

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY,)
)
) Petitioner,)
)
) v.) No. 17-71
)
) UNITED STATES FISH AND WILDLIFE)
)
) SERVICE, ET AL.,)
)
) Respondents.)
)

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WEYERHAEUSER COMPANY,)
Petitioner,)
v.) No. 17-71
UNITED STATES FISH AND WILDLIFE)
SERVICE, ET AL.,)
Respondents.)

Washington, D.C.

Monday, October 1, 2018

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

APPEARANCES:

TIMOTHY S. BISHOP, ESQ., Chicago, Illinois; on behalf of the Petitioner.

EDWIN S. KNEEDLER, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF:	PAGE:
3	TIMOTHY S. BISHOP, ESQ.,	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	EDWIN S. KNEEDLER,	
7	On behalf of the Respondents	28
8	REBUTTAL ARGUMENT OF:	
9	TIMOTHY S. BISHOP, ESQ.,	
10	On behalf of the Petitioner	61
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-71,
5 Weyerhaeuser Company versus the United States
6 Fish and Wildlife Service.

7 Mr. Bishop.

8 ORAL ARGUMENT OF TIMOTHY S. BISHOP
9 ON BEHALF OF THE PETITIONER

10 MR. BISHOP: Mr. Chief Justice, and
11 may it please the Court:

12 Congress amended the Endangered
13 Species Act in 1978 to narrow the concept of
14 critical habitat, and it did that in response
15 to this Court's decision in Hill and an early
16 regulation that allowed critical habitat
17 designation for population expansion beyond a
18 species' present habitat. In the provision
19 that requires designation of critical habitat,
20 Section 4, Congress limited the Service's power
21 to designate to any habitat of such species
22 which is then considered to be critical
23 habitat.

24 In Section 3(5)(C), Congress commanded
25 that critical habitat shall not include the

1 entire area which can be occupied by a species.
2 And those limitations show that Congress
3 intended that areas that can be occupied by a
4 species -- that is, its habitat -- mark the
5 outer bounds, the outer bounds of critical
6 habitat, and it would be perverse --

7 JUSTICE KAGAN: Mr. Bishop, may -- may
8 I offer you a hypothetical just to understand
9 the scope of your argument, which is a bit
10 unclear to me? So, in my hypothetical, there
11 is a species which, like this one, is in only a
12 single habitat, and for whatever reason, that
13 habitat is no longer going to support the
14 species.

15 Disease has come, a predator has come,
16 it's gotten too hot, it's gotten too cold,
17 whatever it is. That single habitat no longer
18 will be able to support the species. And there
19 is no habitat that at the present moment --
20 there is no other habitat that at the present
21 moment is capable of conserving the species
22 over the long term.

23 But there is a habitat that, with only
24 slight improvements, what the government calls
25 reasonable efforts, can support the species.

1 Okay?

2 So habitat A where the species is, no
3 longer any good. Habitat B, it can't -- it
4 won't conserve the species if left just as it
5 is, but it only takes reasonable effort to
6 conserve the species.

7 Can the government designate that area
8 as unoccupied, critical habitat?

9 MR. BISHOP: No, it has to be habitat.
10 Now, just to be plain, part of the problem with
11 that is that the government -- when the
12 government talks about reasonable changes,
13 which is what -- is what it does here, what
14 would be involved in -- on this piece of land
15 for it to be inhabited --

16 JUSTICE KAGAN: I understand that you
17 think --

18 MR. BISHOP: There may --

19 JUSTICE KAGAN: -- that it's much more
20 than reasonable changes that would be involved
21 here. But I'm -- in my hypothetical, that's
22 why it's a hypothetical, I'm --

23 MR. BISHOP: I understand.

24 JUSTICE KAGAN: -- I'm stipulating --

25 MR. BISHOP: I understand.

1 JUSTICE KAGAN: -- that it's -- it's
2 pretty minimal stuff. It's, you know, dig --
3 dig a few holes, plant a few trees, that sort
4 of thing.

5 MR. BISHOP: Right. I don't rule out
6 that the government might be able to justify a
7 critical habitat designation when there are de
8 minimis changes, where you're really only
9 talking about digging a few holes, where there
10 is a very minimal change required in the land.

11 That isn't this case. We haven't seen
12 the government's justification for doing that.

13 JUSTICE KAGAN: But I want to --

14 MR. BISHOP: What happens when you
15 have a reasonable --

16 JUSTICE KAGAN: -- I want to stick to
17 my hypothetical, which is, you know, maybe
18 something more than de minimis but -- but --

19 MR. BISHOP: No, I --

20 JUSTICE KAGAN: -- but what -- what
21 the government views as reasonable changes,
22 such to allow the land to support the species
23 over the long term.

24 MR. BISHOP: No, we don't think so,
25 Justice Kagan.

1 JUSTICE KAGAN: And why is that?

2 MR. BISHOP: And the reason is --

3 JUSTICE KAGAN: Where in the statute
4 do you find that?

5 MR. BISHOP: The statute says it in
6 three places. It says in Section 4 that only
7 habitat of such species can be designated as
8 critical habitat.

9 JUSTICE KAGAN: But we know that
10 habitat --

11 MR. BISHOP: It says it in Section
12 3(5)(C) --

13 JUSTICE KAGAN: -- doesn't mean --
14 excuse me, I'm sorry.

15 We know that habitat doesn't mean just
16 where a species lives. I mean, that's -- that
17 would be the common understanding of the word
18 "habitat," but this statute clearly goes beyond
19 that, and we know because it says -- it's also
20 where a statute -- where a species could live,
21 right? It's out -- there are also habitats
22 that are outside the geographical area occupied
23 by the species.

24 MR. BISHOP: But those are --

25 JUSTICE KAGAN: So we know that the

1 statute is not using the kind of garden-variety
2 definition of habitat.

3 MR. BISHOP: No, I -- I disagree with
4 that, Justice Kagan. 3(5)(C) says the critical
5 habitat cannot be designated beyond the entire
6 area which can be occupied. Congress was
7 thinking about habitat in the sense that it is
8 used in -- in common speech and in the
9 dictionaries, which is a "can be occupied"
10 sense. Let me give you an example: The 1979
11 Convention of -- on Migratory Species, to which
12 we are a signatory, says it's an area which
13 contains suitable living conditions.

14 The Forest Service, contemporaneously
15 with these amendments in 1978, said that it's
16 the environment where all the essentials for a
17 species' development and existence are present.

18 JUSTICE GINSBURG: But if you use the
19 migratory bird example, then we have here the
20 ephemeral ponds, which are supposed -- supposed
21 to be ideal for breeding, so it's -- it's a
22 habitat that is suitable for breeding.

23 MR. BISHOP: I disagree with that,
24 Justice Ginsburg. It's -- it's -- it's
25 incorrect to label that as habitat because the

1 frog spends only less than a month in breeding
2 ponds. For this to be a habitat, it has to be
3 land which can be occupied.

4 The habitat here includes -- and this
5 is list --

6 JUSTICE GINSBURG: But is it -- is it
7 -- is it true with -- in -- in the case of
8 birds that they may stay at a place less than a
9 month?

10 MR. BISHOP: That's an entirely
11 different example, Justice Ginsburg. The
12 habitat for a migratory bird includes a summer
13 habitat, a winter habitat, and the places along
14 the way where it has to -- where it roosts. It
15 may -- it may prefer particular trees. You
16 have a contiguous habitat, and the roosting
17 trees clearly can be listed as critical habitat
18 if they meet the other conditions.

19 JUSTICE KAGAN: If I could go back to
20 the -- the statutory basis for your position,
21 because, to my mind, it is a counterintuitive
22 result that the statute would prefer extinction
23 of the species to the designation of an area
24 which requires only certain reasonable
25 improvements in order to support the species.

1 That seems a counterintuitive result,
2 and, as I say, it does not seem a result that's
3 demanded at all by the statutory language,
4 which contemplates that habitats will exist
5 even beyond the areas where a species currently
6 resides.

7 MR. BISHOP: Justice Kagan, there is a
8 difference between an area -- an unoccupied
9 area that is habitat and an unoccupied area
10 that is not habitat.

11 JUSTICE ALITO: Mr. Bishop --

12 MR. BISHOP: The statute reaches --

13 JUSTICE ALITO: -- do you agree -- I'm
14 sorry. Continue.

15 MR. BISHOP: The statute reaches only
16 in 3(5)(C) critical habitat shall not include
17 the entire area which can be occupied. That is
18 the limit that Congress set. It must be
19 habitat that can be --

20 JUSTICE KAGAN: But I think that that
21 was dealing with a very different problem.
22 That was dealing with a problem where a species
23 can reside in many areas outside of the area
24 where it resided, and the statute was making
25 clear that just because that's true, you can't

1 go designate all of those areas habitat.

2 But this is a different problem from
3 the problem that we're talking about where
4 there's only a single area that might
5 conceivably prevent extinction of the species.
6 And you're saying that, notwithstanding that it
7 was -- it's only reasonable efforts that would
8 allow it to conserve the species, that's not
9 permitted.

10 MR. BISHOP: It is not. And there are
11 clear statutory indications that --

12 JUSTICE ALITO: Well, do you --
13 Mr. Bishop, do you agree with the proposition
14 that the choice in Justice Kagan's hypothetical
15 is between designation of the land as critical
16 habitat and extinction of the species? Are
17 there not --

18 MR. BISHOP: No.

19 JUSTICE ALITO: -- other options
20 available to the federal government?

21 MR. BISHOP: There are other options
22 and there are other clues in the statutory
23 language. Apart from section 4 and 3(5)(C),
24 what this Court said in Sweet Home was that the
25 Section (5) purchase authority was well suited

1 for buying land that is not yet but may in the
2 future become habitat. That was this Court's
3 decision in Sweet Home.

4 In addition, I would point out the
5 definition of conservation in Section 3.3,
6 which you would think if Congress had in mind
7 that restoration and creation of new habitat,
8 which is what would be required on this land,
9 let there be no doubt, if that was what it had
10 in mind, it would have used one of those terms
11 for the list in 3-3 talks about maintenance of
12 habitat and translocation. It does not talk
13 about the creation of new habitat or the
14 restoration of habitat back to the period
15 before human intervention.

16 JUSTICE KAGAN: But -- but I guess
17 what strikes me about the statute, Mr. Bishop,
18 is that really all over the place you get these
19 references to the fact that habitat isn't just
20 sort of there and perfect always, that habitat
21 requires things to be done to it.

22 You know, even in the definition of
23 "occupied critical habitat," it talks about
24 special management that needs to be taken in
25 order to protect the habitat.

1 And, similarly, in the definition of
2 "conservation," it talks about, you know, the
3 need for habitat improvement.

4 So -- so all through the statute
5 there's this idea of it's not just an on/off
6 switch, that there is habitat that needs to be
7 maintained, improved, and so forth in order to
8 fulfill the function of preserving a species.

9 MR. BISHOP: With all due respect,
10 Justice Kagan, I don't think that's right. I
11 think that all of those references to habitat
12 are references to maintaining habitat that
13 already exists. So --

14 JUSTICE GINSBURG: May I ask you a
15 preliminary question? And it concerns whether
16 the landowner's claim is currently ripe. That
17 is, you are not commanded to do anything. You
18 don't have to do anything at all to -- to
19 conserve the endangered species. And you can
20 continue the -- what is it, timber farming
21 that's going on.

22 Now it may be that down the road you
23 will want to do something else with the land,
24 but wouldn't that be the appropriate time to
25 seek exclusion?

1 MR. BISHOP: No, Justice Ginsburg.
2 The -- the immediate effect of this overlay of
3 a critical habitat on this 1500 acres is a
4 diminution in value of tens of millions of
5 dollars. That is what it says in the agency's
6 economic analysis, that there is an immediate
7 loss in value.

8 And the reason I think for that is
9 fairly easy to -- easy to see. Any buyer
10 coming in will recognize that down the road
11 they have to deal with -- with the critical
12 habitat designation.

13 We have ourselves spent hundreds of
14 thousands of dollars completely planning out
15 and obtaining a rezoning of this land for
16 development. We -- those are wasted
17 expenditures at this point. That was done
18 before the critical habitat designation.

19 We would have to go back, we would
20 have to revisit those, obtain changes in the
21 zoning and change our plans. But the critical
22 point here is that the agency itself found that
23 there was an immediate loss of value to our
24 land.

25 This is our land that has been

1 designated. We are the object, to use Lujan's
2 -- Lujan's terms, we are the object of this
3 designation. And it has caused us immediate
4 financial losses, both sunk costs that we
5 already have and changes in order to be able to
6 -- to proceed.

7 JUSTICE SOTOMAYOR: This is a royal
8 we. As I understand it, the only appellant
9 before us is yours, who's the lessee of the
10 timberland, who owns a de minimis amount of
11 acres.

12 So it wasn't the lessee of the timber
13 cutting. It was the separate owner of the land
14 who's incurred these expenses, and that's not
15 an appellant before us, is it?

16 MR. BISHOP: No, we incurred all of
17 these expenses as the -- as the economic
18 analysis explains.

19 JUSTICE SOTOMAYOR: But who are you
20 representing? I thought the --

21 MR. BISHOP: The agreement between
22 Weyerhaeuser -- the agreement between
23 Weyerhaeuser and the owners of the rest of the
24 property is that we would expend the money and
25 they will provide the land.

1 We also own 150 acres. We provided
2 all of the money for the development and we own
3 150 acres that have been designated that have
4 immediately lost value as a result of this.

5 JUSTICE SOTOMAYOR: Can I go back to a
6 question? As I was reading the evidence in
7 this case, it appeared that there was a dispute
8 as to whether this frog could, in fact,
9 survive, maybe not as healthily as it does now,
10 and maybe not for the very long term, but there
11 was evidence that the frog was there for, I
12 think, 10 or 15 years while timber cutting was
13 occurring.

14 There was some scientific evidence
15 that there were stumps that the frog might be
16 able to survive in, as opposed to the canopied
17 forest. I -- I -- I know that the Fifth
18 Circuit said that there was no dispute this
19 wasn't currently habitable, but I think that
20 depended on what definition you gave to
21 habitable.

22 If we give a different definition,
23 what would be the minimum, if it didn't include
24 the PCEs that you think are necessary? Because
25 I don't know that unoccupied has to be an

1 optimal survival place, and if it doesn't have
2 to be optimal, what would otherwise be a
3 minimum?

4 MR. BISHOP: This property is not just
5 not optimal. It is not habitable. And this is
6 only the litigating position of the Department
7 of Justice.

8 The judges below who looked at -- the
9 Fifth Circuit judges, including the majority,
10 not just the dissenters, who looked at the
11 administrative record here, which is what this
12 Court is reviewing, not the litigating position
13 of the Department of Justice, concluded -- and
14 this is from the majority -- that the Service
15 had found that this was -- Unit 1 was currently
16 uninhabitable. That's page 24-A of the
17 petition appendix.

18 And just to --

19 JUSTICE SOTOMAYOR: But that -- but
20 that definition was never provided?

21 MR. BISHOP: The definition that we
22 provided was the definition that we have
23 provided to this Court, which is the dictionary
24 definition from Webster's 3rd, "the physical
25 features that naturally or normally are

1 preferred by the species," the 1979 convention,
2 "land which contains suitable living
3 conditions."

4 And, you know, a picture is worth a
5 thousand words. In the -- in the Joint
6 Appendix on page 57, there is a photo, albeit a
7 small one, of adult frogs' uplands habitat.
8 And it's a picture of a few trees with a
9 grassland savanna. And the scientific experts
10 that you refer to, Justice Sotomayor, for
11 example, Lannoo, talk about the habitat that's
12 needed on the uplands as a savanna.

