

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STATE OF KANSAS, :

4 Plaintiff :

5 v. : No. 126, Orig.

6 STATE OF NEBRASKA AND :

7 STATE OF COLORADO. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, October 14, 2014

11

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

15 APPEARANCES:

16 STEPHEN R. McALLISTER, ESQ., Solicitor General of
17 Kansas, Topeka, Kan; on behalf of Plaintiff.

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

21 DAVID D. COOKSON, ESQ., Chief Deputy Attorney General,
22 Lincoln, Neb.; on behalf of defendants.

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

2 (10:04 a.m.)

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

6 Mr. McAllister.

7 ORAL ARGUMENT OF STEPHEN R. McALLISTER

8 ON BEHALF OF THE PLAINTIFF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 what do we do?

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

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

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

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

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

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

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

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

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

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

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

22 MR. McALLISTER: That is --

23 JUSTICE SCALIA: They were rolling the dice.

24 MR. McALLISTER: That is fundamentally --

25 JUSTICE SCALIA: Whatever animals were in

1 the barn.

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

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

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

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

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

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

23 MR. McALLISTER: You can for disgorgement,
24 although there are other theories that also support and
25 justify disgorgement, which the master recognized here.

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

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

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

23 MR. McALLISTER: The special master was
24 focused on the bottom line notion that somehow we were
25 supposed to reach a bottom line accounting. And -- and

1 with all due respect to the special master, he's simply
2 wrong that the parties did not purposely negotiate for
3 calculating all of these factors, the imported water
4 supply credit, the consumption of each State, the way we
5 did. Kansas specifically wanted the mound turned on
6 as they calculated --

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

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

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

24 MR. McALLISTER: Well, I think you could
25 reach the --

1 JUSTICE SCALIA: If on the other hand, I
2 think it's -- it's the text of the agreement that
3 governs, I don't care what he found about the
4 negotiations.

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

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

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

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

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

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

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

23 MR. McALLISTER: Well, I -- I can mention
24 three or four things that might be different.
25 Obviously, it's hypothetical, but one thing that the

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

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

21 Even the imported water supply credit is
22 probably unduly generous, because it likely includes
23 some Republican Basin water in it. So what -- what I'm
24 suggesting, I think there are a number of things we
25 could negotiate about, but it's not fair to pick out

1 this one thing that the master got focused on and saw as
2 a black or white issue, when it's really not, and say
3 I'm going to fix this one thing, and too bad, Kansas and
4 even perhaps Colorado, everything else we're not going
5 to touch. It all should go to the RRCA process or it
6 all should be in play here. But our preference is that
7 it goes to the RRCA process. That's where the States
8 could negotiate this out.

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

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

21 JUSTICE SOTOMAYOR: So let's assume, as we
22 have, that we're going to credit -- I know you don't
23 want us to -- but let's assume that we're going to
24 credit the special master's finding that this was a
25 mutual mistake. Generally, as I understand it under

1 ordinary contract principles, the remedy is not contract
2 formation. It's rescission. And I don't think you want
3 that.

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

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

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

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

25 JUSTICE SCALIA: It seems to me, it's rather

1 like asking a man who believes he's been wrongfully
2 convicted whether he would like to die by the firing
3 squad or the electric chair. I mean, you -- you didn't
4 want any remedy to be imposed.

5 MR. McALLISTER: Exactly.

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

9 MR. McALLISTER: He shouldn't. He should
10 leave it to the process.

11 JUSTICE SCALIA: I don't blame you for not
12 telling him.

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

17 MR. McALLISTER: And so does each of their
18 States.

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

22 MR. McALLISTER: No, Your Honor. I would --
23 I would tell you a quick story and then make a point
24 about that. Quick story that 20-some years ago, Kansas
25 introduced a resolution in the RRCA that said, how about

1 we all resolve that we will comply with the compact.
2 Kansas voted yes, Colorado voted yes, and Nebraska voted
3 no.

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

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

1 favored Nebraska, so that if the accounting procedure
2 was going to be opened up on this point, that there were
3 other things the special master should have considered?

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

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

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

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

1 But the veto is nothing new in the compact
2 territory. I mean, this was true in Texas v. New
3 Mexico. Either State could disagree and nothing could
4 happen, and the Court said in that setting so be it;
5 that's the system the States created under their
6 compact. Here it's a three-way.

