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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

WESTERN ORGANIZATION OF RESOURCE  
COUNCILS,

Plaintiff,

vs.

DAN BROUILLETTE, in his official  
capacity as Secretary of Energy,  
and UNITED STATES DEPARTMENT OF  
ENERGY,

Defendants.

Civil Docket  
No. CV-20-98-GF-BMM

Transcript of Motion Hearing

Missouri River Federal Courthouse  
125 Central Avenue West  
Great Falls, MT 59404  
Friday, February 5, 2021  
10:00 a.m. to 11:01 p.m.

BEFORE THE HONORABLE BRIAN MORRIS  
UNITED STATES CHIEF DISTRICT COURT JUDGE

Yvette Heinze, RPR, CSR  
United States Court Reporter  
Missouri River Federal Courthouse  
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Great Falls, MT 59404  
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Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

**APPEARANCES**

PRESENT ON BEHALF OF THE PLAINTIFF:

Aman George (via video)  
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Washington, DC 20005

Shiloh Silvan Hernandez (via video)  
WESTERN ENVIRONMENTAL LAW CENTER  
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Helena, MT 59601

PRESENT ON BEHALF OF THE DEFENDANT:

Cody T. Knapp (via video)  
United States Department of Justice  
Federal Programs Branch, Civil Division  
1100 L Street NW  
Washington, DC 20005

ALSO PRESENT:

Kristin Koernig, Department of Energy (via video)

## PROCEEDINGS

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(Open court.)

THE COURT: Madam Clerk, please call the next case on the Court's calendar.

THE CLERK: This Court will now conduct a motion hearing in Case Number CV-20-98-GF-BMM, Western Organization of Resource Councils versus Brouillette.

THE COURT: Good morning, Mr. Hernandez.

MR. HERNANDEZ: Good morning, Your Honor.

THE COURT: Good morning, Mr. Knapp.

MR. KNAPP: (No audible response.)

THE COURT: You are muted there, sir.

MR. KNAPP: (No audible response.)

THE COURT: Still muted.

MR. KNAPP: Can you hear me now, Your Honor?

THE COURT: Yes.

All right. And, Mr. George, which side are you with?

MR. GEORGE: Good morning, Your Honor. Aman George for plaintiff Western Organization of Resource Councils.

THE COURT: Okay. Thank you.

This is a motion to dismiss filed by the defendants.

Are you ready to argue, Mr. Knapp?

MR. KNAPP: Yes, Your Honor.

THE COURT: Go ahead.

MR. KNAPP: Good morning, Your Honor, and thank you

1 for the opportunity to appear before you, if only virtually  
2 today. Defendants have moved to dismiss the complaint because  
3 each of plaintiff's claims, which were asserted under  
4 Sections 10(a) and 10(b) of the Federal Advisory Committee Act,  
5 suffer from a common flaw. They do not concern meetings and  
6 records of the advisory committee. Instead, the meetings and  
7 records which plaintiff have been denied access belong either  
8 to a private organization or to subcommittees that report to  
9 the National Coal Council, not directly to defendants. FACA  
10 does not require defendants to make either of those entities's  
11 meetings or records available to the public. And because the  
12 complaint does not otherwise plausibly allege the existence of  
13 specific meetings or records of the council that must be  
14 disclosed, the complaint should be dismissed.

15 With Your Honor's permission, I would like to start  
16 by addressing plaintiff's claims as to the council  
17 subcommittees.

18 THE COURT: Go ahead.

19 MR. KNAPP: Your Honor, the Court's inquire as to  
20 plaintiff's subcommittee claims can really begin and end with a  
21 single principle. Subcommittees that work for parent  
22 committees are not subject to FACA. Now this principle --

23 THE COURT: Mr. Knapp, tell me the composition of the  
24 Coal Council and then the composition of the committees, the  
25 composition of the corporation, please.

1 MR. KNAPP: Your Honor, so there are around 120  
2 members of the council that are appointed by the Secretary.  
3 Within that, there are a number of subcommittees. There's the  
4 Coal Policy Committee --

5 THE COURT: Hold on. So there's 120 members of the  
6 council?

7 MR. KNAPP: Thereabouts, Your Honor.

8 THE COURT: Okay. Appointed by the Secretary of  
9 Energy?

10 MR. KNAPP: Yes, Your Honor.

11 THE COURT: Okay. And then this council has created  
12 subcommittees; is that right?

13 MR. KNAPP: Yes, Your Honor.

14 THE COURT: All right. And who are the members of  
15 the subcommittees? Are they members of the committee?

16 MR. KNAPP: Yes, Your Honor. All of the council  
17 subcommittees, the membership is only going to be members of  
18 committees.

19 Now, I do think that there may be instances where  
20 they consult with noncommittee members where they will have an  
21 expert come in, when they're preparing reports. But those  
22 are -- those don't then become members.

23 THE COURT: Okay. Then we have committees and  
24 subcommittees. And then what's the third group? The  
25 corporation?

1 MR. KNAPP: Yes, Your Honor.

2 THE COURT: All right. Who are members -- this is a  
3 private entity; correct?

4 MR. KNAPP: Yes, Your Honor.

5 THE COURT: And who are members of it?

6 MR. KNAPP: So it's -- the articles of incorporation  
7 effectively collaterally identify the members of the  
8 corporation as the members of the council. But then the  
9 corporation also has an employee, its CEO, Janet Gellici, who  
10 operates as staff for the corporation and helps to coordinate  
11 its support and expenditures of the council.

12 THE COURT: Okay. So they provide administrative  
13 work for the council?

14 MR. KNAPP: Yes, Your Honor. And just to give some  
15 color to that, it's things like booking hotel rooms for the  
16 annual meetings and things like that.

17 THE COURT: Okay. So let me understand your  
18 argument, then, Mr. Knapp. We have this congressionally  
19 created council appointed by the Department of Energy with 120  
20 people; correct?