13 JUSTICE SOTOMAYOR: I think it's
14 begging -- it's begging the question, which is
15 I don't know that the circuit below actually
16 accepted your definition or whether your
17 definition, for the reasons I indicated just a
18 few minutes ago, covered all of the conditions
19 that could make for survival for the species.

20 As I read the record, there were
21 suggestions by some of the scientists that what
22 -- what you admitted to Justice Kagan a little
23 while ago, minimal work, this species could
24 survive, albeit not robustly, but it could
25 survive.

1 MR. BISHOP: No.

2 JUSTICE SOTOMAYOR: Wouldn't that be
3 enough?

4 MR. BISHOP: No, that's just not what
5 the administrative record shows. All right.
6 The --

7 JUSTICE SOTOMAYOR: Well, I don't want
8 to argue the record now. The question is, if I
9 come away having reviewed it with a question
10 about whether the Circuit actually addressed
11 that question and defined what it thought the
12 minimal requirements for habitat were, wouldn't
13 be -- wouldn't the answer be to remand this
14 case and let it make that determination?

15 MR. BISHOP: If you thought that
16 habitat meant something other than what the
17 convention says and what the dictionaries in
18 1978 said, and if you think that on the basis
19 of this record that this is habitat for these
20 species, then I think that would be --

21 JUSTICE SOTOMAYOR: Well, that's your
22 -- well, that's your adversary --

23 MR. BISHOP: But none of those things
24 are supported -- none of those things are
25 supported by --

1 JUSTICE SOTOMAYOR: Assuming what I
2 said --

3 MR. BISHOP: Yes.

4 JUSTICE SOTOMAYOR: -- would a remand
5 be appropriate?

6 MR. BISHOP: Yes.

7 JUSTICE SOTOMAYOR: Okay.

8 JUSTICE BREYER: I'd like to ask you,
9 I've not -- one way of looking at the case, as
10 I started looking at it, is this isn't about
11 words, really, or definitions. Every time the
12 word "habitat" is used, or almost every time,
13 they talk about critical habitat, which is a
14 defined term. But the key words that follow it
15 are "typically essential" or "necessary," so
16 something like that.

17 So, in thinking about it, I thought,
18 well, air is necessary. We're going to be in
19 real trouble without it. But it's not the only
20 thing that's necessary. Water is necessary
21 too.

22 So you could have for mammals
23 situations where they need air and they can't
24 be submerged in a swamp. So this land will
25 have the air, but it's a big swamp. But maybe

1 we'll drain it. So, if we drain it, it's going
2 to be fine.

3 And if that's what the statute
4 basically means -- you get the idea where I'm
5 driving -- then this is a typical agency case,
6 because, after all, if you can't drain the
7 swamp, then the air is irrelevant.

8 But if you could drain the swamp
9 pretty easily, well, then the air is essential
10 and you better be sure you have it.

11 Now, on that, the agency has found,
12 well, it's not that hard to drain the swamp.
13 Good chance we'll do it. Good chance we'll do
14 it. You say: Ha, they don't know what they're
15 -- well, I mean, you're polite about it.

16 (Laughter.)

17 JUSTICE BREYER: And -- and so you
18 don't -- isn't what we have to do, we look at
19 the record, it's -- the discretion is given to
20 the Secretary. That's a lot. And we say: Did
21 they in this case, the Secretary, exceed the
22 discretion that the statute gives him in
23 thinking they could drain the swamp, i.e., they
24 could make a canopy? Good chance it'll happen.
25 Period. Typical agency case.

1 Now is that how I should look at it?

2 MR. BISHOP: No, not at all. The
3 administrative record here shows that this land
4 would have to be totally remade. It would have
5 to be made to look something like that picture
6 on JA 70 -- 77.

7 And that burden is not something that
8 is allowed by language, plain language, in the
9 statute that requires that the habitat -- the
10 habitat --

11 JUSTICE BREYER: No, we're looking at
12 it the same way. You just want me to come out
13 differently.

14 MR. BISHOP: I would like to spend a
15 couple minutes, if I may, on judicial review.
16 The court below held that the exclusion
17 decision here is not subject to judicial
18 review. And the government argues that that
19 was correct.

20 The statutory language of the
21 exclusion decision here, Section 4(b)(2), is
22 that the agency may exclude any area from
23 designation if the Secretary determines that
24 the benefits of exclusion outweigh the benefits
25 of inclusion.

1 So it's not a "may" statement from
2 Congress. It's a "may/if." May exclude if
3 these other conditions are met. It weighs the
4 benefits of exclusion against the benefits of
5 inclusion.

6 JUSTICE KAGAN: Well, it is a
7 "may/if." But if the other conditions are met,
8 it indicates, because of the use of the "may,"
9 rather than the use of a "shall," doesn't it,
10 that the Secretary still has discretion?

11 In other words, if the conditions
12 aren't met, then the Secretary can't exclude.
13 But if the conditions are met, the Secretary
14 may exclude if he wants.

15 MR. BISHOP: Yes, ultimately, there's
16 -- it's a discretionary decision. I think the
17 question is whether State Farm review of that
18 "if" clause is appropriate. And this Court has
19 already decided that question in Bennett, a
20 unanimous decision of this Court where it
21 considered both parts of that (b)(2) provision.
22 And the Court said it is rudimentary that
23 discretion as to the substance of the ultimate
24 decision does not confer discretion to ignore
25 the required procedures of decision-making.

1 JUSTICE GORSUCH: Mr. Bishop --

2 MR. BISHOP: And the government itself
3 has conceded this.

4 JUSTICE GORSUCH: -- if I --

5 MR. BISHOP: Sorry.

6 JUSTICE GORSUCH: No, not at all.
7 Maybe you can help me out with this. Let's
8 suppose for now that I would agree with you and
9 that we could review this.

10 What more would you expect the
11 Secretary to say, or could say, given the state
12 of scientific evidence before the Secretary?

13 That's not clear to me. The Secretary
14 says there's -- there's just not any evidence
15 of the benefits of exclusion that I -- that I
16 can put a number on.

17 And isn't -- isn't the way the statute
18 written put some burden of proof incumbent upon
19 the landowner or lessee to come forward with
20 something quantifying the benefits of
21 exclusion?

22 MR. BISHOP: Right. Well, certainly,
23 it's permissible for the agency to rely -- to
24 characterize the benefits of inclusion as being
25 biological, which is something that can be

1 described but not quantified.

2 But, on the other side of that ledger,
3 the agency has to meet State Farm standards in
4 identifying what the factors --

5 JUSTICE GORSUCH: And what -- what --
6 on that, my question is, what more would you
7 ask the Secretary to do? The Secretary did
8 quantify the economic benefits exclusion and
9 then said, compared to the benefits of
10 inclusion, they're indeterminate. And,
11 therefore, the burden of proving exclusion has
12 not been met.

13 And that burden, it seems to me, rests
14 with you. So suppose I -- there's some
15 judicial review possible here. Do we need to
16 get into how many angels dance on the head of
17 that pin if you -- if you've got no real
18 complaint at the end of the day with the
19 adequacy of the Secretary's --

20 MR. BISHOP: Well, we do --

21 JUSTICE GORSUCH: -- reasoning?

22 MR. BISHOP: -- we do have that
23 complaint. And, certainly, a remand would --
24 would allow us to explore that. But here,
25 under State Farm, the inputs --

1 JUSTICE GORSUCH: Well, could you
2 explain that to me?

3 MR. BISHOP: Yes, the inputs into the
4 decision have to be fair and reasonable and the
5 connection between those inputs and the
6 ultimate decision have to be.

7 Let -- let me give an example of a
8 very basic error that -- an example of an
9 internal inconsistency.

10 So the -- the Service refused to
11 factor in the loss of Unit 1 to housing and to
12 St. Tammany's tax base, and it did that because
13 it found that Unit 1 is only 0.5 percent of
14 developable land in the parish.

15 There's a big problem with that. It
16 included as developable land everything under
17 -- south of Interstate 12, which is not
18 developable because it flooded in Hurricane
19 Katrina, everyone from that area is moving up
20 to -- to us, to the higher ground.

21 It said, in addition, it acknowledged
22 that Unit 1 is particularly attractive for
23 development because Highway 36 runs through it.
24 It's an attractive area for development because
25 it's connected to centers of -- where jobs --

1 where the jobs are.

2 And yet -- so we have a Unit 1 that is
3 already zoned, it's outside the flood zone, and
4 it's well served by roads connecting it to
5 jobs, but the Service treated every undeveloped
6 area in the parish as fungible and said this
7 just isn't an important development area, even
8 though St. Tammany, as its brief explains in
9 this case, says no, it's a very important
10 development area.

11 The -- that is what you get when
12 there's no judicial review, when an agency
13 thinks that there are no controls over what it
14 concludes.

15 And the economic analysis is riven
16 through with very basic errors of that kind.
17 And I would submit that without the possibility
18 of judicial review in cases like this, that is
19 what you get, a very unsatisfactory balancing.

20 And that is what State Farm is for.
21 State Farm is there to ensure that when a
22 balancing like this has to be done, when there
23 are multiple factors to be considered, that the
24 agency gets it fairly right as to what those
25 factors are and then connects up the dots

1 between what those factors are and what its
2 ultimate conclusion is. Not the one-line
3 conclusion -- unexplained conclusion that it
4 had here that it was not going to exclude.

5 If I can save the rest of my time for
6 rebuttal, please.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Bishop.

9 Mr. Kneedler.

10 ORAL ARGUMENT OF EDWIN S. KNEEDLER

11 ON BEHALF OF THE RESPONDENTS

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

15 The dusky gopher frog is a critically
16 endangered species. It is at serious risk of
17 extinction. As the Fish and Wildlife Service
18 found, if the frog is to be conserved and the
19 risk of its extinction reduced, the area
20 involved here is essential to accomplish those
21 explicit statutory purposes.

22 It, therefore, was properly designated
23 as unoccupied critical habitat. Petitioner
24 does not --

25 CHIEF JUSTICE ROBERTS: It has to be

1 -- your argument is that critical habitat
2 doesn't have to include all of the elements for
3 habitability because you could undertake some
4 restoration that would provide whatever's
5 missing?

6 MR. KNEEDLER: That -- that --

7 CHIEF JUSTICE ROBERTS: So the -- the
8 draining of the -- of -- of the swamp. But,
9 you know, if you have the ephemeral ponds in
10 Alaska, you could build a giant greenhouse and
11 plant the longleaf pines and the -- the frog
12 could live there. In other words, there has to
13 be presumably some limit on what restoration
14 you would say is required.

15 MR. KNEEDLER: Yes. And -- and what
16 the -- what the Service found here is that
17 restoration of the uplands could be
18 accomplished with reasonable efforts. The
19 central -- the central feature of the
20 habitat --

21 CHIEF JUSTICE ROBERTS: Well,
22 reasonable -- reasonable efforts that the
23 landowners would have to undertake voluntarily,
24 right?

25 MR. KNEEDLER: The landowners, or if

1 they entered into an agreement with a -- with a
2 conservation group. The Nature Conservancy has
3 purchased land at the other -- at the other
4 location where the frog is.

5 CHIEF JUSTICE ROBERTS: But they've --
6 they've told you they're not going to do it.

7 MR. KNEEDLER: That -- that's true.
8 But the -- the operation of the Act, it can't
9 be dispositive what the intention -- subjective
10 intentions at this moment in time by this
11 particular owner of the property are. The --
12 the Act turns on the -- on the status of the
13 land, not the intention of -- of the landowner.

14 Now that may be taken into account in
15 -- at some point in deciding whether the land
16 is essential. The -- the proposed regulation
17 that Interior has published says that.

18 CHIEF JUSTICE ROBERTS: I don't
19 understand. I mean, you -- you've said that it
20 can be designated as critical if some
21 restoration can take place. And as far --
22 where we are right now is the landowner's
23 saying: We're not going to do the restoration
24 you want.

25 MR. KNEEDLER: Right. But --

1 CHIEF JUSTICE ROBERTS: So you just
2 say, well, we're going to designate it anyway,
3 even though the restoration won't occur?

4 MR. KNEEDLER: Well, the -- the -- the
5 question of whether it -- it's -- whether it is
6 capable of supporting a population is basically
7 a scientific one. Section 4(b)(2) says that it
8 should be based on the best scientific evidence
9 available. It's about the status of the land
10 in terms of whether --

11 CHIEF JUSTICE ROBERTS: With the --
12 with -- with the change, right? Can this
13 support the population if they make this
14 change?

15 MR. KNEEDLER: Yes. There --

16 CHIEF JUSTICE ROBERTS: Well, but
17 what's the limit? I mean, you could require,
18 say, well, this -- this piece of property in --
19 in Canada could accommodate the species so long
20 as you invested \$100 million to put in
21 ephemeral ponds, change the loblolly pines to
22 longleaf and do all this.

23 MR. KNEEDLER: Well, it has -- it has
24 to be, according to the Service here,
25 reasonable efforts. And --

1 JUSTICE ALITO: What's the definition
2 of reasonable?

3 MR. KNEEDLER: I -- something that --
4 I mean, for one thing, I think there's a big
5 distinction between whether the -- whether, in
6 this case, the upland habitat has been
7 transformed to such an extent that it's
8 destroyed, like if there was a shopping center
9 there or a housing development there.

10 As compared to the upland habitat here
11 --

12 JUSTICE GORSUCH: But why -- why --

13 MR. KNEEDLER: -- has trees that
14 different --

15 JUSTICE GORSUCH: -- why is that so,
16 Mr. Kneedler, though? I mean, it might be a
17 few more dollars to pull up the asphalt and
18 then put down the ephemeral ponds. Why would a
19 parking lot make the difference? Why would
20 that be an unreasonable effort necessarily?

21 MR. KNEEDLER: It's conceivable if
22 there was a small --

23 JUSTICE GORSUCH: And where does all
24 this come from in the statute? Where do you
25 get reasonable efforts in the statute?

1 MR. KNEEDLER: Well, I -- I think it
2 runs throughout the statute, frankly.

3 JUSTICE GORSUCH: Well, runs
4 throughout. Can you show me where?

5 MR. KNEEDLER: Well, a number -- a
6 number of places I would -- I would -- I would
7 refer to. The definition of critical habitat,
8 both prongs, talk about --

9 JUSTICE GORSUCH: I don't see
10 reasonable efforts there.

11 MR. KNEEDLER: No, not reasonable
12 efforts, but --

13 JUSTICE GORSUCH: It's not there.

14 MR. KNEEDLER: No, but it -- it talks
15 about conservation, what's essential for
16 conservation of the species. Conservation is
17 defined as all measures necessary to bring the
18 species back to the point where it does not
19 need protection for that.

20 JUSTICE GORSUCH: Oh, I don't doubt
21 under Section 7 the government has enormous
22 powers to help species, whether in critical
23 habitat or elsewhere. All right? There's
24 nothing preventing the government from
25 purchasing land or taking other actions to

1 protect an endangered species, whether on
2 critical habitat or elsewhere, right?

3 MR. KNEEDLER: But this Court said in
4 Sweet Home, for example, that the fact that the
5 government can purchase land or make grants
6 does not undermine the -- the operation. The
7 critical habitat and --

8 JUSTICE GORSUCH: It's a supplementary
9 power, though, you'd agree?

10 MR. KNEEDLER: It -- it is. But for
11 one thing, the designation of critical habitat
12 serves -- serves a very important function in
13 educating and identifying the areas where the
14 species could be -- could be used.