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

11 MR. McALLISTER: On our issues.

12 JUSTICE SOTOMAYOR: Yes.

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

16 JUSTICE SOTOMAYOR: I see. Okay.

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

20 JUSTICE SOTOMAYOR: The disgorgement issue,
21 you -- you had failed on that.

22 MR. McALLISTER: Well, in arbitration, I
23 think we were trying to establish whether there was a
24 compact violation and -- and the amounts and so forth.
25 And there was some discussion of the accounting

1 procedures. But then we brought the case to this Court
2 because we believed there was a compact violation that
3 required a remedy.

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

12 JUSTICE SCALIA: Well, You got money. You
13 got money, didn't you? You got damages.

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

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

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

22 JUSTICE SCALIA: That's not a normal
23 contract remedy.

24 MR. McALLISTER: It's not -- it's not
25 necessarily a common one, but it's a recognized one in a

1 situation where the master suggests Nebraska gained at
2 least, perhaps, 25 million from the breach. If it only
3 has to pay Kansas 3.7, then next time conditions are
4 dry, there's little incentive, especially when it takes
5 us 8 years basically to get from the point of breach to
6 even the possibility of recovery.

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

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

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

24 I'd like to reserve the remainder of my time
25 for rebuttal if I could, but nothing less than a

1 substantial disgorgement award seems to really get their
2 attention. And here it has gotten their attention and
3 it has also gotten Colorado's attention, as you see in
4 the briefs.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Ms. O'Connell.

7 ORAL ARGUMENT OF ANN O'CONNELL ON BEHALF
8 OF THE UNITED STATES, AS AMICUS CURIAE

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

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

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

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

1 JUSTICE SCALIA: The problem is what should
2 be the conditions under which disgorgement is imposed.
3 Does it require an intentional violation or not?
4 That's -- that's all the debate is about here.

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

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

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

1 MS. O'CONNELL: About what --

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

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

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

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

16 JUSTICE SCALIA: You need intentional
17 violation, don't you?

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

22 JUSTICE SCALIA: Exactly. And -- and you
23 say there's an exception where it's property rights
24 involved. And I'm asking you what cases do you have for
25 that? You see, I don't -- I don't -- I don't think the

1 Restatement can change our law by just saying something
2 by consensus of law professors.

3 MS. O'CONNELL: Well --

4 JUSTICE SCALIA: Are there cases that --
5 that have established that rule?

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

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

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

25 MS. O'CONNELL: I think it's -- it's the one

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

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

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

1 purposes of disgorgement is to relieve a wrongdoer of
2 unjust enrichment; that Nebraska -- there is a finding
3 that they knowingly exposed Kansas to this risk. It's a
4 finding of a conscious wrongdoer. I mean, the master --

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

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

1 -- the wrongful conduct of the party.

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

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

8 JUSTICE SCALIA: And the second question is:
9 How many for an unintentional violation?

10 MS. O'CONNELL: The Court --

11 JUSTICE SCALIA: Minus something, right?

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

15 JUSTICE SCALIA: For an intentional
16 violation.

17 MS. O'CONNELL: Yes.

18 JUSTICE SCALIA: But we've never done it,
19 have we?

20 MS. O'CONNELL: No. And this is a -- a
21 novel --

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

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

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

25 And, Justice Kagan, to get back to the question, I think

1 that if you really thought that somebody was a conscious
2 wrongdoer and you thought all of their profits should be
3 disgorged, then you could do that.

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

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

22 MS. O'CONNELL: Well, when the States agreed
23 to an equitable apportionment of the compact, I mean,
24 the -- this Court does have all of the tools of equity
25 available to it to ensure that there's a fair solution

1 imposed. And it's not just the special master's
2 decision. I mean, this Court could certainly award a
3 different amount of damages. It is de novo review.
4 It's up to you to determine what you think is fair.

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

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

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

24 JUSTICE SCALIA: Well, wait. A lot of
25 contracts -- my goodness. Equity courts adjudicate

1 contract rights sometimes.

2 MS. O'CONNELL: Right.

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

8 MS. O'CONNELL: Right.

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

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

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

25 And if I -- if I could talk, since we took

1 time from both parties about the being the accounting
2 procedures for -- for just a -- well --

3 CHIEF JUSTICE ROBERTS: Maybe for one
4 sentence.

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Cookson.