21 MR. KNAPP: Created by the Agency and the Secretary,  
22 the Department of Energy, not by Congress.

23 THE COURT: Not by what?

24 MR. KNAPP: Not by Congress.

25 THE COURT: Not by Congress. Okay.

1           And would you agree that the work product of this  
2 council is subject to FACA?

3           MR. KNAPP: Certainly, Your Honor.

4           THE COURT: Okay. And why are the claims against the  
5 council then deficient?

6           MR. KNAPP: Your Honor, because the -- as we see it  
7 and maybe plaintiffs can clarify, but there aren't any  
8 independent claims against the council for council records  
9 other than records associated with its subcommittees or the  
10 corporation, the separate private entity.

11          THE COURT: So let me understand. We have 120 people  
12 on the committee; correct?

13          MR. KNAPP: Yes, Your Honor.

14          THE COURT: Say they break into three subcommittees.  
15 Okay? Four each. And they go into three separate rooms, and  
16 they make decisions, have discussions, they come back into the  
17 big group of 120, and those discussions are not subject to  
18 FACA?

19          MR. KNAPP: So long as the big group, the whole  
20 committee, whenever it comes back together, then reconsiders  
21 and reevaluates what was done in the separate subcommittee  
22 meetings. That stems straight from FACA, Your Honor, which --

23          THE COURT: What do you mean that they reevaluate and  
24 reconsider? What does that mean? They actually vote on  
25 something or they --

1 MR. KNAPP: Yes, Your Honor. So what happens is in  
2 these subcommittees they will develop reports, and they'll  
3 consider, you know, facts that are presented to them, and they  
4 will prepare these reports. They then report it back up to the  
5 full council, which then gets a presentation as to the contents  
6 and an opportunity, along with members of the public, to  
7 interrogate the contents of those reports and of those  
8 recommendations before they are transmitted to the Secretary.

9 And this is because FACA is really focused on giving  
10 sort of the public an eye and an opportunity to participate at  
11 the point where recommendations are being transmitted from an  
12 advisory committee to the federal agency. Any sort of internal  
13 committee advising that goes on from subcommittees to full  
14 committees is not subject to FACA.

15 THE COURT: Mr. Knapp, how long has the Coal Council  
16 existed?

17 MR. KNAPP: The Coal Council started in 1984, and  
18 under FACA it is subject to two-year renewals.

19 THE COURT: And how long have these subcommittees  
20 existed?

21 MR. KNAPP: Your Honor, I'm not exactly sure when the  
22 subcommittees were formed. I do know that -- or whenever  
23 reports are being prepared, there are often ad hoc committees  
24 created to prepare those reports.

25 THE COURT: So are the ad hoc committees subject to



1 FACA?

2 MR. KNAPP: No, Your Honor. Because they are  
3 subcommittees, they report only to the full council, not to  
4 defendants.

5 THE COURT: All right. And then the role of the  
6 corporation is to provide administrative support to the  
7 council; is that right?

8 MR. KNAPP: Yes, Your Honor.

9 THE COURT: Hotel rooms and that sort of thing. Does  
10 the corporation receive any reports or input from private  
11 parties to give to the committees and or subcommittee?

12 MR. KNAPP: Your Honor, I do not understand that to  
13 be the case, and I don't think there's anything in the  
14 complaint that directly involves the corporation rather than  
15 subcommittees of the council, in any sort of substantive  
16 deliberations.

17 THE COURT: All right. So what you're saying, in  
18 essence, if we look at my screen here, I've got you,  
19 Mr. George, and Mr. Hernandez. And you are my council,  
20 three-member council. I'm going to send you off into three  
21 separate rooms into subcommittees to consider issues. And you  
22 go into your rooms, and you think about what to do, and you  
23 come up with ideas and brainstorm. You come back into the big  
24 room with three of you again and report to the three. You  
25 can't tell us what happened in the subcommittees meeting? The

1 public can't find that out?

2 MR. KNAPP: Well, Your Honor, you will know what  
3 happened in the subcommittee meetings in the sense that  
4 whatever we are proposing for our entire group to give to the  
5 federal government will be discussed and presented here where  
6 the public has access. And this --

7 THE COURT: I don't understand why the public  
8 wouldn't have access to the subcommittees. What's the point of  
9 hiding the access here?

10 MR. KNAPP: Your Honor, this goes -- and we can  
11 pull -- we can point you to language in the *National*  
12 *Anti-Hunger Coalition* case out of the District of Columbia.  
13 There, it describes how FACA was really intended to get at the  
14 advising functions to the federal government and to give the  
15 public more of an eye into that, not to sort of involve the  
16 public in every stage of drafting, in every stage of evidence  
17 gathering. That wasn't the point of FACA. And really it's  
18 just a practical issue. It would bog down these proceedings in  
19 such a manner that advisory would become much less useful to  
20 the federal government, and part FACA's purpose was to --

21 THE COURT: All right. But after the fact,  
22 Mr. Knapp, how does it bog you down after the fact if an  
23 Interested party says, "Okay. You've made a recommendation  
24 now, Council. Could you please provide to the public, as part  
25 of your obligation to FACA, the information you used to make

1 these recommendations that were presented by the committee and  
2 the subcommittees?" How does that bog things down?

3 MR. KNAPP: So, Your Honor, agencies can decide that  
4 subcommittees materials should be disclosed to the public, and  
5 there are agencies that do that. But the Department of Energy  
6 has not opted to do so here, and it is not required to do so by  
7 FACA, whatever sort of common sense appeal there might be to  
8 that.

9 THE COURT: They are not obligated to create  
10 subcommittees, though, are they?

11 MR. KNAPP: No, Your Honor.

12 THE COURT: All right. So the Department of Energy  
13 has decided to create subcommittees, and these subcommittees  
14 just happen to be exempt from FACA requirements. Is that what  
15 you are telling me?

16 MR. KNAPP: To be clear, the Council has decided to  
17 create subcommittees.

18 THE COURT: What did I say?

19 MR. KNAPP: The department, but --

20 THE COURT: Okay. The council decided.

21 MR. KNAPP: Yes, Your Honor.

22 THE COURT: Do they have the independent authority to  
23 do that?

24 MR. KNAPP: Yes, Your Honor. And that's set forth in  
25 the charter.

1 THE COURT: The reason I say "Department" is because  
2 you mentioned not every department has done this with their  
3 committees.