15 And it's also important to recognize
16 this is a proposition not limited to private
17 land. It also has to do with public land.

18 So having the expertise of the Fish
19 and Wildlife Service identify those areas that
20 are necessary for recovery of the species, can,
21 for example, identify the areas that would be
22 -- that a conservation group might want to
23 enter into an agreement with the landowner to
24 conserve, that -- that the -- that the state
25 might decide to purchase, so the identification

1 of the habitat is not just in terms of
2 triggering Section 7 of the -- of the Act.

3 JUSTICE GORSUCH: Do you --

4 JUSTICE SOTOMAYOR: Mister --

5 JUSTICE ALITO: I think your argument
6 requires you to provide some definition of
7 reasonable restoration. Now this case is going
8 to be spun, we've already heard questions along
9 this line, as a choice between whether the
10 dusky gopher frog is going to become extinct or
11 not. That's not the choice at all.

12 The question is, who is going to have
13 to pay and who should pay for the preservation
14 of this public good? Now it may be very
15 difficult for a lot of people to shed tears for
16 a big corporation like the one in this case,
17 but let's suppose this is a -- this is a family
18 farm and part of the -- the land is designated
19 or a good part of it is designated as critical
20 habitat.

21 Now to what -- is there some formula,
22 some percentage of the value of the family farm
23 that would have to be required for this
24 reasonable restoration be -- before that
25 becomes unreasonable? Can you provide any

1 guidance on that?

2 MR. KNEEDLER: I -- I don't think
3 there would be a hard-and-fast rule. I think
4 if you -- if you look at the -- if you look at
5 the nature of the land, I mean, for example,
6 here, would -- would the restoration be -- be
7 within the framework that the -- that the land
8 is now being used for?

9 JUSTICE BREYER: Well, that's --

10 MR. KNEEDLER: It's being used to
11 raise trees. All that would be necessary at
12 least at the beginning is to thin trees.

13 JUSTICE BREYER: Well, yeah, but
14 that's -- that's -- now you're right at the
15 point. I read this. I thought it's an easy
16 case, not the result, but the concept's easy.
17 The statute books are filled with words like
18 reasonable.

19 And right here it says that the
20 Secretary, it says, a determination by the
21 Secretary that such areas are essential. To
22 me, that calls up is it reasonable or isn't it
23 reasonable?

24 It's not reasonable to say that this
25 area is essential if the frogs will die anyway

1 because there aren't enough trees. Okay?

2 So let's look at the picture on page
3 57. And the picture on page 57 shows an area
4 which has very few trees. And we also know
5 that this is a logging company, and so probably
6 they have lots of trees. They like trees, not
7 forever, but --

8 (Laughter.)

9 JUSTICE BREYER: -- but they want a
10 lot of trees planted there. And so what is it
11 in this case -- and I thought the case was no
12 more than that -- what is it -- what is it in
13 this case that makes discretion -- statute
14 books are filled with words like we give
15 discretion to the Secretary -- that makes this
16 within and not outside that delegated
17 discretion to the Secretary to determine
18 essentiality?

19 MR. KNEEDLER: Well, I -- the Act, as
20 you pointed out, it says the Secretary shall --

21 JUSTICE BREYER: But it's not the Act
22 that I'm thinking of. I agree with you that it
23 gives him lots of discretion. But the Chief
24 Justice's first question was surely he can't
25 require the building of hot air greenhouses in

1 Nome, Alaska. That goes too far.

2 And I'm not asking you to find it
3 either. There are loads of places where it's
4 not defined. I'm asking you to tell me what is
5 in this record that suggests that this is
6 within the Secretary's discretion and not
7 outside of it.

8 MR. KNEEDLER: First of all, you
9 pointed to page 57 of the Joint Appendix, which
10 shows the uplands at Glen Pond. There are
11 pictures in the -- in the record at JA-17
12 through 20 of the -- of the area in -- at issue
13 here. There are trees in the background that
14 -- that don't show a dense canopy.

15 I don't want to say that there is not
16 forested land there, but I think one of -- one
17 of the -- one of the ways to look at it is,
18 would the modifications be compatible with the
19 existing use of the land? If you're running --
20 if you're operating a tree operation, cutting
21 down and thinning trees is part of what you do.

22 And it's not as if this would have to
23 be done overnight.

24 CHIEF JUSTICE ROBERTS: Well, but the
25 problem with that is, once you have the

1 designation, you need probably federal permits
2 to do things like logging companies typically
3 do. And if you are asking for a federal
4 permit, the whole point of the designation is
5 you have to go through a fairly elaborate
6 process. And you might not get it at the end.

7 Well, you won't have to go through the
8 elaborate process, and you probably get one if
9 it weren't designated.

10 MR. KNEEDLER: Well, as far as logging
11 is concerned, the -- the ongoing log -- logging
12 operations here have not required a -- any --
13 any federal permit. And it's -- it's only if
14 the landowner wanted to transform the land and
15 use it for development and if that interferes
16 --

17 CHIEF JUSTICE ROBERTS: Which is
18 exactly what they want to do, right?

19 MR. KNEEDLER: Yes, but -- but if
20 that's true, then a Section 7 -- excuse me, a
21 404 permit would be required if they were going
22 to fill wetlands or -- or fill the ponds. But,
23 if development happened without the need for a
24 federal permit, Section 7 does not impose any
25 limitation at all. It's only if there is

1 federal involvement.

2 But here we're talking about the basic
3 qualification of the land to be designated in
4 the first place. And it --

5 JUSTICE SOTOMAYOR: Mr. Kneedler, in
6 your brief, you give a meaning to "habitat"
7 which, frankly, is very different than its
8 dictionary meaning. Pages 27 to 28, you argue
9 that "habitat can include some areas where a
10 species does not live and cannot ever live,
11 even with restoration." That's very different
12 than what you started your argument with today.

13 It's very different than what you've
14 done with the Santa Ana sucker, for example.
15 If we disagree with you, where does that leave
16 you in this case?

17 MR. KNEEDLER: Well, if you disagree
18 about the Santa Ana sucker, that's --

19 JUSTICE SOTOMAYOR: I'm not -- we're
20 not looking at that.

21 MR. KNEEDLER: Okay.

22 JUSTICE SOTOMAYOR: Let's assume I
23 take the dictionary definition of "habitat,"
24 which is the kind of place that is natural for
25 the life and growth of an animal or plant.

1 That's a fairly simple, natural place.
2 Could this -- is this a natural place for this
3 frog to live? And, if not, do -- is the
4 difference between you and your colleague
5 whether some reasonable restoration can be made
6 or not?

7 MR. KNEEDLER: That -- that may in the
8 end be the difference, but -- but I think it's
9 important when -- when you're talking about the
10 definition that you quoted, and we -- we quote
11 a number of them on page 33 of our brief, a
12 number of dictionary definitions, is it the
13 kind of place, is it the kind of site on which
14 the -- on which the species could thrive?

15 And -- and here, the kind of site, I
16 think, is really most commonly understood or
17 defined as the central element, what makes it
18 rare, and that's the pond. Is it the kind of
19 place that this frog can live, is in an
20 ephemeral pond and the immediately surrounding
21 uplands?

22 JUSTICE SOTOMAYOR: And was I all that
23 --

24 JUSTICE KAGAN: Mr. Kneedler --

25 JUSTICE GINSBURG: We were just told

1 that they were in a pond for less than a month.

2 MR. KNEEDLER: Well, the -- the adult
3 frogs are, but -- but the -- the larvae and
4 tadpoles remain in the -- in the pond for much
5 longer. In fact, one of the -- one of the
6 reasons that this is rendered so rare is that
7 you have to have an ephemeral pond with
8 enough -- with water in it for a long enough
9 period of time, 195 days, so that --

10 JUSTICE GINSBURG: How -- how do you
11 answer --

12 MR. KNEEDLER: -- the tadpoles mature
13 and -- and metamorphize, but -- but not water
14 all the time so it has fish that will eat the
15 larvae. That's what makes this group of ponds
16 critical --

17 JUSTICE GINSBURG: But you need -- you
18 need a place for them to live outside the pond.
19 And Justice Sotomayor brought up the question
20 about whether the frogs could live in the area
21 outside. You said yes, even though it's far
22 from an ideal place.

23 But Mr. Bishop said there is no
24 showing that frogs could live there.

25 MR. KNEEDLER: Well, there -- there is

1 some evidence in the record that we point to
2 where the scientists evaluated the -- the land
3 and found some stumps. And -- and there was --
4 as was pointed out, there were frogs located on
5 this up until 1965, even though there was a
6 tree farm going on.

7 But one of the reasons that -- this
8 hasn't been further developed because this
9 really wasn't the -- the gravamen of the
10 administrative dispute, whether any frog could
11 survive there. And -- and that's why -- that's
12 why it's not -- you know, there isn't more
13 express findings about that. But --

14 JUSTICE ALITO: The frogs need the --
15 the frogs need the ephemeral ponds, and those
16 are there. And there's evidence in the record
17 that there are some stumps. But what about the
18 -- the ground cover and the trees? Is there
19 anything in the record that shows, that could
20 -- that could show that the frogs -- there
21 could be a sustaining population of frogs there
22 without changes in the tree cover and,
23 therefore, changes in the ground cover?

24 MR. KNEEDLER: For a long-term
25 sustaining population, there would have to be

1 changes. No, that -- we acknowledge that. And
2 that -- that is what is said here. But one --
3 one --

4 JUSTICE ALITO: So they -- they
5 couldn't survive where they are now? I mean,
6 the test can't be could you -- if you dumped a
7 couple of frogs there and then you came back
8 two weeks later or a month later, would any of
9 the frogs still be alive? That can't be the
10 test, right?

11 MR. KNEEDLER: No, but -- but --

12 JUSTICE ALITO: They would have to
13 sustain themselves.

14 MR. KNEEDLER: Well, they -- they
15 might live for several generations. I mean, I
16 -- I don't know. But I don't think that's the
17 -- the central point here.

18 I think the -- I think the fact that
19 frogs were identified there up until 1965 and
20 -- and there are stump holes and -- and the --
21 and the basics for this to be a sustained area
22 is -- is -- is really what's important because
23 it shows that it's capable of. And --

24 JUSTICE KAGAN: Mister --

25 JUSTICE SOTOMAYOR: So if we were --

1 JUSTICE KAGAN: -- Mr. Kneedler,
2 suppose -- if we could just go back to Justice
3 Alito's question, Justice Alito suggested that
4 there were other things that the government is
5 capable of doing to conserve these frogs.

6 So what, consistent with Mr. Bishop's
7 view of the statute, could the government do,
8 is the government enabled to do, that would
9 effectively conserve these frogs? Is there
10 anything?

11 MR. KNEEDLER: It does have the
12 authority -- there's a grant program under
13 Section 6 of the Act of grants to states. Now
14 that would -- the -- the grants to the state is
15 the state would have to decide to become
16 involved, and those can involve private
17 conservation groups.

18 The federal government could purchase
19 the land if -- for example, if the landowner
20 was willing to sell it. So far, there hasn't
21 been any indication that they would be. And
22 the Service understandably very rarely
23 exercises the power of eminent domain. It
24 probably would have the -- the -- the power to
25 do so.

1 But the -- none of that -- none of
2 that undercuts the need, the statutory
3 obligation to designate critical habitat.

4 JUSTICE KAGAN: And -- and this --
5 this statute presumes that the designation of
6 critical habitat is often, almost always, going
7 to be on private land, isn't that correct?

8 MR. KNEEDLER: Well, not -- not --

9 JUSTICE KAGAN: Maybe I'll take
10 down "almost always."

11 MR. KNEEDLER: -- almost always.

12 JUSTICE KAGAN: Often.

13 MR. KNEEDLER: No, I --

14 JUSTICE KAGAN. Is often going to be
15 on private land?

16 MR. KNEEDLER: It often will be on
17 private land. But it's also on public land.
18 And it's important -- it's -- it's important
19 that the Court understand that the limitations
20 the Petitioner would place on the designation
21 of critical habitat would also apply to the
22 government's own land in -- in terms of
23 limiting the Section 7 consultation process if
24 somebody wants a permit on -- on federal land.

25 CHIEF JUSTICE ROBERTS: Can't you do

1 what you want on federal land?

2 MR. KNEEDLER: Well, but triggering
3 section -- yes, but -- to an extent, but
4 Section 7 is a framework to bring in the Fish
5 and Wildlife Service and its expertise. And --
6 and for --

7 CHIEF JUSTICE ROBERTS: Well, so the
8 only benefit to the federal government is that
9 the Fish and Wildlife Service will sit down at
10 the table with whoever else, whatever other
11 government agency owns the land?

12 MR. KNEEDLER: Well, I -- that is an
13 important benefit. It's not the only benefit.
14 There's a benefit to the public in having -- in
15 having Section 7 scrutiny and consultation go
16 on before an action agency undertakes --

17 CHIEF JUSTICE ROBERTS: At some point,
18 somebody in the federal government can say to
19 the federal wildlife service: I want you to
20 sit down with whoever it is, the Army Corps of
21 Engineers. Right?

22 MR. KNEEDLER: That --

23 CHIEF JUSTICE ROBERTS: You don't need
24 a statute to bring that about.

25 MR. KNEEDLER: Well, it's true they

1 could, but Section 7 of the ESA organizes that
2 by setting up a consultation process such that
3 the action agency can't go -- can't go forward
4 in an area that might harm the species or its
5 habitat without consulting with the agency.
6 That is a very important concept at that time.

7 JUSTICE ALITO: Let's go back to my --

8 JUSTICE KAGAN: I guess what I was
9 suggesting was -- was -- you know, Congress
10 could have passed a statute which just said
11 every time that there's a problem of this kind,
12 the federal government has to purchase the land
13 that will support an endangered species. It
14 didn't pass that statute.

15 It passed a statute that said that the
16 Secretary could designate critical habitat
17 regardless whether that habitat was on private
18 or public land.

19 And then the question is, where does
20 this requirement of immediacy come from that
21 Mr. Bishop wants to impose?

22 MR. KNEEDLER: You mean immediate
23 restoration, do you mean?

24 JUSTICE KAGAN: You know, that it has
25 to be -- that it has to be available to support

1 the species exactly now without any further
2 effort?

3 MR. KNEEDLER: It is not in the Act at
4 all. And the -- and the whole concept of
5 conservation is a long-term prospect, not
6 something that has to happen immediately.

7 JUSTICE BREYER: So that's -- all
8 right, that's -- that's so. Land is around for
9 a long time. We hope the frogs will be too.
10 You're looking out into the future. Is there
11 anything you want to add in words that I would
12 write if I were writing this opinion that would
13 distinguish the case the Chief Justice first
14 brought up where the only way to save these
15 frogs, in addition to the ponds, is to build
16 special hothouses in Nome, Alaska?

17 A decision resting on that I -- would
18 strike me as far-fetched, from a situation
19 where all you have to do in addition is drain
20 six inches of swamp. If the decision rested on
21 that, even if the owner said I'll never do it,
22 I would say it was a reasonable decision.
23 Okay. That's highly subjective. Are there any
24 words that you could use that would distinguish
25 those two instances?