15 ORAL ARGUMENT BY DAVID D. COOKSON

16 ON BEHALF OF DEFENDANTS

17 MR. COOKSON: Mr. Chief Justice, may it
18 please the Court:

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

25 The deal between the parties is found in the

1 Final Settlement Stipulation that this Court approved in
2 2003. Section IV F expressly provides that this compact
3 accounting will not count imported Platte River water
4 supply as part of the Republican River Basin, in part
5 because that's --

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

9 MR. COOKSON: That is --

10 JUSTICE SCALIA: It went on to determine
11 that.

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

13 JUSTICE SCALIA: Through a formula.

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

15 JUSTICE SCALIA: And they agreed to that
16 formula, right?

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

21 JUSTICE SCALIA: Let's assume two parties --
22 I come into an antique store and I see this -- this item
23 of furniture that I like, and I talk it over with the --
24 with the owner, and I say, you know, let -- let's come
25 to a fair price on this. He says, yes, that's what I

1 want to do, too. Let's have a fair price. And we write
2 it down. It's going to be a fair price. And the fair
3 price is \$200. Okay?

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

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

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

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

1 But under -- to your point, Your Honor, the
2 deal we made was not to count imported water. Kansas'
3 own expert testified that the purposes of the accounting
4 procedure and the groundwater model are to effectuate
5 the terms of the Final Settlement Stipulation. The
6 master agreed. And it's undisputed between all of the
7 parties that the accounting procedures are acting in
8 direct conflict to both Section IV F of the Final
9 Settlement Stipulation, and to Article III of the
10 Compact, which allocates water originating --

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

23 MR. COOKSON: In this instance, Your Honor,
24 the Technical Appendix is more like the ongoing matter
25 because the parties specifically bargained in

1 Section I F of the Final Settlement Stipulation that we
2 would be able to modify the accounting procedures --

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

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

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

25 So that's the deal. So we go to the judge.

1 And one way is reformation, but they say no, no, it's a
2 contracts deal, it's all closed, you can't -- another
3 way is rescission. Okay. Rescission, apparently nobody
4 wants that. Because there was a mutual mistake, they
5 rescind. Okay. You must have read -- there must be
6 thousands of cases with algorithms. I mean, we live in
7 a world where there are algorithms, there are computers,
8 there is the Internet, there is this formula, that
9 formula.

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

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

24 Likewise, in Wisconsin v. Michigan this
25 Court entered a consent decree dealing with islands in

1 the Lake Michigan between Wisconsin and Michigan, but
2 neglected to address an issue regarding where is the
3 boundary in Green Bay.

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

8 MR. COOKSON: Not that I'm aware of, Your
9 Honor.

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

14 MR. COOKSON: That's correct.

15 CHIEF JUSTICE ROBERTS: Why is that?

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

22 JUSTICE SCALIA: Was the appendix included
23 in it when it was submitted to Congress?

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

25 JUSTICE SCALIA: That was just added

1 afterwards?

2 MR. COOKSON: In 1943 when the compact was
3 complied, article 9 provides that at some point the
4 States, the compact administration, which we now know as
5 the RRCA, would meet and establish rules and regulations
6 that were not inconsistent with the compact. That
7 actually did not occur until 1961.

8 Justice Scalia: I see, I see...

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

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

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

1 formulas for how not to count Platte River water and
2 instead only to count Republican River water.

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

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

21 And what we have here is a Texas v. New
22 Mexico situation, where Kansas has exercised its veto
23 right, and in that case this Court said that the States
24 may come to this Court, and in this case a special
25 master, to seek vindication of its rights to correct

1 what everyone agrees is a mistake that's not only in
2 violation of the final settlement stipulation, but
3 expanding the terms of the compact beyond what
4 Congress intended.

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

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

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

23 So they -- it's incorporated directly in
24 that procedure that this is only a credit and that
25 it's going to be -- any credit shall be calculated in

1 accordance with the procedures set forth therein. What
2 gives us the right to, the special master or anyone,
3 under reformation principles to create a new procedure
4 because the 5-run mile protocol is a new procedure that
5 they never agreed to.