4 MR. KNAPP: Yes.

5 THE COURT: So does the Secretary of Energy have to  
6 approve the creation of these subcommittees or be involved in  
7 the creation of subcommittees?

8 MR. KNAPP: The creation of subcommittees is subject  
9 to the approval of the Department, per the council's charter.

10 THE COURT: Okay. And you don't know when the  
11 Department of Energy approved the creation of these  
12 subcommittees?

13 MR. KNAPP: I have not delved that deeply into the  
14 issue, and it's certainly not --

15 THE COURT: That doesn't seem to be that death to me,  
16 though. The council has been in existence since 1984, so  
17 almost 40 years now. I was wondering how much of that 40 years  
18 they operated with subcommittees and how much without? Is this  
19 something that was created by the way we couldn't function or  
20 something created much more recently because we didn't like the  
21 way it was functioning?

22 MR. KNAPP: Your Honor, I am not aware of the answer  
23 to that question, but I don't think that Your Honor needs to  
24 know it to resolve the questions today. Because as every other  
25 Court that has considered this question has decided,

1 subcommittees, regardless of when they were created and how  
2 long they've been in existence, are not as a matter of course  
3 subject to FACA's disclosure requirements.

4           And we would point Your Honor to your colleague  
5 Judge Molloy's decision in *Bernhardt* for this -- (video  
6 disruption) --

7           THE COURT: I'm sorry, Mr. Knapp. Mr. Knapp, hold  
8 on, please. We're having some transmission problems.

9           Just to make sure, Mr. George and Mr. Hernandez,  
10 would you make sure your microphones are muted.

11           Okay. Would you repeat yourself. You started  
12 talking about Judge Molloy, and then you started fading out.  
13 Go ahead, please.

14           MR. KNAPP: Yes, Your Honor. Can you hear me now?

15           THE COURT: I can, yes. Go ahead, please.

16           MR. KNAPP: I was just going to point Your Honor to  
17 the *Bernhardt* case where Judge Molloy recognized exactly this  
18 point. Subcommittee proceedings and materials are only going  
19 on be required to be publicly disclosed under FACA if the  
20 subcommittee is the entity that is really making the  
21 recommendations to defendants. And all that is required to  
22 sort of break that chain is for the full committee, the full  
23 council here, to conduct further deliberations as to any  
24 recommendations that are passed on to defendants.

25           And, Your Honor, we would just point out that this

1 really has to be the rule because FACA has to be sort of  
2 forward-looking. When entities are created, the Department  
3 needs to know whether they are going to have to collect records  
4 and open meetings for those subcommittees. And so we can't  
5 sort of depend on a backward looking analysis of what happened  
6 in the subcommittee hearings or in the council hearings. It is  
7 enough that we know from the charter and from the Department of  
8 Energy's own manual that all subcommittee recommendations will  
9 be subject to a public meeting and discussion by the full  
10 council before any recommendations make their way to  
11 defendants. That's enough to break the chain from the  
12 subcommittees to defendants.

13 THE COURT: Mr. Knapp, give me an idea of -- when you  
14 say there's a public meeting and discussion when the  
15 subcommittee recommends to the council, how does that work? Is  
16 that an open meeting to the public? People sit and there's  
17 testimony and documents presented? How does that work?

18 MR. KNAPP: Yes, Your Honor. So what happens is  
19 there will be a federal register notice that goes out alerting  
20 the public to the fact that there will be a meeting and  
21 directing them to a link where the draft report exists, and it  
22 can be reviewed. And then at the meeting there will be a  
23 presentation of the contents and an opportunity for members of  
24 the public to give their comment on the contents of the report  
25 and for members of the council to ask questions.

1           And, Your Honor, plaintiffs in their response brief  
2 have cited to the meeting minutes of the three meetings that  
3 are sort of at issue for the time period of this complaint, and  
4 can you see -- you know, I will point Your Honor to the  
5 July 16, 2020 meeting minutes. You will see that there were  
6 questions asked, and there were suggestions made as to the  
7 report by council members. And all of that was open to the  
8 public. You can go to the council's website, maintained by the  
9 Department of Energy, and you can actually watch that  
10 proceeding. Or for older hearings, there are transcripts  
11 available. And so there's really a lot of public access  
12 already into the advising process that the council engages in.

13           THE COURT: Mr. Knapp, what application, if any, does  
14 Judge Boasberg's opinion and *Niskanen Center* have here?

15           MR. KNAPP: Your Honor, we think -- you know, the  
16 government certainly disagrees with Judge Boasberg's analysis  
17 in that case as to the FOIA questions. But what Judge Boasberg  
18 was addressing wasn't coverage under FACA. He was not deciding  
19 as a matter of future practice whether corporation records  
20 needed to be maintained by the Department of Energy. He was  
21 simply assessing how certain documents came to be in possession  
22 of one Department of Energy employee. And so the analysis  
23 there we think does not govern here at all.

24           And, in any case, even to the extent that -- and, you  
25 know, I will acknowledge there is some muddling of the

1 relationship between the corporation and the council in the  
2 *Niskanen Center* decision. But there's no indication in that  
3 decision that the corporation is involved in advising  
4 defendants as opposed to simply providing financial support for  
5 the operations of the council.

6 THE COURT: You said the government disagrees with  
7 Judge Boasberg's decision. You didn't appeal it, though?

8 MR. KNAPP: That's correct, Your Honor.

9 THE COURT: So to the extent, I guess, it applies to  
10 that case and the reasoning to the extent that anyone else  
11 finds it persuasive.