1 MR. KNEEDLER: Well, the greenhouse
2 example is not -- is not restoring habitat. I
3 don't -- I don't think a greenhouse would --

4 JUSTICE BREYER: Well, you see what
5 I'm trying to get at --

6 MR. KNEEDLER: No, no, no --

7 JUSTICE BREYER: -- is very unlikely.

8 MR. KNEEDLER: Yes. No, it's very
9 unlikely. But -- but here -- here the
10 restoration efforts are -- are entirely in sync
11 with the use of the land. I mean, there are
12 uplands with trees. As I say, they could be
13 thinned. It's not as if the -- not only does
14 the conservation not have to happen immediately
15 but the --

16 CHIEF JUSTICE ROBERTS: So would you
17 --

18 MR. KNEEDLER: -- but the restoration
19 doesn't have to happen immediately.

20 CHIEF JUSTICE ROBERTS: That's your --
21 that's your requirement, the restoration has to
22 -- has to be entirely in, what did you say, in
23 sync or in --

24 MR. KNEEDLER: In -- in sync with --
25 I'm not saying that that is a hard-and-fast

1 rule. I'm trying to explain why this one --
2 why it is reasonable in this case.

3 CHIEF JUSTICE ROBERTS: Okay. Well,
4 but I know. But the question and the reason
5 for the hypothetical is it seems to me that if
6 you permit the designation of something as
7 critical habitat that cannot be occupied by the
8 animal, because you think they can do something
9 down the road that will cure the problem,
10 whether it's cut the trees or do anything else,
11 that you ought to be able to articulate what
12 the limit is on what you require down the road.

13 MR. KNEEDLER: I -- I think it's
14 whether -- whether it is a further modification
15 of the habitat in it -- in its existing -- in
16 its existing state. And at least where the --
17 at least where the -- the habitat is being used
18 in a way that is similar to what would be
19 necessary for its restoration or would the
20 restoration undermine the fundamental nature of
21 it and in that --

22 CHIEF JUSTICE ROBERTS: So if you get
23 to Justice Gorsuch's or whoever it was -- the
24 asphalt thing, if what you have to do is just
25 dig up the asphalt, that's -- the use of the

1 area for a parking lot is not in tune with its
2 normal whatever, so you couldn't do that under
3 this statute?

4 MR. KNEEDLER: Well, I -- I think -- I
5 think there may be several factors, the size --
6 the -- the effort involved. I mean, if it's
7 one road, that may not be an obstacle.

8 If I could just point out there is a
9 -- there is a statutory place to look for the
10 distinction that I'm drawing, and among others,
11 it's in 1533(a)(1)(A), which in designating or,
12 excuse me, listing a species, it directs the
13 Secretary to take -- to determine whether a
14 species may be endangered because of a number
15 of factors.

16 The first one is "the present or
17 threatened destruction, modification, or
18 curtailment of its habitat or range." The
19 reference to modification of habitat suggests
20 that even with modification, it's still
21 habitat, even though it's been modified.

22 And one of the reasons that land is
23 unoccupied by a species is often precisely
24 because of what has happened, people using the
25 land in a way or transforming the land. But

1 this -- this passage contrasts destruction of
2 the habitat, which would be the case if -- if
3 there was a parking lot or a building or some
4 -- something that transformed it, and
5 modification of the habitat, which suggests
6 that it retains its essential nature.

7 And here, Unit 1 retains its essential
8 nature, which is these very rare ponds, not
9 only that, a collection of five ponds, which
10 enables the development of a -- of a -- a meta
11 population.

12 JUSTICE SOTOMAYOR: So can we talk
13 about -- I -- I see your point with talking
14 about a kind of place, and it does seem logical
15 that the frogs were there and they were there
16 for a very long time. They were there during
17 the timber cutting. But they left. They left
18 or they were destroyed.

19 So I -- what is it about the natural
20 -- the native environment that still exists
21 there and what is it that you think, with very
22 little reasonable effort, that you could change
23 to make it sustaining for a long period of time
24 again?

25 MR. KNEEDLER: What -- what the frog

1 needs is -- is some --

2 JUSTICE SOTOMAYOR: The PCEs, I know.

3 MR. KNEEDLER: Well, yes, but it --
4 but it -- that -- that transformation or that
5 change, that restoration would not have to
6 happen overnight. It would not mean
7 clear-cutting the loblolly pines and planting
8 -- and -- and planting longleaf pines.

9 JUSTICE SOTOMAYOR: That's my point.

10 MR. KNEEDLER: And -- and there --
11 there is an example in the -- in the recovery
12 plan that is cited in the record when it's
13 describing what has happened at Glen Pond,
14 which is the place in Mississippi, the only
15 place where there is a -- a stable population
16 at all.

17 It describes that there has been some
18 habitat management which has included thinning
19 trees and planting longleaf pines, which
20 suggests this could be a gradual process. As
21 the loblolly pines mature, they could be cut.
22 They could -- some could be cut now to create
23 some open space. You could cut some trees and
24 leave stumps there for the frog. It could be a
25 gradual process. It doesn't require that it be

1 instantly made -- made available.

2 CHIEF JUSTICE ROBERTS: But it's still
3 the case that that would require consent of the
4 owners, and they say they're not going to do
5 it.

6 MR. KNEEDLER: But -- but again --

7 CHIEF JUSTICE ROBERTS: You can't
8 require them to do it, right?

9 MR. KNEEDLER: But, again, what
10 constitutes habitat, looks at the nature of the
11 land. And what -- and whether something is
12 essential -- no, you can't require them to do
13 it, but -- but the Service looks at it and says
14 if this species is going to be conserved, in
15 fact, if this species is going to survive at
16 all and not be extinct, it is essential to use
17 these ponds.

18 It may be that if -- that the
19 landowner can ignore that, but it -- it does
20 serve to identify for the landowner and for
21 others that this is critical habitat to -- to
22 the survival of the species.

23 JUSTICE GINSBURG: But can you --

24 JUSTICE GORSUCH: Suppose the missing
25 --

1 JUSTICE GINSBURG: -- can you explain,
2 suppose the proposed regulation is in effect.
3 What would the Fish and Wildlife Service have
4 to do differently if the proposed regulation
5 were in effect?

6 MR. KNEEDLER: If the what? The
7 proposed regulation?

8 JUSTICE GINSBURG: Yes.

9 MR. KNEEDLER: I think this would
10 qualify under the proposed regulation as I --
11 as I read it. In fact, it identifies -- it
12 says while the landowner's intentions can be
13 taken into account, it's sort of a sliding
14 scale, and the more critical the particular
15 area is for the -- for the species, the -- the
16 less likely it is that the intentions of the
17 landowner would be taken into account.

18 And I think that exactly describes
19 this case. This is a rare case because of the
20 rare nature of these ponds. It is critical to
21 preserve these ponds. And they can be used for
22 the habitat of -- of the species.

23 JUSTICE GORSUCH: Could -- could this
24 --

25 MR. KNEEDLER: It is the kind of

1 place, because of the ponds, where the species
2 can thrive.

3 JUSTICE GORSUCH: Let's -- let's
4 assume for the moment that this isn't habitat
5 and, therefore, couldn't be designated as
6 critical habitat.

7 Could the Secretary take other actions
8 to identify this land as critical to the
9 survival of the species, even if it isn't
10 currently habitat? Is there anything in
11 Section 7 or elsewhere in the statute that
12 would prohibit that?

13 The way I read the statute, it says
14 that, you know, the Secretary has to take
15 actions to avoid jeopardizing the continued
16 existence of any endangered species, or result
17 in the destruction of habitat, critical
18 habitat.

19 So there's -- there's an "or" there.
20 And it seems to me, I -- I wonder, isn't the
21 Secretary fully endowed with authority to take
22 other actions, even if this isn't critical
23 habitat, to identify this land as important to
24 the future survival of the species?

25 MR. KNEEDLER: Well, Section --

1 Section 7(a)(2) is talking about what the
2 action agency does to avoid --

3 JUSTICE GORSUCH: Right.

4 MR. KNEEDLER: -- to avoid critical
5 habitat. But --

6 JUSTICE GORSUCH: That's the operative
7 --

8 MR. KNEEDLER: -- but -- but --

9 JUSTICE GORSUCH: -- action part of
10 the statute.

11 MR. KNEEDLER: -- but -- but Congress
12 enacted it -- the concept of habitat has never
13 been a technical term or a technical feature in
14 the way that it's applied.

15 JUSTICE GORSUCH: I -- if you can just
16 answer my question --

17 MR. KNEEDLER: Yes.

18 JUSTICE GORSUCH: -- I'd be grateful.
19 Is there anything that prohibits the Secretary
20 --

21 MR. KNEEDLER: Maybe on an ad hoc
22 basis --

23 JUSTICE GORSUCH: Right.

24 MR. KNEEDLER: -- but not -- it's not
25 under the statute. And the question is what

1 are the responsibilities --

2 JUSTICE GORSUCH: My question is: Why
3 isn't it under the statute, given that language
4 that says specifically that the agency -- the
5 agency can take cognizance of the continued
6 existence of any endangered or threatened
7 species, quite apart from preserving its
8 threatened habitat?

9 It seems to me there are two duties
10 that the Secretary has there, and this would
11 fit neatly under at least one of them, if not
12 the second.

13 MR. KNEEDLER: But the -- the
14 Secretary could, but the -- but the designation
15 of critical habitat, as I said, it's mandatory
16 under the Act. It has -- it has important
17 functions, including identifying the area where
18 actions should be taken because of the
19 likelihood here that the frog will need that
20 space to -- to survive.

21 Again, I suppose the Secretary could
22 do something on an ad hoc basis, but that's not
23 the framework that the statute set up. It's
24 set up with rule-making, with public
25 transparency, to be based on science, with

1 public input, and identification of -- of
2 costs, and weighing of costs. This is an
3 elaborate process.

4 And the -- and what the Secretary
5 should do to protect the land and what other
6 agencies should do to protect the land --

7 JUSTICE GORSUCH: The agency --

8 MR. KNEEDLER: -- are part of that
9 process.

10 JUSTICE GORSUCH: The agency does lots
11 of things to protect species, endangered
12 species, beyond protecting their habitat,
13 doesn't it?

14 MR. KNEEDLER: Yes. If there's
15 federal land involved, other federal agencies
16 could do it, but the Secretary would have no
17 independent authority with respect to private
18 land, except the designation of critical
19 habitat.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Bishop, you have four minutes
23 remaining.

24

25

1 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP
2 ON BEHALF OF THE PETITIONER

3 MR. BISHOP: Justice Gorsuch, to your
4 point, 7(a)(1) imposes an obligation on all
5 other federal agencies which shall, in
6 consultation with the Secretary, utilize their
7 authorities in furtherance of the purposes of
8 this chapter.

9 Critical habitat is just one part.

10 JUSTICE SOTOMAYOR: But that's only if
11 it's designated critical habitat.

12 MR. BISHOP: No, no, no, that is a
13 general obligation. I can tell you that
14 whenever you go for a Clean Water Act permit,
15 you don't -- it doesn't have to be -- no
16 critical habitat need be involved. State
17 wildlife agencies and FWS immediately gets
18 involved and has to sign off on those.

19 Critical habitat does not have to be
20 involved. And there's a perfect example in
21 this case. If you read the final designation
22 here, the properties in Mississippi were
23 restored before there was any critical habitat
24 designation.

25 And CBD in its brief says that in

1 doing so, the frog survived in Mississippi
2 through "intense human effort and extensive
3 habitat restoration."

4 That was all done before the critical
5 habitat designation in this case. So the -- so
6 -- and -- and just to understand here, and to
7 respond to this changes in sync argument that
8 Mr. Kneedler made, there is nothing in sync
9 about creating a -- an open savanna on our
10 property.

11 This is an intensive 1500-acre tree
12 farm. The trees are planted 10 to 12 feet
13 apart. There is no groundcover because the
14 sunlight does not reach the forest floor, and
15 we don't want it to because that interferes
16 with tending to the trees. It interferes with
17 harvesting them.

18 This is not a property on which there
19 will be any groundcover to supply moisture or
20 food or cover for these frogs. We would have
21 to totally change the way that this land
22 operates in order to accommodate the frog.

23 And the idea that the frog scientists
24 here agree with the government is simply wrong.
25 And I would urge the Court to read Lannoo and

1 Pechmann and Blihovde, who say, for example,
2 Pechmann, one of the scientists, the upland is
3 currently in commercial pine plantations but --
4 but could be restored to suitable upland
5 habitat.

6 Blihovde says that aggressive and
7 proactive management of the uplands will be
8 critical to the survival of the frog, the most
9 important management tool being fire to prevent
10 this from being unsuitable habitat.

11 These scientists all have the same
12 point of view, that this land could be restored
13 through extensive effort to upland frog
14 habitat. Not one of them said that this is
15 currently habitat on what this frog -- on which
16 this frog can -- can't survive.

17 The immediacy here, Justice Kagan,
18 comes from the statutory language. It comes
19 from the word "habitat" in Section 4. It comes
20 from the limitation in 3(5)(C) that the maximum
21 extent of a critical habitat designation is
22 land that can be occupied. It comes from the
23 list in 3(3) where you would certainly have
24 anticipated that if Congress thought that land
25 had to be restored or totally remade in order

1 to be habitat for the frog, that it would have
2 said that rather than using the word
3 "maintenance."

4 Maintenance is a word that naturally
5 refers to maintaining what you already have
6 there and improving it, not to completely
7 changing it.

8 And, in addition -- in addition to the
9 powers that I already talked about of the
10 federal agencies having to protect these
11 creatures quite apart from critical habitat
12 designation, there are all sorts of powers
13 operated through the states and the purchase
14 power in Section 5 that allow protection.

15 This is not a choice between the frog
16 surviving and -- and not surviving if it
17 doesn't have this critical habitat. There are
18 plenty of ways for the government to ensure, as
19 it should, that the frog survives.

20 JUSTICE SOTOMAYOR: I'm sorry. I'm
21 sorry. I think I read that if these ponds are
22 not designated, that there are no other ponds
23 in the United States.

24 So, to the extent that these ponds are
25 not designated critical habitat, and don't

1 survive, this frog won't, if there's a drought
2 or other conditions in Mississippi.

3 MR. BISHOP: Well, first of all, there
4 are other ways to acquire these ponds. Not one
5 person has talked, from the government, or from
6 any of the nature conservancy or other groups
7 that buy easements on property have talked to
8 any of the owners here.

9 But the -- the second thing is that --

10 JUSTICE SOTOMAYOR: But they don't
11 have to.

12 MR. BISHOP: No, they don't --

13 JUSTICE SOTOMAYOR: If it's critical
14 --

15 MR. BISHOP: Well, they -- well --

16 JUSTICE SOTOMAYOR: -- they can
17 designate it and then a deliberate process goes
18 on where they talk to the owners, and you come
19 to an accommodation. That's what generally
20 happens.

21 MR. BISHOP: Could I answer that
22 question, Chief Justice?

23 CHIEF JUSTICE ROBERTS: Briefly.

24 MR. BISHOP: I mean, you know, the
25 government has made absolutely clear what it

1 thinks that means, right? It -- it -- it
2 admits that it's the most likely outcome here,
3 if we need to apply for permits, is that we get
4 to use 40 percent of the land for development
5 and we have to turn 60 percent of it over for
6 frog habitat.

7 We don't think that that is an
8 appropriate use of our land, given that this is
9 not habitat to begin with.

10 Thank you.

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

13 (Whereupon, at 11:08 a.m., the case
14 was submitted.)

