:21,22 13:1 42:4 58:5  <b>storage</b> <sup>[3]</sup> 8:5,10,17  <b>strong</b> <sup>[3]</sup> 40:20 41:19 48:14  <b>stuck</b> <sup>[1]</sup> 42:4  <b>studied</b> <sup>[1]</sup> 16:19  <b>subject</b> <sup>[2]</sup> 18:5 55:13  <b>submitted</b> <sup>[2]</sup> 66:13,15  <b>subservient</b> <sup>[1]</sup> 45:17  <b>substantially</b> <sup>[1]</sup> 34:3  <b>substantive</b> <sup>[6]</sup> 39:11 42:20 44:7 45:22 47:9 49:6  <b>subsumed</b> <sup>[1]</sup> 41:15</p>	<p><b>succinctly</b> <sup>[1]</sup> 21:18  <b>sue</b> <sup>[23]</sup> 18:6 19:3 21:22 23:4 25:19,20 26:4 36:7 37:25 43:23 58:11,12,19 59:1,9,14,23 60:10,13 61:2,4,7,20  <b>sued</b> <sup>[3]</sup> 17:16 36:19 58:24  <b>sues</b> <sup>[1]</sup> 5:7  <b>suggest</b> <sup>[1]</sup> 38:15  <b>suing</b> <sup>[1]</sup> 5:12  <b>suit</b> <sup>[11]</sup> 13:18,20,24 14:13 17:19 18:9,10 20:8 22:5 27:10 38:6  <b>suits</b> <sup>[5]</sup> 17:12 18:8,11 20:4 48:13  <b>summary</b> <sup>[2]</sup> 37:13 59:5  <b>support</b> <sup>[2]</sup> 19:6 58:4  <b>suppose</b> <sup>[2]</sup> 10:15 54:16  <b>SUPREME</b> <sup>[2]</sup> 1:1,13  <b>surely</b> <sup>[1]</sup> 12:22  <b>surface</b> <sup>[1]</sup> 43:10  <b>surprising</b> <sup>[1]</sup> 38:5  <b>system</b> <sup>[1]</sup> 59:22</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>tail</b> <sup>[1]</sup> 37:22  <b>terms</b> <sup>[6]</sup> 11:22 24:7 38:21 39:9,10 59:11  <b>territorial</b> <sup>[1]</sup> 42:25  <b>TEXAS</b> <sup>[41]</sup> 1:3,20,21 3:5,14 21:2,8,17 22:5 23:5 24:18,23 25:13 28:6,21 29:22,24 30:12,25 31:14 39:11,23 44:11 46:25 47:20 49:18 57:12,25 58:10 59:19 60:14,18,19 63:12,13,18 64:2,22 65:1,2,13  <b>Texas'</b> <sup>[1]</sup> 60:16  <b>Texas's</b> <sup>[11]</sup> 9:24 10:3 12:23 14:3,7 21:21,25 26:13 28:18 29:1 49:18  <b>text</b> <sup>[1]</sup> 32:17  <b>themselves</b> <sup>[2]</sup> 47:25 60:5  <b>There'd</b> <sup>[1]</sup> 22:22  <b>there's</b> <sup>[19]</sup> 6:23 11:13,16 17:21 22:6,7,15 23:12 36:2,3,24 38:25 39:3 43:14 47:15 53:7,8 55:2 65:8  <b>therefore</b> <sup>[5]</sup> 21:22 26:4 29:23 38:9 55:18  <b>they'll</b> <sup>[1]</sup> 46:18  <b>they've</b> <sup>[1]</sup> 55:2  <b>thinks</b> <sup>[1]</sup> 27:22  <b>third</b> <sup>[2]</sup> 21:15 57:8  <b>third-party</b> <sup>[2]</sup> 19:4 38:19  <b>though</b> <sup>[5]</sup> 13:17 14:12 22:7 59:1 64:4  <b>three</b> <sup>[6]</sup> 21:9 38:12 51:6 57:24 62:8,22  <b>thrust</b> <sup>[1]</sup> 29:21  <b>timing</b> <sup>[2]</sup> 27:17 28:3  <b>Tin</b> <sup>[1]</sup> 20:14  <b>today</b> <sup>[3]</sup> 29:7 31:6 51:8  <b>took</b> <sup>[1]</sup> 44:22  <b>top</b> <sup>[1]</sup> 23:14  <b>totally</b> <sup>[2]</sup> 10:24 65:21  <b>touch</b> <sup>[1]</sup> 