12 MR. KNAPP: Yes, Your Honor. And there was a later  
13 Supreme Court decision that effectively changed the analysis  
14 that Judge Boasberg did in a manner that was favorable to the  
15 government. And so I think to the extent the government  
16 chooses to appeal some cases and not others, sometimes that can  
17 have to do with vehicle issues, and I am not -- I was not  
18 consulted as part of any of those proceedings. So I can't  
19 pretend to know what exactly went on behind the scenes there.  
20 But it is not entirely governed by the government's agreement  
21 or disagreement with the outcome.

22 THE COURT: So, Mr. Knapp, if you're telling me the  
23 minutes of these meetings, there's a streaming option  
24 available, where are we here if everything is as transparent as  
25 you tell me?



1 MR. KNAPP: Well, Your Honor, everything is  
2 transparent as to the council. And I think the problem here is  
3 that plaintiffs are attempting to get at records and meetings  
4 of entities that don't have a relationship to defendants but  
5 have a relationship to the council. That isn't what FACA  
6 governs. FACA governs the relationship of nongovernmental or  
7 quasi-governmental entities to the government, not  
8 relationships of private organizations who are in theory is an  
9 advising entity. We think plaintiffs have just attempted to  
10 stretch FACA well beyond its nature.

11 THE COURT: What's your strongest claim -- or case  
12 for the argument regarding access to the subcommittees?

13 MR. KNAPP: Access to the subcommittees? We would  
14 point Your Honor to Bernhardt. We also think that the *Drone*  
15 *Advisory Committee* case is helpful to us. They are --  
16 Judge Contreras rejected the notion that there were different  
17 subcommittees -- there were two different sets of subcommittees  
18 at issue in that case, but he rejected the claims for access to  
19 those subcommittees at the motion to dismiss stage, relying on  
20 the fact that subcommittees that do not report to the federal  
21 government are not subject to FACA requirements.

22 THE COURT: Okay. And what about the claims against  
23 the corporation? Why are they not tenable?

24 MR. KNAPP: Your Honor, there are two sets of claims  
25 at issue in this case. There's a subcommittee claim, which is

1 the 10(a) claim and then the open records claim, which is  
2 10(b). The only way that both of those can succeed as to the  
3 corporation is if the corporation is itself an advisory  
4 committee under FACA, and we think that it's not for two  
5 reasons. First, plaintiffs have not shown that it is utilized  
6 by defendants and --

7 THE COURT: Mr. Knapp, let me interrupt you. I'm  
8 sorry. When was the corporation created?

9 MR. KNAPP: 1985.

10 THE COURT: By whom?

11 MR. KNAPP: It's created by private individuals who  
12 sought to support the council. And this is -- you know, one  
13 thing about the corporation is it is effectively defraying  
14 costs to the government that the government might otherwise  
15 have to incur in the sort of logistical processing of council  
16 business.

17 THE COURT: All right. So you don't -- you think the  
18 corporation is in the same situation as the subcommittees  
19 regarding to FACA?

20 MR. KNAPP: Yes, Your Honor. We just think that both  
21 sets of entities are not subject to FACA.

22 THE COURT: Okay. Let's go back to the council for a  
23 moment. Your first argument in your motion is that this Court  
24 lacks jurisdiction to grant relief. Why is that?

25 MR. KNAPP: Your Honor, I think what -- the point we

1 were attempting to make is that other than subcommittee  
2 meetings and records and corporation meetings and records, that  
3 plaintiff has not identified any other residual category of  
4 council materials that have not been disclosed. In response to  
5 plaintiff's request for disclosure, what the government did was  
6 move the whole historical record for transcripts, meeting  
7 minutes, presentation, sort of PowerPoint presentations  
8 associated with the council onto a new website. And we think  
9 that that was responsive to plaintiff's request for council  
10 records as distinct from subcommittees records and corporation  
11 records. We think there's just no -- (video disruption) --

12 THE COURT: Mr. Knapp, I'm sorry. We had a  
13 transmission delay there. Would you repeat that last bit  
14 please, starting with plaintiff's request for council records  
15 as distinct from subcommittee records.

16 MR. KNAPP: Yes, Your Honor. There's just no  
17 residual category of council meetings and records that  
18 plaintiff has identified that we think were not disclosed  
19 whenever the government posted all of those materials to its  
20 new website.

21 THE COURT: So let me ask one basic question,  
22 Mr. Knapp. The council, the entity actually subject to FACA  
23 created by the Secretary, how does it -- is that in-person  
24 meetings?

25 MR. KNAPP: Yes, Your Honor. They have in-person

1 meetings and then some are virtual.

2 THE COURT: All right. Well, before COVID, were they  
3 all mostly in person?

4 MR. KNAPP: I would actually say in the time period  
5 of the complaint, I think it's a little -- maybe 60 percent  
6 were in-person and around 40 percent maybe were virtual. There  
7 are two to three meetings a year effectively.

8 THE COURT: And those meetings, they're noticed up?

9 MR. KNAPP: Yes, Your Honor.

10 THE COURT: And the public can attend?

11 MR. KNAPP: Yes, Your Honor.

12 THE COURT: And there's an agenda posted?

13 MR. KNAPP: Yes, Your Honor.

14 THE COURT: And are there --

15 MR. KNAPP: We cite --

16 THE COURT: Pardon?

17 MR. KNAPP: Your Honor, I was just going to say in  
18 our opening brief we cite a bunch of the notices that the  
19 council has.

20 THE COURT: And then who runs the meeting?

21 MR. KNAPP: Your Honor, it's run by -- in  
22 coordination, the chairman of the council and then Janet  
23 Gellici is sort of there, you know, in an administrative sense.

24 THE COURT: She's from the corporation?

25 MR. KNAPP: Yes, Your Honor.

1 THE COURT: But do they take testimony? How do  
2 they -- do they take votes on things? How do they make  
3 decisions?

4 MR. KNAPP: Yes, Your Honor, they take votes. And in  
5 the meeting minutes that are cited in plaintiff's brief, you  
6 will see there's, you know, an appendix that shows how each  
7 member of the council voted as to each report that's being  
8 passed on to defendants.