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Official - Subject to Review

\$	a.m [3] 1:15 3:2 66:13	animal [2] 40:25 51:8	Bennett [1] 23:19
\$100 [1] 31:20	able [5] 4:18 6:6 15:5 16:16 51:11	answer [4] 19:13 42:11 58:16 65:21	best [1] 31:8
0	above-entitled [1] 1:13	anticipated [1] 63:24	better [1] 21:10
0.5 [1] 26:13	absolutely [1] 65:25	anyway [2] 31:2 36:25	between [10] 10:8 11:15 15:21,22 26:5 28:1 32:5 35:9 41:4 64:15
1	accepted [1] 18:16	Apert [4] 11:23 59:7 62:13 64:11	beyond [5] 3:17 7:18 8:5 10:5 60:12
1 [7] 1:11 17:15 26:11,13,22 27:2 53:7	accommodate [2] 31:19 62:22	APPEARANCES [1] 1:17	big [4] 20:25 26:15 32:4 35:16
10 [2] 16:12 62:12	accommodation [1] 65:19	appeared [1] 16:7	biological [1] 24:25
10:06 [2] 1:15 3:2	accomplish [1] 28:20	appellant [2] 15:8,15	bird [2] 8:19 9:12
11:08 [1] 66:13	accomplished [1] 29:18	appendix [3] 17:17 18:6 38:9	birds [1] 9:8
12 [2] 26:17 62:12	according [1] 31:24	applied [1] 58:14	BISHOP [65] 1:18 2:3,9 3:7,8,10 4:7 5:9,18,23,25 6:5,14,19,24 7:2,5,11,24 8:3,23 9:10 10:7,11,12,15 11:10,13,18,21 12:17 13:9 14:1 15:16,21 17:4,21 19:1,4,15,23 20:3,6 22:2,14 23:15 24:1,2,5,22 25:20,22 26:3 28:8 42:23 48:21 60:22 61:1,3,12 65:3,12,15,21,24
15 [1] 16:12	account [3] 30:14 56:13,17	apply [2] 46:21 66:3	Bishop's [1] 45:6
150 [2] 16:1,3	acknowledge [1] 44:1	appropriate [4] 13:24 20:5 23:18 66:8	bit [1] 4:9
1500-acre [1] 62:11	acknowledged [1] 26:21	area [28] 4:1 5:7 7:22 8:6,12 9:23 10:8,9,9,17,23 11:4 22:22 26:19,24 27:6,7,10 28:19 36:25 37:3 38:12 42:20 44:21 48:4 52:1 56:15 59:17	Blihovde [2] 63:1,6
1533(a)(1)(A) [1] 52:11	acquire [1] 65:4	areas [9] 4:3 10:5,23 11:1 34:13,19,21 36:21 40:9	books [2] 36:17 37:14
17-71 [1] 3:4	acres [4] 14:3 15:11 16:1,3	aren't [2] 23:12 37:1	both [3] 15:4 23:21 33:8
195 [1] 42:9	Act [10] 3:13 30:8,12 35:2 37:19,21 45:13 49:3 59:16 61:14	argue [2] 19:8 40:8	bounds [2] 4:5,5
1965 [2] 43:5 44:19	action [4] 47:16 48:3 58:2,9	argues [1] 22:18	breeding [3] 8:21,22 9:1
1978 [3] 3:13 8:15 19:18	actions [5] 33:25 57:7,15,22 59:18	argument [13] 1:14 2:2,5,8 3:4,8 4:9 28:10 29:1 35:5 40:12 61:1 62:7	BREYER [10] 20:8 21:17 22:11 36:9,13 37:9,21 49:7 50:4,7
1979 [2] 8:10 18:1	actually [2] 18:15 19:10	Army [1] 47:20	brief [4] 27:8 40:6 41:11 61:25
2	ad [2] 58:21 59:22	around [1] 49:8	Briefly [1] 65:23
20 [1] 38:12	add [1] 49:11	articulate [1] 51:11	bring [3] 33:17 47:4,24
2018 [1] 1:11	addition [6] 12:4 26:21 49:15,19 64:8,8	asphalt [3] 32:17 51:24,25	brought [2] 42:19 49:14
24-A [1] 17:16	addressed [1] 19:10	assume [2] 40:22 57:4	build [2] 29:10 49:15
27 [1] 40:8	adequacy [1] 25:19	Assuming [1] 20:1	building [2] 37:25 53:3
28 [2] 2:7 40:8	administrative [4] 17:11 19:5 22:3 43:10	attractive [2] 26:22,24	burden [4] 22:7 24:18 25:11,13
3	admits [1] 66:2	authorities [1] 61:7	buy [1] 65:7
3 [1] 2:4	admitted [1] 18:22	authority [4] 11:25 45:12 57:21 60:17	buyer [1] 14:9
3(3) [1] 63:23	adult [2] 18:7 42:2	available [4] 11:20 31:9 48:25 55:1	buying [1] 12:1
3(5)(C) [6] 3:24 7:12 8:4 10:16 11:23 63:20	adversary [1] 19:22	avoid [3] 57:15 58:2,4	C
3-3 [1] 12:11	agencies [5] 60:6,15 61:5,17 64:10	away [1] 19:9	calls [2] 4:24 36:22
3.3 [1] 12:5	agency [18] 14:22 21:5,11,25 22:22 24:23 25:3 27:12,24 47:11,16 48:3,5 58:2 59:4,5 60:7,10	B	came [2] 1:13 44:7
33 [1] 41:11	agency's [1] 14:5	b)(2) [1] 23:21	Canada [1] 31:19
36 [1] 26:23	aggressive [1] 63:6	back [8] 9:19 12:14 14:19 16:5 33:18 44:7 45:2 48:7	cannot [3] 8:5 40:10 51:7
3rd [1] 17:24	ago [2] 18:18,23	background [1] 38:13	canopied [1] 16:16
4	agree [6] 10:13 11:13 24:8 34:9 37:22 62:24	balancing [2] 27:19,22	canopy [2] 21:24 38:14
4 [4] 3:20 7:6 11:23 63:19	agreement [4] 15:21,22 30:1 34:23	base [1] 26:12	capable [4] 4:21 31:6 44:23 45:5
4(b)(2) [2] 22:21 31:7	air [6] 20:18,23,25 21:7,9 37:25	based [2] 31:8 59:25	Case [28] 3:4 6:11 9:7 16:7 19:14 20:9 21:5,21,25 27:9 32:6 35:7,16 36:16 37:11,11,13 40:16 49:13 51:5 2 53:2 55:3 56:19,19 61:21 62:5 66:12,13
40 [1] 66:4	AL [1] 1:7	basically [2] 21:4 31:6	cases [1] 27:18
404 [1] 39:21	Alaska [3] 29:10 38:1 49:16	basics [1] 44:21	caused [1] 15:3
5	albeit [2] 18:6,24	basis [4] 9:20 19:18 58:22 59:22	CBD [1] 61:25
5 [2] 11:25 64:14	ALITO [11] 10:11,13 11:12,19 32:1 35:5 43:14 44:4,12 45:3 48:7	become [3] 12:2 35:10 45:15	center [1] 32:8
57 [4] 18:6 37:3,3 38:9	Alito's [1] 45:3	becomes [1] 35:25	centers [1] 26:25
6	alive [1] 44:9	begging [2] 18:14,14	central [4] 29:19,19 41:17 44:17
6 [1] 45:13	allow [4] 6:22 11:8 25:24 64:14	begin [1] 66:9	certain [1] 9:24
60 [1] 66:5	allowed [2] 3:16 22:8	beginning [1] 36:12	certainly [3] 24:22 25:23 63:23
61 [1] 2:10	almost [4] 20:12 46:6,10,11	behalf [8] 1:18,21 2:4,7,10 3:9 28:11 61:2	chance [3] 21:13,13,24
7	already [7] 13:13 15:5 23:19 27:3 35:8 64:5,9	below [3] 17:8 18:15 22:16	change [8] 6:10 14:21 31:12,14,21 53:22 54:5 62:21
7 [9] 33:21 35:2 39:20,24 46:23 47:4,15 48:1 57:11	amended [1] 3:12	benefit [4] 47:8,13,13,14	changes [10] 5:12,20 6:8,21 14:20
7(a)(1) [1] 61:4	amendments [1] 8:15	benefits [9] 22:24,24 23:4,4 24:15,20,24 25:8,9	
7(a)(2) [1] 58:1	among [1] 52:10		
70 [1] 22:6	amount [1] 15:10		
77 [1] 22:6	Ana [2] 40:14,18		
A	analysis [3] 14:6 15:18 27:15		
	angels [1] 25:16		

Official - Subject to Review

<p>15:5 43:22,23 44:1 62:7 changing [1] 64:7 chapter [1] 61:8 characterize [1] 24:24 Chicago [1] 1:18 CHIEF [31] 3:3,10 28:7,12,13,25 29:7,21 30:5,18 31:1,11,16 37:23 38:24 39:17 46:25 47:7,17,23 49: 13 50:16,20 51:3,22 55:2,7 60:20 65:22,23 66:11 choice [4] 11:14 35:9,11 64:15 Circuit [4] 16:18 17:9 18:15 19:10 cited [1] 54:12 claim [1] 13:16 clause [1] 23:18 Clean [1] 61:14 clear [4] 10:25 11:11 24:13 65:25 clear-cutting [1] 54:7 clearly [2] 7:18 9:17 clues [1] 11:22 cognizance [1] 59:5 cold [1] 4:16 colleague [1] 41:4 collection [1] 53:9 come [8] 4:15,15 19:9 22:12 24:19 32:24 48:20 65:18 comes [4] 63:18,18,19,22 coming [1] 14:10 commanded [2] 3:24 13:17 commercial [1] 63:3 common [2] 7:17 8:8 commonly [1] 41:16 companies [1] 39:2 COMPANY [3] 1:3 3:5 37:5 compared [2] 25:9 32:10 compatible [1] 38:18 complaint [2] 25:18,23 completely [2] 14:14 64:6 conceded [1] 24:3 conceivable [1] 32:21 conceivably [1] 11:5 concept [4] 3:13 48:6 49:4 58:12 concept's [1] 36:16 concerned [1] 39:11 concerns [1] 13:15 concluded [1] 17:13 concludes [1] 27:14 conclusion [3] 28:2,3,3 conditions [9] 8:13 9:18 18:3,18 23:3,7,11,13 65:2 confer [1] 23:24 Congress [11] 3:12,20,24 4:2 8:6 10:18 12:6 23:2 48:9 58:11 63:24 connected [1] 26:25 connecting [1] 27:4 connection [1] 26:5 connects [1] 27:25 consent [1] 55:3 Conservancy [2] 30:2 65:6 conservation [10] 12:5 13:2 30:2 33:15,16,16 34:22 45:17 49:5 50: 14 conserve [7] 5:4,6 11:8 13:19 34: 24 45:5,9</p>	<p>conserved [2] 28:18 55:14 conserving [1] 4:21 considered [3] 3:22 23:21 27:23 consistent [1] 45:6 constitutes [1] 55:10 consultation [4] 46:23 47:15 48:2 61:6 consulting [1] 48:5 contains [2] 8:13 18:2 contemplates [1] 10:4 contemporaneously [1] 8:14 contiguous [1] 9:16 Continue [2] 10:14 13:20 continued [2] 57:15 59:5 contrasts [1] 53:1 controls [1] 27:13 Convention [3] 8:11 18:1 19:17 corporation [1] 35:16 Corps [1] 47:20 correct [2] 22:19 46:7 costs [3] 15:4 60:2,2 couldn't [3] 44:5 52:2 57:5 counsel [2] 60:21 66:12 counterintuitive [2] 9:21 10:1 couple [2] 22:15 44:7 COURT [14] 1:1,14 3:11 11:24 17: 12,23 22:16 23:18,20,22 28:14 34: 3 46:19 62:25 Court's [2] 3:15 12:2 cover [4] 43:18,22,23 62:20 covered [1] 18:18 create [1] 54:22 creating [1] 62:9 creation [2] 12:7,13 creatures [1] 64:11 critical [56] 3:14,16,19,22,25 4:5 5: 8 6:7 7:8 8:4 9:17 10:16 11:15 12: 23 14:3,11,18,21 20:13 28:23 29: 1 30:20 33:7,22 34:2,7,11 35:19 42:16 46:3,6,21 48:16 51:7 55:21 56:14,20 57:6,8,17,22 58:4 59:15 60:18 61:9,11,16,19,23 62:4 63:8, 21 64:11,17,25 65:13 critically [1] 28:15 cure [1] 51:9 currently [7] 10:5 13:16 16:19 17: 15 57:10 63:3,15 curtailment [1] 52:18 cut [4] 51:10 54:21,22,23 cutting [4] 15:13 16:12 38:20 53: 17</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [2] 1:10,21 dance [1] 25:16 day [1] 25:18 days [1] 42:9 de [3] 6:7,18 15:10 deal [1] 14:11 dealing [2] 10:21,22 decide [2] 34:25 45:15 decided [1] 23:19 deciding [1] 30:15 decision [12] 3:15 12:3 22:17,21</p>	<p>23:16,20,24 26:4,6 49:17,20,22 decision-making [1] 23:25 defined [5] 19:11 20:14 33:17 38: 4 41:17 definition [17] 8:2 12:5,22 13:1 16: 20,22 17:20,21,22,24 18:16,17 32: 1 33:7 35:6 40:23 41:10 definitions [2] 20:11 41:12 delegated [1] 37:16 deliberate [1] 65:17 demanded [1] 10:3 dense [1] 38:14 Department [3] 1:21 17:6,13 depended [1] 16:20 Deputy [1] 1:20 described [1] 25:1 describes [2] 54:17 56:18 describing [1] 54:13 designate [7] 3:21 5:7 11:1 31:2 46:3 48:16 65:17 designated [14] 7:7 8:5 15:1 16:3 28:22 30:20 35:18,19 39:9 40:3 57:5 61:11 64:22,25 designating [1] 52:11 designation [22] 3:17,19 6:7 9:23 11:15 14:12,18 15:3 22:23 34:11 39:1,4 46:5,20 51:6 59:14 60:18 61:21,24 62:5 63:21 64:12 destroyed [2] 32:8 53:18 destruction [3] 52:17 53:1 57:17 determination [2] 19:14 36:20 determine [2] 37:17 52:13 determines [1] 22:23 developable [3] 26:14,16,18 developed [1] 43:8 development [12] 8:17 14:16 16:2 26:23,24 27:7,10 32:9 39:15,23 53:10 66:4 dictionaries [2] 8:9 19:17 dictionary [4] 17:23 40:8,23 41:12 die [1] 36:25 difference [4] 10:8 32:19 41:4,8 different [8] 9:11 10:21 11:2 16:22 32:14 40:7,11,13 differently [2] 22:13 56:4 difficult [1] 35:15 dig [3] 6:2,3 51:25 digging [1] 6:9 diminution [1] 14:4 directs [1] 52:12 disagree [4] 8:3,23 40:15,17 discretion [10] 21:19,22 23:10,23, 24 37:13,15,17,23 38:6 discretionary [1] 23:16 Disease [1] 4:15 dispositive [1] 30:9 dispute [3] 16:7,18 43:10 dissenters [1] 17:10 dissinction [2] 32:5 52:10 distinguish [2] 49:13,24 doing [3] 6:12 45:5 62:1 dollars [3] 14:5,14 32:17 domain [1] 45:23 done [6] 12:21 14:17 27:22 38:23</p>	<p>40:14 62:4 dots [1] 27:25 doubt [2] 12:9 33:20 down [9] 13:22 14:10 32:18 38:21 46:10 47:9,20 51:9,12 drain [7] 21:1,1,6,8,12,23 49:19 draining [1] 29:8 drawing [1] 52:10 driving [1] 21:5 drought [1] 65:1 due [1] 13:9 dumped [1] 44:6 during [1] 53:16 dusky [2] 28:15 35:10 duties [1] 59:9</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>early [1] 3:15 easements [1] 65:7 easily [1] 21:9 easy [4] 14:9,9 36:15,16 eat [1] 42:14 economic [4] 14:6 15:17 25:8 27: 15 educating [1] 34:13 EDWIN [3] 1:20 2:6 28:10 effect [3] 14:2 56:2,5 effectively [1] 45:9 effort [7] 5:5 32:20 49:2 52:6 53: 22 62:2 63:13 efforts [9] 4:25 11:7 29:18,22 31: 25 32:25 33:10,12 50:10 either [1] 38:3 elaborate [3] 39:5,8 60:3 element [1] 41:17 elements [1] 29:2 elsewhere [3] 33:23 34:2 57:11 eminent [1] 45:23 enabled [1] 45:8 enables [1] 53:10 enacted [1] 58:12 end [3] 25:18 39:6 41:8 Endangered [9] 3:12 13:19 28:16 34:1 48:13 52:14 57:16 59:6 60: 11 endowed [1] 57:21 Engineers [1] 47:21 enormous [1] 33:21 enough [4] 19:3 37:1 42:8,8 ensure [2] 27:21 64:18 enter [1] 34:23 entered [1] 30:1 entire [3] 4:1 8:5 10:17 entirely [3] 9:10 50:10,22 environment [2] 8:16 53:20 ephemeral [7] 8:20 29:9 31:21 32: 18 41:20 42:7 43:15 error [1] 26:8 errors [1] 27:16 ESA [1] 48:1 ESQ [3] 1:18 2:3,9 essential [11] 20:15 21:9 28:20 30: 16 33:15 36:21,25 53:6,7 55:12, 16</p>
--	--	---	--