61:15  <b>treaties</b> <sup>[4]</sup> 15:7,7 16:11 44:8  <b>treaty</b> <sup>[50]</sup> 5:3,11,15,20 7:17,25 9:2 10:10,17,18,21 11:1,2,4,7,13,17,</p>	<p>19,23 12:6 15:4,9,12,18 18:20 24:20 35:5,17 36:2 38:22 39:20 40:5 41:2,3 42:5 49:2,20 51:19,22 52:3,5,5,9,11 56:23,24 58:6 62:10 65:7 66:3  <b>true</b> <sup>[2]</sup> 33:5 59:24  <b>trumps</b> <sup>[1]</sup> 10:22  <b>try</b> <sup>[4]</sup> 26:20 41:21 54:12 59:14  <b>trying</b> <sup>[6]</sup> 5:6,16 13:6 45:4 52:22 56:25  <b>turn</b> <sup>[2]</sup> 32:8 50:1  <b>two</b> <sup>[5]</sup> 18:8 19:17 41:1 42:7 64:11  <b>type</b> <sup>[1]</sup> 44:5  <b>typically</b> <sup>[1]</sup> 5:12</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U.S</b> <sup>[12]</sup> 16:9 21:6,8,11,22,24 26:17 30:4 36:14 43:4 50:13 58:10  <b>ultimately</b> <sup>[1]</sup> 47:22  <b>under</b> <sup>[94]</sup> 5:1,15,20,20 6:4,4,6,7,11,12 7:5 10:1 12:14,14 13:24 15:13 18:4,6,9,10 23:21 24:7,15 25:24 26:4,7,11 27:23 32:23 33:16,18,20 35:10,16 37:15,16 39:20,20 42:24 43:23 44:7 45:16,22,25 46:24 47:8,23 48:15 49:2 51:15,21,21,22 52:1,10,11,16,24,24 53:10,11,16 54:6,19 55:1,4,5,9,10,11,11 56:18,19,23 57:2,23 58:6,6,17,17 59:9 60:3,3,4,4,13,17 61:2,8,9,20,23 64:4 65:6 66:9  <b>undermine</b> <sup>[1]</sup> 18:20  <b>undermines</b> <sup>[1]</sup> 5:10  <b>understand</b> <sup>[6]</sup> 4:21 12:9 25:17 26:5 42:4 61:13  <b>understanding</b> <sup>[1]</sup> 45:2  <b>understood</b> <sup>[1]</sup> 18:2  <b>Union</b> <sup>[1]</sup> 38:14  <b>unique</b> <sup>[2]</sup> 22:10 28:12  <b>UNITED</b> <sup>[166]</sup> 1:1,13,19 2:4,16 3:9,23 4:2,8 5:7,10,14 6:17 7:10 9:21,22 10:5 11:18 12:21,25 13:9 14:4,17,19 15:23 17:8,9,11,16,18,22 19:19 20:2 22:2,13 23:3,25 25:3,6,13 27:7,17 28:11,15,25 29:8,13,14,21 31:1,6,11 32:7,10,10,20,22,25 33:2,11,14,16,20 34:6,12,14,25,25 35:5,9,13,24 36:7,20 37:4,6,11,23 38:5,16 39:7,13,18 40:3,10,15,23 41:18,21 42:6,10,21,23 43:13,15 44:3,6,17 45:3,4,7,20,24 46:7,14 47:4,18 48:12,17,20 49:3,7 51:10,14,18 52:4,8,13,18 53:5,8,15 54:5,8,11,17 55:12,20 56:5,11,17,21 57:13,21 58:7,17,23,25 59:9,10,15,21 60:1,8,17,20 61:2,15 62:1,2,4,8,20,24 63:7,19,23 64:3,7,22 65:1,9,11 66:2,6,7  <b>unless</b> <sup>[4]</sup> 19:15 26:2 39:1 44:22  <b>unlike</b> <sup>[1]</sup> 16:10  <b>unprecedented</b> <sup>[2]</sup> 32:12 62:25  <b>unusual</b> <sup>[1]</sup> 3:12  <b>up</b> <sup>[4]</sup> 16:6 19:21 29:3 54:10  <b>usable</b> <sup>[7]</sup> 8:5,15,15,21 12:4 23:7</p>
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## Official - Subject to Final Review