9 THE COURT: Okay. Anything else, Mr. Knapp?

10 MR. KNAPP: If Your Honor has no further questions, I  
11 think we'll hear what plaintiff had to say.

12 THE COURT: All right. Thank you. I will give you  
13 an opportunity for a brief rebuttal.

14 MR. KNAPP: Thank you.

15 THE COURT: Who is going to argue for the plaintiff,  
16 please?

17 MR. HERNANDEZ: Your Honor, Mr. George will argue.

18 THE COURT: All right. Go ahead, Mr. George.

19 MR. GEORGE: Thank you, Your Honor.

20 THE COURT: Where are you located, Mr. George?

21 MR. GEORGE: I'm in Washington DC, Your Honor.

22 THE COURT: Okay. Go ahead.

23 MR. GEORGE: Thank you, Your Honor. And may it  
24 please the Court, I'm the counsel for Western Organization of  
25 Resource Councils.

1           This case is about the public's right to access  
2 records held by a federal advisory committee and its  
3 appendages. Congress clearly intended to bring balance and  
4 transparency to the operation of federal advisory committees  
5 when it passed FACA. Here, the Department of Energy seeks to  
6 read that law's mandates into a virtual nullity.

7           THE COURT: When did Congress pass FACA?

8           MR. GEORGE: Your Honor, it was in the '70s, I  
9 believe. But what courts have held -- what has repeatedly been  
10 the theme of Congress's intent when passing FACA was to bring  
11 the operation of federal advisory committees out into the  
12 light. They were concerned that federal advisory committees  
13 had proliferated and had become a vehicle for private interests  
14 to suddenly influence federal policy out of the public eye and  
15 without sufficient participation from the public. It was  
16 tilted in favor of private interests and intended to try to  
17 bring balance and transparency to how advisory committees  
18 operated.

19           THE COURT: And that was Congress's intent or that  
20 was the Court's interpretation of Congress's intent?

21           MR. GEORGE: Your Honor, that was Congress's intent,  
22 and a number of court cases have, I guess, given rise to that  
23 intent and they codified it and interpreted it --

24           THE COURT: All right.

25           MR. GEORGE: -- to that extent.

1           According to the Department, the Federal Advisory  
2 Committee Act would allow the vast majority of the National  
3 Coal Council's work to be hidden from public view as long as  
4 it's described as being carried out by a parallel corporate  
5 entity or by subcommittees. We think these claims deserve  
6 serious scrutiny, Your Honor. I'll begin with the corporation.  
7 If it's okay with you, I'd like to begin with the argument that  
8 the corporation should itself be subject to FACA.

9           The corporation here is an indistinguishable alter  
10 ego of the council. Another federal court has already found  
11 that exact -- has already found that exact thing in the  
12 *Niskanen Center* case that you were discussing with Mr. Knapp  
13 earlier.

14           Under the Federal Advisory Committee Act any group  
15 that is utilized by an agency in the interest of obtaining  
16 advice from an agency is subject to the Federal Advisory  
17 Committee Act. Here, we think it is clear that the corporation  
18 is utilized by the Department of Energy within the meaning of  
19 FACA.

20           If we look to certain facts from the charter, for  
21 example, the charter of the corporation says that the  
22 membership of the corporation is entirely coterminous with the  
23 National Coal Council. The charter explicitly says that the  
24 Secretary of Energy appoints every member of the corporation  
25 and has the ability to dismiss at will every member of the

1 corporation.

2           Mr. Knapp also suggested that the corporation's work  
3 is purely administrative. I think, Your Honor, you  
4 characterize it as looking for hotels. But the sole purpose  
5 for the corporation listed in the charter is to advise, inform,  
6 and make recommendations to the Secretary of Energy with  
7 respect to matters submitted to the corporation by the  
8 Secretary of Energy on coal policy. The purpose articulated in  
9 the corporate charter is to provide advice to the Secretary of  
10 Energy in response to requests from the Secretary of Energy.  
11 So what we see in the charter for the corporation is an entity  
12 where every single member is appointed by and dismissible by  
13 the Secretary of Energy, and its sole stated purpose is to  
14 respond to requests from the Secretary.

15           On those facts, Your Honor, as I noted, another court  
16 has already found that the corporation is an indistinguishable  
17 alter ego of the council. We would posit that while that case  
18 was about FOIA, the indistinguishable alter ego of the federal  
19 advisory committee is itself the federal advisory committee and  
20 should be subject to FACA.

21           Mr. Knapp also said that the corporation has one  
22 employee, Janet Gellici, who performs purely administrative  
23 work. But, Your Honor, if we look to -- for example, two of  
24 the reports that the council put out between 2018 and 2019,  
25 Ms. Gellici is listed as a principal editor of the report. And



1 in one of the reports in 2018, she's listed as a chapter lead.  
2 If she's the only corporate employee and her work is purely  
3 administrative, I don't think that we would expect a purely  
4 administrative role to show up as a chapter lead for the  
5 reports that the National Coal Council actually puts out.

6 Your Honor, we think that there's no question and  
7 certainly at a motion to dismiss stage that it is plausible  
8 that the corporation is utilized by the Secretary of Energy  
9 within the meaning of FACA.

10 Your Honor, I'd also like to turn to counsel's  
11 arguments about the subcommittees. Mr. Knapp argues that what  
12 we see from the records of the council's meetings are adequate  
13 to suggest that the subcommittees are not themselves subject to  
14 FACA. The inquiry the courts have asked themselves in the  
15 cases that Mr. Knapp cited, the *National Anti-Hunger Coalition*  
16 and the *Drone Advisory Committee*, is they look to whether the  
17 subcommittee's recommendations are passed on by a council to  
18 the agency without deliberation. They look to whether the  
19 council is itself a rubber stamp on the subcommittees's  
20 recommendations. Here, we think it's extremely clear that the  
21 council is just that, a rubber stamp.