Official - Subject to Review

<p>essentiality ^[1] 37:18 essentials ^[1] 8:16 ET ^[1] 1:7 evaluated ^[1] 43:2 even ^[12] 10:5 12:22 27:7 31:3 40:11 42:21 43:5 49:21 52:20,21 57:9,22 everyone ^[1] 26:19 everything ^[1] 26:16 evidence ^[8] 16:6,11,14 24:12,14 31:8 43:1,16 exactly ^[3] 39:18 49:1 56:18 example ^[15] 8:10,19 9:11 18:11 26:7,8 34:4,21 36:5 40:14 45:19 50:2 54:11 61:20 63:1 exceed ^[1] 21:21 except ^[1] 60:18 exclude ^[5] 22:22 23:2,12,14 28:4 exclusion ^[9] 13:25 22:16,21,24 23:4 24:15,21 25:8,11 excuse ^[4] 7:14 28:13 39:20 52:12 exercises ^[1] 45:23 exist ^[1] 10:4 existence ^[3] 8:17 57:16 59:6 existing ^[3] 38:19 51:15,16 exists ^[2] 13:13 53:20 expansion ^[1] 3:17 expect ^[1] 24:10 expend ^[1] 15:24 expenditures ^[1] 14:17 expenses ^[2] 15:14,17 expertise ^[2] 34:18 47:5 experts ^[1] 18:9 explain ^[3] 26:2 51:1 56:1 explains ^[2] 15:18 27:8 explicit ^[1] 28:21 explore ^[1] 25:24 express ^[1] 43:13 extensive ^[2] 62:2 63:13 extent ^[4] 32:7 47:3 63:21 64:24 extinct ^[2] 35:10 55:16 extinction ^[5] 9:22 11:5,16 28:17,19</p>	<p>feet ^[1] 62:12 few ^[7] 6:3,3,9 18:8,18 32:17 37:4 Fifth ^[2] 16:17 17:9 fill ^[2] 39:22,22 filled ^[2] 36:17 37:14 final ^[1] 61:21 financial ^[1] 15:4 find ^[2] 7:4 38:2 findings ^[1] 43:13 fine ^[1] 21:2 fire ^[1] 63:9 first ^[7] 3:4 37:24 38:8 40:4 49:13 52:16 65:3 FISH ^[8] 1:6 3:6 28:17 34:18 42:14 47:4,9 56:3 fit ^[1] 59:11 five ^[1] 53:9 flood ^[1] 27:3 flooded ^[1] 26:18 floor ^[1] 62:14 follow ^[1] 20:14 food ^[1] 62:20 Forest ^[3] 8:14 16:17 62:14 forested ^[1] 38:16 forever ^[1] 37:7 formula ^[1] 35:21 forth ^[1] 13:7 forward ^[2] 24:19 48:3 found ^[7] 14:22 17:15 21:11 26:13 28:18 29:16 43:3 four ^[1] 60:22 framework ^[3] 36:7 47:4 59:23 frankly ^[2] 33:2 40:7 frog ^[27] 9:1 16:8,11,15 28:15,18 29:11 30:4 35:10 41:3,19 43:10 53:25 54:24 59:19 62:1,22,23 63:8,13,15,16 64:1,15,19 65:1 66:6 frogs ^[18] 36:25 42:3,20,24 43:4,14,15,20,21 44:7,9,19 45:5,9 49:9,15 53:15 62:20 frogs' ^[1] 18:7 fulfill ^[1] 13:8 fully ^[1] 57:21 function ^[2] 13:8 34:12 functions ^[1] 59:17 fundamental ^[1] 51:20 fungible ^[1] 27:6 further ^[3] 43:8 49:1 51:14 furtherance ^[1] 61:7 future ^[3] 12:2 49:10 57:24 FWS ^[1] 61:17</p>	<p>give ^[5] 8:10 16:22 26:7 37:14 40:6 given ^[4] 21:19 24:11 59:3 66:8 gives ^[2] 21:22 37:23 Glen ^[2] 38:10 54:13 gopher ^[2] 28:15 35:10 GORSUCH ^[28] 24:1,4,6 25:5,21 26:1 32:12,15,23 33:3,9,13,20 34:8 35:3 55:24 56:23 57:3 58:3,6,9,15,18,23 59:2 60:7,10 61:3 Gorsuch's ^[1] 51:23 got ^[1] 25:17 gotten ^[2] 4:16,16 government ^[24] 4:24 5:7,11,12 6:6,21 11:20 22:18 24:2 33:21,24 34:5 45:4,7,8,18 47:8,11,18 48:12 62:24 64:18 65:5,25 government's ^[2] 6:12 46:22 gradual ^[2] 54:20,25 grant ^[1] 45:12 grants ^[3] 34:5 45:13,14 grassland ^[1] 18:9 grateful ^[1] 58:18 gravamen ^[1] 43:9 greenhouse ^[3] 29:10 50:1,3 greenhouses ^[1] 37:25 ground ^[3] 26:20 43:18,23 groundcover ^[2] 62:13,19 group ^[3] 30:2 34:22 42:15 groups ^[2] 45:17 65:6 growth ^[1] 40:25 guess ^[2] 12:16 48:8 guidance ^[1] 36:1</p>	<p>hear ^[1] 3:3 heard ^[1] 35:8 held ^[1] 22:16 help ^[2] 24:7 33:22 higher ^[1] 26:20 highly ^[1] 49:23 Highway ^[1] 26:23 Hill ^[1] 3:15 hoc ^[2] 58:21 59:22 holes ^[3] 6:3,9 44:20 Home ^[3] 11:24 12:3 34:4 hope ^[1] 49:9 hot ^[2] 4:16 37:25 hothouses ^[1] 49:16 housing ^[2] 26:11 32:9 human ^[2] 12:15 62:2 hundreds ^[1] 14:13 Hurricane ^[1] 26:18 hypothetical ^[7] 4:8,10 5:21,22 6:17 11:14 51:5</p>
I			
<p>fact ^[7] 12:19 16:8 34:4 42:5 44:18 55:15 56:11 factor ^[1] 26:11 factors ^[6] 25:4 27:23,25 28:1 52:5,15 fair ^[1] 26:4 fairly ^[4] 14:9 27:24 39:5 41:1 family ^[2] 35:17,22 far ^[5] 30:21 38:1 39:10 42:21 45:20 far-fetched ^[1] 49:18 Farm ^[9] 23:17 25:3,25 27:20,21 35:18,22 43:6 62:12 farming ^[1] 13:20 feature ^[2] 29:19 58:13 features ^[1] 17:25 federal ^[17] 11:20 39:1,3,13,24 40:1 45:18 46:24 47:1,8,18,19 48:12 60:15,15 61:5 64:10</p>	<p>F</p>	<p>Ha ^[1] 21:14 habitability ^[1] 29:3 habitable ^[3] 16:19,21 17:5 habitat ^[133] 3:14,16,18,19,21,23,25 4:4,6,12,13,17,19,20,23 5:2,3,8,9 6:7 7:7,8,10,15,18 8:2,5,7,22,25 9:2,4,12,13,13,16,17 10:9,10,16,19 11:1,16 12:2,7,12,13,14,19,20,23,25 13:3,6,11,12 14:3,12,18 18:7,11 19:12,16,19 20:12,13 22:9,10 28:23 29:1,20 32:6,10 33:7,23 34:2,7,11 35:1,20 40:6,9,23 46:3,6,21 48:5,16,17 50:2 51:7,15,17 52:18,19,21 53:2,5 54:18 55:10,21 56:22 57:4,6,10,17,18,23 58:5,12 59:8,15 60:12,19 61:9,11,16,19,23 62:3,5 63:5,10,14,15,19,21 64:1,11,17,25 66:6,9 habitats ^[2] 7:21 10:4 happen ^[5] 21:24 49:6 50:14,19 54:6 happened ^[3] 39:23 52:24 54:13 happens ^[2] 6:14 65:20 hard ^[1] 21:12 hard-and-fast ^[2] 36:3 50:25 harm ^[1] 48:4 harvesting ^[1] 62:17 head ^[1] 25:16 healthily ^[1] 16:9</p>	<p>i.e ^[1] 21:23 idea ^[3] 13:5 21:4 62:23 ideal ^[2] 8:21 42:22 identification ^[2] 34:25 60:1 identified ^[1] 44:19 identifies ^[1] 56:11 identify ^[5] 34:19,21 55:20 57:8,23 identifying ^[3] 25:4 34:13 59:17 ignore ^[2] 23:24 55:19 Illinois ^[1] 1:18 immediacy ^[2] 48:20 63:17 immediate ^[5] 14:2,6,23 15:3 48:22 immediately ^[6] 16:4 41:20 49:6 50:14,19 61:17 important ^[13] 27:7,9 34:12,15 41:9 44:22 46:18,18 47:13 48:6 57:23 59:16 63:9 impose ^[2] 39:24 48:21 imposes ^[1] 61:4 improved ^[1] 13:7 improvement ^[1] 13:3 improvements ^[2] 4:24 9:25 improving ^[1] 64:6 inches ^[1] 49:20 include ^[5] 3:25 10:16 16:23 29:2 40:9 included ^[2] 26:16 54:18 includes ^[2] 9:4,12 including ^[2] 17:9 59:17 inclusion ^[4] 22:25 23:5 24:24 25:10 inconsistency ^[1] 26:9 incorrect ^[1] 8:25 incumbent ^[1] 24:18 incurred ^[2] 15:14,16 independent ^[1] 60:17 indeterminate ^[1] 25:10 indicated ^[1] 18:17 indicates ^[1] 23:8 indication ^[1] 45:21 indications ^[1] 11:11</p>
G			
	<p>garden-variety ^[1] 8:1 gave ^[1] 16:20 General ^[2] 1:20 61:13 generally ^[1] 65:19 generations ^[1] 44:15 geographical ^[1] 7:22 gets ^[2] 27:24 61:17 giant ^[1] 29:10 GINSBURG ^[12] 8:18,24 9:6,11 13:14 14:1 41:25 42:10,17 55:23 56:1,8</p>		