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

10 So how do we get there? Under contract
11 principles, under equitable principles, how do we get to
12 do that?

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

1 still not agreed to the groundwater model, which is the
2 fundamental principle that will do it and, in fact, came
3 back to this Court roughly 6 months later for approval
4 of the groundwater model. So again --

5 JUSTICE SOTOMAYOR: All right. You haven't
6 answered my question.

7 MR. COOKSON: I believe --

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

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

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

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

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

24 MR. COOKSON: It reforms the inflow and
25 outflow steady plan to conform to the intent of the

1 parties in the Pecos River Compact.

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

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

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

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

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

1 JUSTICE BREYER: That's true, but they've
2 made an argument that if you look at the contract law,
3 you will see that rescission is the normal remedy for
4 this kind of a mistake rather than reformation. And you
5 apparently, at some level, agree with that because what
6 you've pointed to are not normal contract cases. You
7 pointed to two cases involving State compacts in this
8 Court.

9 And suppose that I think that that is
10 actually a difficult question.

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

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

24 JUSTICE ALITO: Now, this may be an unfair
25 question, so if you are not prepared to answer it,

1 that's fine. But just out of curiosity, which would you
2 prefer, a decision that agrees with the special master
3 on both reformation and disgorgement or a decision that
4 disagrees with the special master on both reformation
5 and disgorgement?

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

9 (Laughter.)

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

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

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

1 lucky fortuitous thing that happened, the quite
2 foreseeable effect of your actions was going to be that
3 Kansas didn't have enough water.

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

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

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

22 JUSTICE GINSBURG: Didn't the special master
23 say that was the risk that Nebraska should have known,
24 so -- and he said they did this and that, but it wasn't
25 enough and it wasn't until 2007 that they came into

1 compliance in a way that didn't put Kansas in jeopardy.
2 But he said all along Nebraska knew that Kansas
3 might well be the loser, because Nebraska didn't take
4 adequate steps. It was aware of the risk to Kansas,
5 right?

6 MR. COOKSON: No, we would not agree with
7 the master's characterization of what was reasonably
8 foreseeable, Your Honor.

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

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

25 But, again, to get to the characterization

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

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

1 even in the driest condition now of record in the basin.
2 And we've added additional tools, should it get dryer,
3 to address it.

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

13 JUSTICE SCALIA: Does disgorgement and
14 injunction -- do the two go together?

15 MR. COOKSON: No, Your Honor.

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

23 MR. COOKSON: In our view, yes, disgorgement
24 should not be used as a future-looking tool. Injunctive
25 relief is the appropriate remedy, and in this case the

1 facts don't justify it.

2 JUSTICE SCALIA: I'm not sure you've
3 answered my question. You say it should not be used as
4 a future tool. So it can be used even though it's not
5 being imposed in order to deter future action.

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

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

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

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

25 MR. COOKSON: This Court --

1 JUSTICE SCALIA: You either sue for your
2 damages or you sue for unjust enrichment. Can you do
3 both? You get your damages plus the other guy's
4 profits.

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

7 JUSTICE SCALIA: One or the other --

8 MR. COOKSON: -- you get contract damages,
9 your expectation interest.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. McAllister, 2 minutes.

12 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

13 ON BEHALF OF THE PLAINTIFF

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

16 I wanted to go back to something
17 Justice Kagan correctly identified as that when these
18 procedures were negotiated there were lots of options on
19 the table. In fact, the groundwater model option the
20 parties chose was not Kansas's first choice. It was
21 Nebraska's first choice. And these kind of trade-offs
22 were being made, and I think this case is directly
23 analogous to New Hampshire v. Maine, which is talked
24 about in the briefs, where those two States reached a
25 boundary agreement. And the Court said, well, your

1 agreement may not be perfect, but you were dealing with
2 some vague terms, some uncertainties, you've done
3 something reasonable, we bless it. 25 years later New
4 Hampshire came back and said: You know, we made a bad
5 deal. We'd like you to undo it because we shouldn't
6 have agreed to that 25 years ago.

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

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

24 JUSTICE SOTOMAYOR: Mr. McAllister, how much
25 more are you going to get under the accounting

1 procedures as they exist without the 5-mile run?

2 MR. McALLISTER: Yeah, I believe on an
3 annual basis the difference is on the order of 8 to
4 10,000 acre feet. So that's the difference in what --
5 Nebraska wants that much more taken out of its
6 consumptive use.

7 JUSTICE SOTOMAYOR: Give me money?

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 The case is submitted.

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

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