22 What we've seen, as Mr. Knapp noted, there are over  
23 120 members of the National Coal Council. They receive a  
24 presentation on a report with, as we've detailed in our  
25 complaint, for example, over 70 discreet recommendations and

1 without any council member asking a single question about the  
2 report or taking issue with any aspect of it. The council  
3 votes without a single dissenting vote to approve these  
4 reports, and that is systematically how these reports have been  
5 produced ostensibly by subcommittees, provided to the council,  
6 and then provided on to the Secretary of Energy without any  
7 deliberation or -- you know, anything in the record that  
8 suggests that the council has actually considered these  
9 seriously before going to the council -- to the Secretary of  
10 Energy.

11           In the *Drone Advisory Committee* case, for example,  
12 Your Honor, where that Court held that the subcommittees in  
13 that case were not subject to FACA, the Court specifically  
14 pointed to contentious debate about a number of the  
15 recommendations that were reflected in the record. Here, there  
16 is no such debate. It is simply presented, voted on, and then  
17 passed on to the Secretary of Energy without discussion.

18           THE COURT: Mr. George, how do you make that claim?  
19 Based on what? That they're just simply presented and voted on  
20 with no discussion? By looking at the minutes?

21           MR. GEORGE: Yes, Your Honor, that's looking at the  
22 minutes.

23           THE COURT: All right. So are you getting the record  
24 of the coal council but not the subcommittee?

25           MR. GEORGE: That's correct, Your Honor. I think

1 Mr. Knapp -- I don't disagree with Mr. Knapp's characterization  
2 that the records of the council itself, when it comes to simply  
3 the transcripts of the meetings that they hold and the reports  
4 themselves, are adequately posted. We don't take issue with  
5 that. We've reviewed the meeting minutes, and that's what we  
6 look to to --

7 THE COURT: Mr. George, give me an idea of what you  
8 are talking about. So on the agenda, does it say, consider  
9 report by subcommittee X, and then the agenda item comes up,  
10 and the person running the meeting says, "All right. We're  
11 going to now take a vote on the report of subcommittee X. All  
12 in favor, aye. All opposed, nay." And that's it? End of  
13 discussion? Is there any record of the content of the report?

14 MR. GEORGE: Yes, Your Honor. But the content of the  
15 report is described at the meeting. So what happens is one of  
16 the reports' authors, I believe, will present the report, for  
17 example, via WebX. So he'll present the main portions of the  
18 report to the members of the council. And then after that,  
19 while there's an opportunity for discussion, nobody takes that  
20 opportunity, and a vote happens and the report is finalized.

21 THE COURT: Are you able to obtain the content of the  
22 reports?

23 MR. GEORGE: Yes, Your Honor.

24 THE COURT: All right. So what are you missing?

25 MR. GEORGE: So --

1           THE COURT: There's no discussion. I get that. They  
2 are just, in your view, rubber stamping it. But here's the  
3 report. The report says what it says, and you get a copy of  
4 the report. Right?

5           MR. GEORGE: That's right, Your Honor.

6           THE COURT: What are you lacking here?

7           MR. GEORGE: The Federal Advisory Committee Act gives  
8 the public the right to access records beyond simply final  
9 reports of the advisory committee. So the Federal Advisory  
10 Committee Act requires the government to make public  
11 transcripts, meeting minutes, working papers, drafts, studies,  
12 meeting agenda, or any other documents made available to,  
13 prepared for, or prepared by an advisory committee. That's a  
14 much broader set of documents than simply the final report.

15           But when all of those documents are held by a  
16 subcommittee and all of the work of preparing and deliberating  
17 the report occurs at the subcommittee level, the public no  
18 longer gets the right to access that report.

19           And the way courts have -- and GSA regulations have  
20 squared that with FACA is to say that those sorts of working  
21 materials and the records of deliberations can be shielded from  
22 the public view as long as the subcommittee -- as long as the  
23 work of the subcommittee is not transmitted directly to the  
24 Secretary of Energy in this case. What we look to for direct  
25 transmission is whether there is deliberation about the report

1 at the council level that suffices to illuminate the council's  
2 thinking in a way that, therefore, doesn't violate the spirit  
3 of FACA.

4 THE COURT: So this is the rubber stamp issue?

5 MR. GEORGE: Exactly, Your Honor.

6 THE COURT: How do you -- when were these  
7 subcommittees created?

8 MR. GEORGE: Your Honor, Mr. Knapp has said that  
9 subcommittees -- I think he wasn't sure how long they have been  
10 operating, and he also, I think, said that subcommittees are  
11 sometimes created in an ad hoc manner to draft each report.

12 And as we noted in our complaint, Your Honor, it's  
13 not always -- it's not explicit in records published by the  
14 federal government when and how each of these subcommittees is  
15 created and what they are tasked and who the members are.

16 THE COURT: Mr. George, do you have experience with  
17 other kinds of -- besides the coal council, other kinds of  
18 entities similar to this, with their use of subcommittees?

19 MR. GEORGE: Yes, Your Honor. It is fairly common  
20 for federal advisory committees to rely on subcommittees to  
21 prepare materials.

22 THE COURT: All right. Is it fairly common for the  
23 subcommittees to operate in the fashion you claim that the  
24 subcommittees here operate?

25 MR. GEORGE: Your Honor, I can't say that I have

1 looked at so many FACAs that I could tell what is normal versus  
2 not normal. I can tell you at the very least that the level of  
3 deliberation that the full council undertakes here with respect  
4 to the subcommittees is extremely low and lower than in the  
5 other cases that we've discussed.

6 THE COURT: The other cases you discussed where?

7 MR. GEORGE: So, for example, Your Honor, the *Drone*  
8 *Advisory Committee* case that Mr. Knapp discussed in his opening  
9 argument, as well as the Bernhardt case that Mr. Knapp  
10 mentioned in which Judge Molloy found that the subcommittees  
11 were not subject to FACA.

12 THE COURT: And so how do you distinguish the  
13 Bernhardt case?

14 MR. GEORGE: Your Honor, I would make two points  
15 about the Bernhardt case. The first is that in that case  
16 Judge Molloy found at summary judgment that the subcommittees  
17 had actually undertaken some deliberation. Here, the records  
18 of the meetings show zero deliberation.