<p><b>30:19</b>  <b>user</b> <sup>[1]</sup> 47:20  <b>users</b> <sup>[7]</sup> 5:12,21 18:19 25:10 26:11 27:12 58:13  <b>uses</b> <sup>[1]</sup> 62:9  <b>using</b> <sup>[1]</sup> 17:17</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>vehicle</b> <sup>[3]</sup> 21:20 62:6,9  <b>versus</b> <sup>[14]</sup> 3:5 17:8,9 21:14 28:17 29:14 33:8 36:14 41:7 63:3,12,14,18 64:2  <b>view</b> <sup>[3]</sup> 27:19 28:24 40:23  <b>violate</b> <sup>[1]</sup> 18:20  <b>violating</b> <sup>[1]</sup> 5:13  <b>violation</b> <sup>[3]</sup> 5:7 22:6 63:4  <b>virtue</b> <sup>[1]</sup> 37:24  <b>vital</b> <sup>[1]</sup> 47:4  <b>voting</b> <sup>[2]</sup> 39:12,13</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wagging</b> <sup>[1]</sup> 37:23  <b>wanting</b> <sup>[1]</sup> 27:7  <b>Washington</b> <sup>[2]</sup> 1:9,18  <b>water</b> <sup>[94]</sup> 3:14 5:8,12,15,21 6:1 8:6,8,15,15,16,16,21 9:3 10:7,9,20 12:3,4,13 13:22 17:17,17 18:19 21:8 22:11,18 23:7,13,16,18,22 24:2 25:10,21 26:10,11 27:12 28:14,19 29:23,24 30:18,19 32:14 35:21,23,24 37:19,24 38:21 39:14 40:1,18 41:14 42:7,8,24 43:5,10,11,15,19 45:14 46:19,23 47:20,21,25,25 50:13,19 52:16 53:18 55:13,15,23,24 57:1,22 58:13,25 59:2 60:2,4 61:14,15 62:4,7,12,13 64:4 65:8 66:2  <b>way</b> <sup>[16]</sup> 5:10 8:1 9:15 22:22 24:11,14 25:12 29:1 36:24 40:1 43:16 45:15 59:10,25 64:6 65:15  <b>ways</b> <sup>[1]</sup> 41:1  <b>whatever</b> <sup>[5]</sup> 9:10 10:22 12:14 45:15 63:25  <b>Whereupon</b> <sup>[1]</sup> 66:14  <b>whether</b> <sup>[8]</sup> 9:16 15:18 16:20 27:10 29:18 60:23 64:20 65:18  <b>who's</b> <sup>[1]</sup> 57:21  <b>whole</b> <sup>[1]</sup> 47:24  <b>will</b> <sup>[26]</sup> 9:23,23 23:18,19 27:3 28:7 29:2,3 31:4 34:10 37:20 39:17,25 40:4 43:6 44:23 45:16 46:21 47:10,22 49:18,19 50:18,20 56:9 60:18  <b>willing</b> <sup>[1]</sup> 13:13  <b>within</b> <sup>[4]</sup> 35:8 41:15 45:17 48:1  <b>without</b> <sup>[5]</sup> 3:23 5:9 38:7 48:9,14  <b>words</b> <sup>[2]</sup> 13:19 46:13  <b>work</b> <sup>[2]</sup> 22:23 66:11  <b>working</b> <sup>[1]</sup> 11:11  <b>worried</b> <sup>[1]</sup> 46:10  <b>wreck</b> <sup>[1]</sup> 38:14  <b>wrote</b> <sup>[1]</sup> 38:11  <b>Wyoming</b> <sup>[5]</sup> 21:15 28:17 36:14,19 58:22</p>	<hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>XVI</b> <sup>[1]</sup> 11:17</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>YARGER</b> <sup>[30]</sup> 1:22 2:9 31:24 32:1,4 33:5 34:1 35:3,17,19 36:22 39:3,7 40:21,25 41:12 42:4,13,18 43:25 44:4 45:6 46:11,16 47:6,12,17 48:4,11,24  <b>year</b> <sup>[3]</sup> 43:12 52:10 62:13  <b>years</b> <sup>[5]</sup> 15:21 30:24 41:13 45:10 48:12  <b>yourself</b> <sup>[1]</sup> 9:17  <b>yourselves</b> <sup>[1]</sup> 39:25</p>
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