Official - Subject to Review

<p>inhabited ^[1] 5:15 input ^[1] 60:1 inputs ^[3] 25:25 26:3,5 instances ^[1] 49:25 instantly ^[1] 55:1 intended ^[1] 4:3 intense ^[1] 62:2 intensive ^[1] 62:11 intention ^[2] 30:9,13 intentions ^[3] 30:10 56:12,16 interferes ^[3] 39:15 62:15,16 Interior ^[1] 30:17 internal ^[1] 26:9 Interstate ^[1] 26:17 intervention ^[1] 12:15 invested ^[1] 31:20 involve ^[1] 45:16 involved ^[9] 5:14,20 28:20 45:16 52:6 60:15 61:16,18,20 involvement ^[1] 40:1 irrelevant ^[1] 21:7 isn't ^[15] 6:11 12:19 20:10 21:18 24:17,17 27:7 36:22 43:12 46:7 57:4,9,20,22 59:3 issue ^[1] 38:12 it'll ^[1] 21:24 itself ^[2] 14:22 24:2</p>	<p>8,24 63:17 Kagan's ^[1] 11:14 Katrina ^[1] 26:19 key ^[1] 20:14 kind ^[10] 8:1 27:16 40:24 41:13,13, 15,18 48:11 53:14 56:25 KNEEDLER ^[78] 1:20 2:6 28:9,10, 12 29:6,15,25 30:7,25 31:4,15,23 32:3,13,16,21 33:1,5,11,14 34:3, 10 36:2,10 37:19 38:8 39:10,19 40:5,17,21 41:7,24 42:2,12,25 43: 24 44:11,14 45:1,11 46:8,11,13,16 47:2,12,22,25 48:22 49:3 50:1,6,8, 18,24 51:13 52:4 53:25 54:3,10 55:6,9 56:6,9,25 57:25 58:4,8,11, 17,21,24 59:13 60:8,14 62:8</p>	<p>loblolly ^[3] 31:21 54:7,21 located ^[1] 43:4 location ^[1] 30:4 log ^[1] 39:11 logging ^[4] 37:5 39:2,10,11 logical ^[1] 53:14 long ^[8] 4:22 6:23 16:10 31:19 42: 8 49:9 53:16,23 long-term ^[2] 43:24 49:5 longer ^[4] 4:13,17 5:3 42:5 longleaf ^[4] 29:11 31:22 54:8,19 look ^[8] 21:18 22:1,5 36:4,4 37:2 38:17 52:9 looked ^[2] 17:8,10 looking ^[5] 20:9,10 22:11 40:20 49:10 looks ^[2] 55:10,13 loss ^[3] 14:7,23 26:11 losses ^[1] 15:4 lost ^[1] 16:4 lot ^[6] 21:20 32:19 35:15 37:10 52: 1 53:3 lots ^[3] 37:6,23 60:10 Lujan's ^[2] 15:1,2</p>	<p>Mississippi ^[4] 54:14 61:22 62:1 65:2 Mister ^[2] 35:4 44:24 modification ^[5] 51:14 52:17,19, 20 53:5 modifications ^[1] 38:18 modified ^[1] 52:21 moisture ^[1] 62:19 moment ^[4] 4:19,21 30:10 57:4 Monday ^[1] 1:11 money ^[2] 15:24 16:2 month ^[4] 9:1,9 42:1 44:8 morning ^[1] 3:4 most ^[3] 41:16 63:8 66:2 moving ^[1] 26:19 much ^[2] 5:19 42:4 multiple ^[1] 27:23 must ^[1] 10:18</p>
<p style="text-align: center;">J</p> <p>JA ^[1] 22:6 JA-17 ^[1] 38:11 jeopardizing ^[1] 57:15 jobs ^[3] 26:25 27:1,5 Joint ^[2] 18:5 38:9 judges ^[2] 17:8,9 judicial ^[5] 22:15,17 25:15 27:12, 18 Justice ^[156] 1:21 3:3,10 4:7 5:16, 19,24 6:1,13,16,20,25 7:1,3,9,13, 25 8:4,18,24 9:6,11,19 10:7,11,13, 20 11:12,14,19 12:16 13:10,14 14: 1 15:7,19 16:5 17:7,13,19 18:10, 13,22 19:2,7,21 20:1,4,7,8 21:17 22:11 23:6 24:1,4,6 25:5,21 26:1 28:7,12,13,25 29:7,21 30:5,18 31: 1,11,16 32:1,12,15,23 33:3,9,13, 20 34:8 35:3,4,5 36:9,13 37:9,21 38:24 39:17 40:5,19,22 41:22,24, 25 42:10,17,19 43:14 44:4,12,24, 25 45:1,2,3 46:4,9,12,14,25 47:7, 17,23 48:7,8,24 49:7,13 50:4,7,16, 20 51:3,22,23 53:12 54:2,9 55:2,7, 23,24 56:1,8,23 57:3 58:3,6,9,15, 18,23 59:2 60:7,10,20 61:3,10 63: 17 64:20 65:10,13,16,22,23 66:11 Justice's ^[1] 37:24 justification ^[1] 6:12 justify ^[1] 6:6</p>	<p style="text-align: center;">L</p> <p>label ^[1] 8:25 land ^[63] 5:14 6:10,22 9:3 11:15 12: 1,8 13:23 14:15,24,25 15:13,25 18:2 20:24 22:3 26:14,16 30:3,13, 15 31:9 33:25 34:5,17,17 35:18 36:5,7 38:16,19 39:14 40:3 43:2 45:19 46:7,15,17,17,22,24 47:1,11 48:12,18 49:8 50:11 52:22,25,25 55:11 57:8,23 60:5,6,15,18 62:21 63:12,22,24 66:4,8 landowner ^[8] 24:19 30:13 34:23 39:14 45:19 55:19,20 56:17 landowner's ^[3] 13:16 30:22 56: 12 landowners ^[2] 29:23,25 language ^[7] 10:3 11:23 22:8,8,20 59:3 63:18 Lannoo ^[2] 18:11 62:25 larvae ^[2] 42:3,15 later ^[2] 44:8,8 Laughter ^[2] 21:16 37:8 least ^[4] 36:12 51:16,17 59:11 leave ^[2] 40:15 54:24 ledger ^[1] 25:2 left ^[3] 5:4 53:17,17 less ^[4] 9:1,8 42:1 56:16 lessee ^[3] 15:9,12 24:19 life ^[1] 40:25 likelihood ^[1] 59:19 likely ^[2] 56:16 66:2 limit ^[4] 10:18 29:13 31:17 51:12 limitation ^[2] 39:25 63:20 limitations ^[2] 4:2 46:19 limited ^[2] 3:20 34:16 limiting ^[1] 46:23 line ^[1] 35:9 list ^[3] 9:5 12:11 63:23 listed ^[1] 9:17 listing ^[1] 52:12 litigating ^[2] 17:6,12 little ^[2] 18:22 53:22 live ^[10] 7:20 29:12 40:10,10 41:3, 19 42:18,20,24 44:15 lives ^[1] 7:16 living ^[2] 8:13 18:2 loads ^[1] 38:3</p>	<p style="text-align: center;">M</p> <p>made ^[6] 22:5 41:5 55:1,1 62:8 65: 25 maintained ^[1] 13:7 maintaining ^[2] 13:12 64:5 maintenance ^[3] 12:11 64:3,4 majority ^[2] 17:9,14 mammals ^[1] 20:22 management ^[4] 12:24 54:18 63: 7,9 mandatory ^[1] 59:15 many ^[2] 10:23 25:16 mark ^[1] 4:4 matter ^[1] 1:13 mature ^[2] 42:12 54:21 maximum ^[1] 63:20 may/if ^[2] 23:2,7 mean ^[17] 7:13,15,16 21:15 30:19 31:17 32:4,16 36:5 44:5,15 48:22, 23 50:11 52:6 54:6 65:24 meaning ^[2] 40:6,8 means ^[2] 21:4 66:1 meant ^[1] 19:16 measures ^[1] 33:17 meet ^[2] 9:18 25:3 met ^[5] 23:3,7,12,13 25:12 meta ^[1] 53:10 metamorphize ^[1] 42:13 might ^[9] 6:6 11:4 16:15 32:16 34: 22,25 39:6 44:15 48:4 Migratory ^[3] 8:11,19 9:12 million ^[1] 31:20 millions ^[1] 14:4 mind ^[3] 9:21 12:6,10 minimal ^[4] 6:2,10 18:23 19:12 minimis ^[3] 6:8,18 15:10 minimum ^[2] 16:23 17:3 minutes ^[3] 18:18 22:15 60:22 missing ^[2] 29:5 55:24</p>	<p style="text-align: center;">N</p> <p>narrow ^[1] 3:13 native ^[1] 53:20 natural ^[4] 40:24 41:1,2 53:19 naturally ^[2] 17:25 64:4 Nature ^[8] 30:2 36:5 51:20 53:6,8 55:10 56:20 65:6 neatly ^[1] 59:11 necessarily ^[1] 32:20 necessary ^[9] 16:24 20:15,18,20, 20 33:17 34:20 36:11 51:19 need ^[15] 13:3 20:23 25:15 33:19 39:1,23 42:17,18 43:14,15 46:2 47:23 59:19 61:16 66:3 needed ^[1] 18:12 needs ^[3] 12:24 13:6 54:1 never ^[3] 17:20 49:21 58:12 new ^[2] 12:7,13 Nome ^[2] 38:1 49:16 none ^[4] 19:23,24 46:1,1 normal ^[1] 52:2 normally ^[1] 17:25 nothing ^[2] 33:24 62:8 notwithstanding ^[1] 11:6 number ^[6] 24:16 33:5,6 41:11,12 52:14</p>
<p style="text-align: center;">K</p> <p>KAGAN ^[32] 4:7 5:16,19,24 6:1,13, 16,20,25 7:1,3,9,13,25 8:4 9:19 10:7,20 12:16 13:10 18:22 23:6 41:24 44:24 45:1 46:4,9,12,14 48:</p>			<p style="text-align: center;">O</p> <p>object ^[2] 15:1,2 obligation ^[3] 46:3 61:4,13 obstacle ^[1] 52:7 obtain ^[1] 14:20 obtaining ^[1] 14:15 occupied ^[10] 4:1,3 7:22 8:6,9 9:3 10:17 12:23 51:7 63:22 occur ^[1] 31:3 occurring ^[1] 16:13 October ^[1] 1:11 offer ^[1] 4:8 often ^[5] 46:6,12,14,16 52:23 Okay ^[6] 5:1 20:7 37:1 40:21 49:23 51:3 on/off ^[1] 13:5 once ^[1] 38:25 one ^[26] 4:11 12:10 18:7 20:9 31:7</p>

Official - Subject to Review

<p>32:4 34:11 35:16 38:16,16,17 39:8 42:5,5 43:7 44:2,3 51:1 52:7,16,22 59:11 61:9 63:2,14 65:4</p> <p>one-line [1] 28:2</p> <p>ongoing [1] 39:11</p> <p>only [23] 4:11,23 5:5 6:8 7:6 9:1,24 10:15 11:4,7 15:8 17:6 20:19 26:13 39:13,25 47:8,13 49:14 50:13 53:9 54:14 61:10</p> <p>open [2] 54:23 62:9</p> <p>operated [1] 64:13</p> <p>operates [1] 62:22</p> <p>operating [1] 38:20</p> <p>operation [3] 30:8 34:6 38:20</p> <p>operations [1] 39:12</p> <p>operative [1] 58:6</p> <p>opinion [1] 49:12</p> <p>opposed [1] 16:16</p> <p>optimal [3] 17:1,2,5</p> <p>options [2] 11:19,21</p> <p>oral [5] 1:13 2:2,5 3:8 28:10</p> <p>order [6] 9:25 12:25 13:7 15:5 62:22 63:25</p> <p>organizes [1] 48:1</p> <p>other [25] 4:20 9:18 11:19,21,22 19:16 23:3,7,11 25:2 29:12 30:3,3 33:25 45:4 47:10 57:7,22 60:5,15 61:5 64:22 65:2,4,6</p> <p>others [2] 52:10 55:21</p> <p>otherwise [1] 17:2</p> <p>ought [1] 51:11</p> <p>ourselves [1] 14:13</p> <p>out [10] 6:5 7:21 12:4 14:14 22:12 24:7 37:20 43:4 49:10 52:8</p> <p>outcome [1] 66:2</p> <p>outer [2] 4:5,5</p> <p>outside [7] 7:22 10:23 27:3 37:16 38:7 42:18,21</p> <p>outweigh [1] 22:24</p> <p>over [5] 4:22 6:23 12:18 27:13 66:5</p> <p>overlay [1] 14:2</p> <p>overnight [2] 38:23 54:6</p> <p>own [3] 16:1,2 46:22</p> <p>owner [3] 15:13 30:11 49:21</p> <p>owners [4] 15:23 55:4 65:8,18</p> <p>owns [2] 15:10 47:11</p>	<p>P</p> <p>PAGE [7] 2:2 17:16 18:6 37:2,3 38:9 41:11</p> <p>Pages [1] 40:8</p> <p>parish [2] 26:14 27:6</p> <p>parking [3] 32:19 52:1 53:3</p> <p>part [7] 5:10 35:18,19 38:21 58:9 60:8 61:9</p> <p>particular [3] 9:15 30:11 56:14</p> <p>particularly [1] 26:22</p> <p>parts [1] 23:21</p> <p>pass [1] 48:14</p> <p>passage [1] 53:1</p> <p>passed [2] 48:10,15</p> <p>pay [2] 35:13,13</p> <p>PCEs [2] 16:24 54:2</p>	<p>people [2] 35:15 52:24</p> <p>percent [3] 26:13 66:4,5</p> <p>percentage [1] 35:22</p> <p>perfect [2] 12:20 61:20</p> <p>period [4] 12:14 21:25 42:9 53:23</p> <p>permissible [1] 24:23</p> <p>permit [7] 39:4,13,21,24 46:24 51:6 61:14</p> <p>permits [2] 39:1 66:3</p> <p>permitted [1] 11:9</p> <p>person [1] 65:5</p> <p>perverse [1] 4:6</p> <p>petition [1] 17:17</p> <p>Petitioner [8] 1:4,19 2:4,10 3:9 28:23 46:20 61:2</p> <p>photo [1] 18:6</p> <p>physical [1] 17:24</p> <p>picture [5] 18:4,8 22:5 37:2,3</p> <p>pictures [1] 38:11</p> <p>piece [2] 5:14 31:18</p> <p>pin [1] 25:17</p> <p>pine [1] 63:3</p> <p>pin [6] 29:11 31:21 54:7,8,19,21</p> <p>place [18] 9:8 12:18 17:1 30:21 40:4,24 41:1,2,13,19 42:18,22 46:20 52:9 53:14 54:14,15 57:1</p> <p>places [4] 7:6 9:13 33:6 38:3</p> <p>plain [2] 5:10 22:8</p> <p>plan [1] 54:12</p> <p>planning [1] 14:14</p> <p>plans [1] 14:21</p> <p>plant [3] 6:3 29:11 40:25</p> <p>plantations [1] 63:3</p> <p>planted [2] 37:10 62:12</p> <p>planting [3] 54:7,8,19</p> <p>please [3] 3:11 28:6,14</p> <p>plenty [1] 64:18</p> <p>point [15] 12:4 14:17,22 30:15 33:18 36:15 39:4 43:1 44:17 47:17 52:8 53:13 54:9 61:4 63:12</p> <p>pointed [3] 37:20 38:9 43:4</p> <p>polite [1] 21:15</p> <p>Pond [8] 38:10 41:18,20 42:1,4,7,18 54:13</p> <p>ponds [19] 8:20 9:2 29:9 31:21 32:18 39:22 42:15 43:15 49:15 53:8,9 55:17 56:20,21 57:1 64:21,22,24 65:4</p> <p>population [7] 3:17 31:6,13 43:21,25 53:11 54:15</p> <p>position [3] 9:20 17:6,12</p> <p>possibility [1] 27:17</p> <p>possible [1] 25:15</p> <p>power [5] 3:20 34:9 45:23,24 64:14</p> <p>powers [3] 33:22 64:9,12</p> <p>precisely [1] 52:23</p> <p>predator [1] 4:15</p> <p>prefer [2] 9:15,22</p> <p>preferred [1] 18:1</p> <p>preliminary [1] 13:15</p> <p>present [5] 3:18 4:19,20 8:17 52:16</p>	<p>preservation [1] 35:13</p> <p>preserve [1] 56:21</p> <p>preserving [2] 13:8 59:7</p> <p>presumably [1] 29:13</p> <p>presumes [1] 46:5</p> <p>pretty [2] 6:2 21:9</p> <p>prevent [2] 11:5 63:9</p> <p>preventing [1] 33:24</p> <p>private [7] 34:16 45:16 46:7,15,17 48:17 60:17</p> <p>proactive [1] 63:7</p> <p>probably [4] 37:5 39:1,8 45:24</p> <p>problem [9] 5:10 10:21,22 11:2,3 26:15 38:25 48:11 51:9</p> <p>procedures [1] 23:25</p> <p>proceed [1] 15:6</p> <p>process [9] 39:6,8 46:23 48:2 54:20,25 60:3,9 65:17</p> <p>program [1] 45:12</p> <p>prohibit [1] 57:12</p> <p>prohibits [1] 58:19</p> <p>prongs [1] 33:8</p> <p>proof [1] 24:18</p> <p>properly [1] 28:22</p> <p>properties [1] 61:22</p> <p>property [7] 15:24 17:4 30:11 31:18 62:10,18 65:7</p> <p>proposed [5] 30:16 56:2,4,7,10</p> <p>proposition [2] 11:13 34:16</p> <p>prospect [1] 49:5</p> <p>protect [6] 12:25 34:1 60:5,6,11 64:10</p> <p>protecting [1] 60:12</p> <p>protection [2] 33:19 64:14</p> <p>provide [4] 15:25 29:4 35:6,25</p> <p>provided [4] 16:1 17:20,22,23</p> <p>proving [1] 25:11</p> <p>provision [2] 3:18 23:21</p> <p>public [7] 34:17 35:14 46:17 47:14 48:18 59:24 60:1</p> <p>published [1] 30:17</p> <p>pull [1] 32:17</p> <p>purchase [6] 11:25 34:5,25 45:18 48:12 64:13</p> <p>purchased [1] 30:3</p> <p>purchasing [1] 33:25</p> <p>purposes [2] 28:21 61:7</p> <p>put [4] 24:16,18 31:20 32:18</p>	<p>R</p> <p>raise [1] 36:11</p> <p>range [1] 52:18</p> <p>rare [5] 41:18 42:6 53:8 56:19,20</p> <p>rarely [1] 45:22</p> <p>rather [2] 23:9 64:2</p> <p>reach [1] 62:14</p> <p>reaches [2] 10:12,15</p> <p>read [7] 18:20 36:15 56:11 57:13 61:21 62:25 64:21</p> <p>reading [1] 16:6</p> <p>real [2] 20:19 25:17</p> <p>really [6] 6:8 12:18 20:11 41:16 43:9 44:22</p> <p>reason [4] 4:12 7:2 14:8 51:4</p> <p>reasonable [27] 4:25 5:5,12,20 6:15,21 9:24 11:7 26:4 29:18,22,22 31:25 32:2,25 33:10,11 35:7,24 36:18,22,23,24 41:5 49:22 51:2 53:22</p> <p>reasoning [1] 25:21</p> <p>reasons [4] 18:17 42:6 43:7 52:22</p> <p>REBUTTAL [3] 2:8 28:6 61:1</p> <p>recognize [2] 14:10 34:15</p> <p>record [13] 17:11 18:20 19:5,8,19 21:19 22:3 38:5,11 43:1,16,19 54:12</p> <p>recovery [2] 34:20 54:11</p> <p>reduced [1] 28:19</p> <p>refer [2] 18:10 33:7</p> <p>reference [1] 52:19</p> <p>references [3] 12:19 13:11,12</p> <p>refers [1] 64:5</p> <p>refused [1] 26:10</p> <p>regardless [1] 48:17</p> <p>regulation [6] 3:16 30:16 56:2,4,7,10</p> <p>rely [1] 24:23</p> <p>remade [2] 22:4 63:25</p> <p>remain [1] 42:4</p> <p>remaining [1] 60:23</p> <p>remand [3] 19:13 20:4 25:23</p> <p>rendered [1] 42:6</p> <p>representing [1] 15:20</p> <p>require [7] 31:17 37:25 51:12 54:25 55:3,8,12</p> <p>required [7] 6:10 12:8 23:25 29:14 35:23 39:12,21</p> <p>requirement [2] 48:20 50:21</p> <p>requirements [1] 19:12</p> <p>requires [5] 3:19 9:24 12:21 22:9 35:6</p> <p>reside [1] 10:23</p> <p>resided [1] 10:24</p> <p>resides [1] 10:6</p> <p>respect [2] 13:9 60:17</p> <p>respond [1] 62:7</p> <p>Respondents [4] 1:8,22 2:7 28:11</p> <p>response [1] 3:14</p> <p>responsibilities [1] 59:1</p> <p>rest [2] 15:23 28:5</p> <p>rested [1] 49:20</p>
<p>Sheet 5</p>	<p>Heritage Reporting Corporation</p>	<p>one - rested</p>	<p>one - rested</p>	