19 THE COURT: By the subcommittees?

20 MR. GEORGE: By the full council prior to the  
21 approval of the subcommittee recommendation.

22 THE COURT: So Bernhardt, you said, first, that the  
23 record showed there were some deliberations of the  
24 subcommittees. So you meant --

25 MR. GEORGE: Of the subcommittee's recommendations to

1 the council.

2 THE COURT: All right. Some deliberations by the  
3 committee of the subcommittee's recommendations.

4 MR. GEORGE: Yes, Your Honor.

5 THE COURT: Okay. Go ahead. What's the second  
6 distinction?

7 MR. GEORGE: The second point, Your Honor, it's not  
8 so much a distinguishing point as it is a point of respectful  
9 disagreement. Judge Molloy in the Bernhardt case implied that  
10 it's inappropriate for a Court to evaluate the substance and  
11 quantity or quality of the deliberation of the council of  
12 subcommittee recommendations and that was the sort of thing  
13 committed to discretion of the agency and not subject to  
14 judicial review.

15 We don't think that -- we don't necessarily agree  
16 with that conclusion either, Your Honor. We believe that there  
17 are judicial and amenable standards a court could apply in  
18 evaluating --

19 THE COURT: Such as what?

20 MR. GEORGE: Well, Your Honor, in this case, all that  
21 we would ask you to find is simply that zero deliberations or  
22 discussions available in the record is not enough to constitute  
23 something more than rubber stamping.

24 THE COURT: So what you mean by zero deliberation  
25 would be -- we have a coal council meeting. Agenda Item 1

1 comes up whether to adopt a report of subcommittee X. All in  
2 favor -- they just vote on it with no discussion? How does it  
3 work?

4 MR. GEORGE: Your Honor, we would argue that that  
5 does not constitute deliberation.

6 THE COURT: Is that what happened?

7 MR. GEORGE: Yes, Your Honor.

8 THE COURT: You've got minutes of the meetings of  
9 coal council; right?

10 MR. GEORGE: Correct.

11 THE COURT: So do those minutes reflect any  
12 discussion or questions from the coal council members about the  
13 agenda items?

14 MR. GEORGE: No, Your Honor. They do not.

15 And what I would add to that is it's not simply one  
16 agenda item by agenda item. What happens is the entire -- the  
17 contents of the report are presented all at once. So it might  
18 take a 40- or 50-minute presentation by report authors at the  
19 end of which there's a vote. And a vote happens without, in  
20 between, any discussion or deliberation about, you know, the  
21 40- or 50-minutes of content that might have occurred before  
22 them. These reports are long, you know, 60, 70 pages. In our  
23 complaint, the most recent one had over 70 discrete policy  
24 recommendations. So it's not as if there's, you know, one  
25 policy recommendation and then they have the opportunity to ask



1 questions or deliberate and then go to the next. The entirety  
2 of the report is presented, and then there's no discussion.

3 THE COURT: Mr. George, you have access to the policy  
4 recommendations from the subcommittee?

5 MR. GEORGE: Correct, Your Honor, as codified in the  
6 final reports by the coal council.

7 THE COURT: So you're complaining about not being  
8 able to determine the source of the these recommendations and  
9 why they were -- why the choices were recommended?

10 MR. GEORGE: That's right, Your Honor, among other  
11 things. We're unable to see the draft of the recommendations,  
12 so how they evolved. We're unable to see, you know, what  
13 records and information the subcommittees relied on in  
14 generating the recommendations. We're not able to see any  
15 deliberation about the substance of those recommendations or  
16 testimony about strengths or weaknesses of the recommendations  
17 that might have occurred at the subcommittee level. Those are  
18 the type records that are -- (video disruption) -- to the  
19 public by FACA. It's explicit in FACA that those types of  
20 records are supposed to be public. Part of the purpose of FACA  
21 was to open this sort of deliberation up to the public.

22 And admittedly, you know, the public's right of  
23 access has been shrunken by the ability of the subcommittees to  
24 conduct some of this work. But the Department of Energy is  
25 seeking to shrink that, basically, to zero, and we don't think

1 that that's consistent with the case law.

2 THE COURT: Now, Mr. George, don't take this wrong,  
3 but so what? You can't -- you have a coal council that's  
4 created by the Secretary of Energy -- appointed by the  
5 Secretary of Energy. It's a coal industry -- a pro-coal  
6 industry membership; correct?

7 MR. GEORGE: That is how we would characterize it,  
8 yes, Your Honor.

9 THE COURT: And they are -- the council is making  
10 recommendations to the Secretary of Energy, generally, to  
11 promote the coal industry?

12 MR. GEORGE: That's how we would characterize it,  
13 Your Honor.

14 THE COURT: And these recommendations in particular  
15 come from these subcommittees?

16 MR. GEORGE: Correct, Your Honor.

17 THE COURT: And you have access to the content of the  
18 recommendation but not how the recommendation evolved or any  
19 discussion or debate about the recommendations?

20 MR. GEORGE: Correct, Your Honor.

21 THE COURT: All right. How would that help you? How  
22 would that change the outcome here? Would the  
23 industry-dominated council suddenly change their mind because,  
24 "Gosh, I didn't know the basis for that or the source of that  
25 information"?

1 MR. GEORGE: Well, Your Honor, I don't know the  
2 degree to which I could say that we would change the industry  
3 association's mind by having access to those, such as records  
4 at the subcommittees level.

5 However, what I could say is that WORC, as an  
6 organization, advocates for the interest of its membership,  
7 which are negatively affected by coal production. And WORC is  
8 negatively impacted in its ability to, for example, advocate  
9 against the coal council's recommendations if we can't see how  
10 those recommendations were developed, you know, whether certain  
11 entities had undue influence over the creation of those  
12 records -- of those recommendations, whether the coal council  
13 took into account concerns such as environmental concerns or  
14 any concerns of landowners or ranchers in developing the  
15 recommendation.