Official - Subject to Review

<p>resting ^[1] 49:17 restoration ^[2] 12:7,14 29:4,13, 17 30:21,23 31:3 35:7,24 36:6 40:11 41:5 48:23 50:10,18,21 51:19, 20 54:5 62:3 restored ^[4] 61:23 63:4,12,25 restoring ^[1] 50:2 rests ^[1] 25:13 result ^[6] 9:22 10:1,2 16:4 36:16 57:16 retains ^[2] 53:6,7 review ^[7] 22:15,18 23:17 24:9 25:15 27:12,18 reviewed ^[1] 19:9 reviewing ^[1] 17:12 revisiting ^[1] 14:20 rezoning ^[1] 14:15 ripe ^[1] 13:16 risk ^[2] 28:16,19 riven ^[1] 27:15 road ^[5] 13:22 14:10 51:9,12 52:7 roads ^[1] 27:4 ROBERTS ^[25] 3:3 28:7,25 29:7, 21 30:5,18 31:1,11,16 38:24 39:17 46:25 47:7,17,23 50:16,20 51:3,22 55:2,7 60:20 65:23 66:11 robustly ^[1] 18:24 roosting ^[1] 9:16 roosts ^[1] 9:14 royal ^[1] 15:7 rudimentary ^[1] 23:22 rule ^[3] 6:5 36:3 51:1 rule-making ^[1] 59:24 running ^[1] 38:19 runs ^[3] 26:23 33:2,3</p>	<p>57:11,25 58:1 63:19 64:14 see ^[4] 14:9 33:9 50:4 53:13 seek ^[1] 13:25 seem ^[2] 10:2 53:14 seems ^[5] 10:1 25:13 51:5 57:20 59:9 seen ^[1] 6:11 sell ^[1] 45:20 sense ^[2] 8:7,10 separate ^[1] 15:13 serious ^[1] 28:16 serve ^[1] 55:20 served ^[1] 27:4 serves ^[2] 34:12,12 SERVICE ^[16] 1:7 3:6 8:14 17:14 26:10 27:5 28:17 29:16 31:24 34:19 45:22 47:5,9,19 55:13 56:3 Service's ^[1] 3:20 set ^[3] 10:18 59:23,24 setting ^[1] 48:2 several ^[2] 44:15 52:5 shall ^[5] 3:25 10:16 23:9 37:20 61:5 shed ^[1] 35:15 shopping ^[1] 32:8 show ^[4] 4:2 33:4 38:14 43:20 showing ^[1] 42:24 shows ^[6] 19:5 22:3 37:3 38:10 43:19 44:23 side ^[1] 25:2 sign ^[1] 61:18 signatory ^[1] 8:12 similar ^[1] 51:18 similarly ^[1] 13:1 simple ^[1] 41:1 simply ^[1] 62:24 single ^[3] 4:12,17 11:4 sit ^[2] 47:9,20 site ^[2] 41:13,15 situation ^[1] 49:18 situations ^[1] 20:23 six ^[1] 49:20 size ^[1] 52:5 sliding ^[1] 56:13 slight ^[1] 4:24 small ^[2] 18:7 32:22 Solicitor ^[1] 1:20 somebody ^[2] 46:24 47:18 sorry ^[5] 7:14 10:14 24:5 64:20,21 sort ^[3] 6:3 12:20 56:13 sorts ^[1] 64:12 SOTOMAYOR ^[27] 15:7,19 16:5 17:19 18:10,13 19:2,7,21 20:1,4,7 35:4 40:5,19,22 41:22 42:19 44:25 53:12 54:2,9 61:10 64:20 65:10,13,16 south ^[1] 26:17 space ^[2] 54:23 59:20 special ^[2] 12:24 49:16 Species ^[59] 3:13,21 4:1,4,11,14, 18,21,25 5:2,4,6 6:22 7:7,16,20,23 8:11 9:23,25 10:5,22 11:5,8,16 13:8,19 18:1,19,23 19:20 28:16 31:19 33:16,18,22 34:1,14,20 40:10</p>	<p>41:14 48:4,13 49:1 52:12,14,23 55:14,15,22 56:15,22 57:1,9,16,24 59:7 60:11,12 species ^[2] 3:18 8:17 specifically ^[1] 59:4 speech ^[1] 8:8 spend ^[1] 22:14 spends ^[1] 9:1 spent ^[1] 14:13 spun ^[1] 35:8 St ^[2] 26:12 27:8 stable ^[1] 54:15 standards ^[1] 25:3 started ^[2] 20:10 40:12 State ^[11] 23:17 24:11 25:3,25 27:20,21 34:24 45:14,15 51:16 61:16 statement ^[1] 23:1 STATES ^[7] 1:1,6,14 3:5 45:13 64:13,23 status ^[2] 30:12 31:9 statute ^[33] 7:3,5,18,20 8:1 9:22 10:12,15,24 12:17 13:4 21:3,22 22:9 24:17 32:24,25 33:2 36:17 37:13 45:7 46:5 47:24 48:10,14, 15 52:3 57:11,13 58:10,25 59:3, 23 statutory ^[9] 9:20 10:3 11:11,22 22:20 28:21 46:2 52:9 63:18 stay ^[1] 9:8 stick ^[1] 6:16 still ^[5] 23:10 44:9 52:20 53:20 55:2 stipulating ^[1] 5:24 strike ^[1] 49:18 strikes ^[1] 12:17 stuff ^[1] 6:2 stump ^[1] 44:20 stumps ^[4] 16:15 43:3,17 54:24 subject ^[1] 22:17 subjective ^[2] 30:9 49:23 submerged ^[1] 20:24 submit ^[1] 27:17 submitted ^[2] 66:12,14 substance ^[1] 23:23 sucker ^[2] 40:14,18 suggested ^[1] 45:3 suggesting ^[1] 48:9 suggestions ^[1] 18:21 suggests ^[4] 38:5 52:19 53:5 54:20 suitable ^[4] 8:13,22 18:2 63:4 suited ^[1] 11:25 summer ^[1] 9:12 sunk ^[1] 15:4 sunlight ^[1] 62:14 supplementary ^[1] 34:8 supply ^[1] 62:19 support ^[8] 4:13,18,25 6:22 9:25 31:13 48:13,25 supported ^[2] 19:24,25 supporting ^[1] 31:6 suppose ^[7] 24:8 25:14 35:17 45:2 55:24 56:2 59:21 supposed ^[2] 8:20,20</p>	<p>SUPREME ^[2] 1:1,14 surely ^[1] 37:24 surrounding ^[1] 41:20 survival ^[6] 17:1 18:19 55:22 57:9, 24 63:8 survive ^[10] 16:9,16 18:24,25 43:11 44:5 55:15 59:20 63:16 65:1 survived ^[1] 62:1 survives ^[1] 64:19 surviving ^[2] 64:16,16 sustain ^[1] 44:13 sustained ^[1] 44:21 sustaining ^[3] 43:21,25 53:23 swamp ^[8] 20:24,25 21:7,8,12,23 29:8 49:20 Sweet ^[3] 11:24 12:3 34:4 switch ^[1] 13:6 sync ^[5] 50:10,23,24 62:7,8</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table ^[1] 47:10 tadpoles ^[2] 42:4,12 talked ^[3] 64:9 65:5,7 talks ^[5] 5:12 12:11,23 13:2 33:14 Tammany ^[1] 27:8 Tammany's ^[1] 26:12 tax ^[1] 26:12 tears ^[1] 35:15 technical ^[2] 58:13,13 tending ^[1] 62:16 tens ^[1] 14:4 term ^[5] 4:22 6:23 16:10 20:14 58:13 terms ^[5] 12:10 15:2 31:10 35:1 46:22 test ^[2] 44:6,10 themselves ^[1] 44:13 there's ^[19] 11:4 13:5 23:15 24:14, 14 25:14 26:15 27:12 32:4 33:23 43:16 45:12 47:14 48:11 57:19,19 60:14 61:20 65:1 therefore ^[4] 25:11 28:22 43:23 57:5 they've ^[2] 30:5,6 thin ^[1] 36:12 thinking ^[4] 8:7 20:17 21:23 37:22 thinks ^[2] 27:13 66:1 thinned ^[1] 50:13 thinning ^[2] 38:21 54:18 though ^[7] 27:8 31:3 32:16 34:9 42:21 43:5 52:21 thousand ^[1] 18:5 thousands ^[1] 14:14 threatened ^[3] 52:17 59:6,8 three ^[1] 7:6 thrive ^[2] 41:14 57:2 throughout ^[2] 33:2,4 timber ^[4] 13:20 15:12 16:12 53:17 timberland ^[1] 15:10 TIMOTHY ^[5] 1:18 2:3,9 3:8 61:1 today ^[1] 40:12 tool ^[1] 63:9 totally ^[3] 22:4 62:21 63:25</p>
---	--	--	--

Official - Subject to Review

transform ^[1] 39:14	versus ^[1] 3:5
transformation ^[1] 54:4	view ^[2] 45:7 63:12
transformed ^[2] 32:7 53:4	views ^[1] 6:21
transforming ^[1] 52:25	voluntarily ^[1] 29:23
translocation ^[1] 12:12	W
transparency ^[1] 59:25	wanted ^[1] 39:14
treated ^[1] 27:5	wants ^[3] 23:14 46:24 48:21
tree ^[4] 38:20 43:6,22 62:11	Washington ^[2] 1:10,21
trees ^[2] 6:3 9:15,17 18:8 32:13	wasted ^[1] 14:16
36:11,12 37:1,4,6,6,10 38:13,21	Water ^[4] 20:20 42:8,13 61:14
43:18 50:12 51:10 54:19,23 62:12,16	way ^[10] 9:14 20:9 22:12 24:17 49:14 51:18 52:25 57:13 58:14 62:21
triggering ^[2] 35:2 47:2	ways ^[3] 38:17 64:18 65:4
trouble ^[1] 20:19	Webster's ^[1] 17:24
true ^[5] 9:7 10:25 30:7 39:20 47:25	weeks ^[1] 44:8
trying ^[2] 50:5 51:1	weighing ^[1] 60:2
tune ^[1] 52:1	weighs ^[1] 23:3
turn ^[1] 66:5	wetlands ^[1] 39:22
turns ^[1] 30:12	WEYERHAEUSER ^[4] 1:3 3:5 15:22,23
two ^[3] 44:8 49:25 59:9	whatever ^[4] 4:12,17 47:10 52:2
typical ^[2] 21:5,25	whatever's ^[1] 29:4
typically ^[2] 20:15 39:2	whenever ^[1] 61:14
U	Whereupon ^[1] 66:13
ultimate ^[3] 23:23 26:6 28:2	whether ^[23] 13:15 16:8 18:16 19:10 23:17 30:15 31:5,5,10 32:5,5 33:22 34:1 35:9 41:5 42:20 43:10 48:17 51:10,14,14 52:13 55:11
ultimately ^[1] 23:15	who's ^[2] 15:9,14
unanimous ^[1] 23:20	whoever ^[3] 47:10,20 51:23
unclear ^[1] 4:10	whole ^[2] 39:4 49:4
under ^[10] 25:25 26:16 33:21 45:12 52:2 56:10 58:25 59:3,11,16	WILDLIFE ^[9] 1:6 3:6 28:17 34:19 47:5,9,19 56:3 61:17
undercuts ^[1] 46:2	will ^[16] 4:18 10:4 13:23 14:10 15:25 20:24 36:25 42:14 46:16 47:9 48:13 49:9 51:9 59:19 62:19 63:7
undermine ^[2] 34:6 51:20	willing ^[1] 45:20
understand ^[8] 4:8 5:16,23,25 15:8 30:19 46:19 62:6	winter ^[1] 9:13
understandably ^[1] 45:22	within ^[3] 36:7 37:16 38:6
understanding ^[1] 7:17	without ^[6] 20:19 27:17 39:23 43:22 48:5 49:1
understood ^[1] 41:16	wonder ^[1] 57:20
undertake ^[2] 29:3,23	word ^[5] 7:17 20:12 63:19 64:2,4
undertakes ^[1] 47:16	words ^[9] 18:5 20:11,14 23:11 29:12 36:17 37:14 49:11,24
undeveloped ^[1] 27:5	work ^[1] 18:23
unexplained ^[1] 28:3	worth ^[1] 18:4
uninhabitable ^[1] 17:16	write ^[1] 49:12
Unit ^[6] 17:15 26:11,13,22 27:2 53:7	writing ^[1] 49:12
UNITED ^[5] 1:1,6,14 3:5 64:23	written ^[1] 24:18
unlikely ^[2] 50:7,9	Y
unoccupied ^[6] 5:8 10:8,9 16:25 28:23 52:23	years ^[1] 16:12
unreasonable ^[2] 32:20 35:25	Z
unsatisfactory ^[1] 27:19	zone ^[1] 27:3
unsuitable ^[1] 63:10	zoned ^[1] 27:3
until ^[2] 43:5 44:19	zoning ^[1] 14:21
up ^[12] 26:19 27:25 32:17 36:22 42:19 43:5 44:19 48:2 49:14 51:25 59:23,24	
upland ^[5] 32:6,10 63:2,4,13	
uplands ^[7] 18:7,12 29:17 38:10 41:21 50:12 63:7	
urge ^[1] 62:25	
using ^[3] 8:1 52:24 64:2	
utilize ^[1] 61:6	
V	
value ^[5] 14:4,7,23 16:4 35:22	