16 WORC can't as effectively mount a public persuasion  
17 campaign or the ability to interact with Secretary -- with the  
18 Department of Energy officials about the degree to which to  
19 accept and move forward with those recommendations without  
20 being able to explain how those recommendations came into being  
21 and why they might be flawed.

22 THE COURT: When is the next meeting of this council,  
23 Mr. George?

24 MR. GEORGE: Your Honor, I'm not sure when the next  
25 meeting is. Mr. Knapp may know when the next one is. I'm not

1 sure one has been noticed yet.

2 THE COURT: And who is making this decision as to the  
3 accessibility of the records in the subcommittee?

4 MR. GEORGE: Your Honor, could you clarify the  
5 question? Do you mean which entity within the government  
6 decides whether to make subcommittee records public?

7 THE COURT: Does the Secretary of Energy have the  
8 authority to say we're going to make this whole process  
9 transparent, open up the meetings and everything of the  
10 subcommittees and the committees open to the public?

11 MR. GEORGE: Yes, Your Honor.

12 THE COURT: All right. And what's the policy of the  
13 current administration regarding these meetings?

14 MR. GEORGE: The new administration, Your Honor?

15 THE COURT: Yes.

16 MR. GEORGE: I am not aware of a change yet, Your  
17 Honor. I believe it is -- as far as I know, it is the same.  
18 We have not heard from the government that there's any change  
19 in their position on subcommittee records.

20 THE COURT: All right. Anything else, Mr. George?

21 MR. GEORGE: Your Honor, the last thing I would note  
22 is, very quickly, even if this Court were not to find that the  
23 corporation itself was subject to FACA, which we believe it  
24 clearly is, the documents produced by the corporation for the  
25 council should be subject to FACA. As I noted before, FACA

1 requires the government to make public records prepared for or  
2 by the advisory committee or made available to the advisory  
3 committee. The corporation's records are prepared for and made  
4 available to the council. And so even if the corporation  
5 itself is not a FACA, its records should be made public subject  
6 to FACA.

7 THE COURT: Mr. George, you mentioned the Bernhardt  
8 case. That was decided on summary judgment.

9 MR. GEORGE: That's right, Your Honor.

10 THE COURT: All right. So by that point there was  
11 agreement as to the nature of the deliberations by the  
12 committee on the subcommittee recommendations?

13 MR. GEORGE: Yes, Your Honor.

14 THE COURT: All right. In this case, is there any  
15 dispute as to the content of the deliberation by the coal  
16 council on the subcommittee recommendations?

17 MR. GEORGE: Your Honor, I have not heard the  
18 government dispute our characterization that the council does  
19 not deliberate subcommittees recommendations prior to voting.

20 THE COURT: So your view is it's a rubber stamp?

21 MR. GEORGE: Correct, Your Honor.

22 THE COURT: Okay. Anything else?

23 MR. GEORGE: That's it, Your Honor.

24 THE COURT: All right. Thank you, Mr. George.

25 MR. GEORGE: Thank you.

1 THE COURT: Mr. Knapp, rebuttal. Do you agree with  
2 Mr. George's characterization that the council rubber stamps  
3 the recommendations to the subcommittee?

4 MR. KNAPP: No, Your Honor. We certainly dispute  
5 that.

6 THE COURT: Okay.

7 MR. KNAPP: I think there's agreement about what  
8 occurs per the meeting minutes, what the meeting minutes show.  
9 What we disagree about is whether what is shown in those  
10 minutes is further deliberation as required.

11 THE COURT: So would this be a situation where a  
12 decision should be made on summary judgment rather than a  
13 motion to dismiss phase, like Bernhardt?

14 MR. KNAPP: Your Honor, we think that a motion to  
15 dismiss is appropriate here because what distinguishes this  
16 case from Bernhardt in the posture is that in Bernhardt, you  
17 know, we didn't know the sort of like whole universe of  
18 meetings. Here, we're talking about three minutes for which  
19 plaintiff has cited the meeting minutes for each of those  
20 meetings. We know exactly what we're talking about, and we can  
21 look at those, and we can determine whether or not what appears  
22 in the public record is further deliberation.

23 THE COURT: Mr. Knapp, those meeting minutes reflect  
24 the level of deliberation by the coal council?

25 MR. KNAPP: Your Honor, we believe they reflect

1 exactly what was required in Bernhardt, and I will just read  
2 you some language from that discussion. What Judge Molloy  
3 required was that the record show that each recommendation was  
4 presented to the committee and subjected to public comment.  
5 And we think that's exactly what is shown in each of the  
6 meeting minutes cited by plaintiff.

7 THE COURT: Do you know, Mr. Knapp, in the Bernhardt  
8 case, were all the subcommittees at issue comprised exclusively  
9 of members of the full committee?

10 MR. KNAPP: Your Honor, I don't specifically recall  
11 whether or not. I would expect that it was just members of the  
12 committee, but I can't say that I've reviewed it for that  
13 particular question.

14 THE COURT: Okay. Go ahead, please.

15 MR. KNAPP: And, Your Honor, we think that even to  
16 the extent that what plaintiff is looking for in these meeting  
17 minutes, it's evidenced that questions were asked about the  
18 deliberations or that there were suggestions for changes. We  
19 would point Your Honor to the meeting minutes for the July 2020  
20 meeting. I will just read some language. Tom Sarkus, who was  
21 the DDF0, called for questions to be posted --

22 THE COURT: What's a DDF0?

23 MR. KNAPP: Sorry. The deputy designated federal  
24 officer, who is effectively the Secretary's representative at  
25 those meetings.

1 THE COURT: Go ahead.

2 MR. KNAPP: "Called for questions to be posted via  
3 the chat box and sent to panelists. Questions and suggestions  
4 were taken and noted."

5 You know, so to the extent that what plaintiff is  
6 looking for is some indication at some point in time that  
7 questions were asked, that is in the meeting minutes. And,  
8 Your Honor --

9 THE COURT: Hold on, Mr. Knapp. Let me just clarify.  
10 Does it show that the opportunity for questions was made, or  
11 does it show that questions actually were asked?

12 MR. KNAPP: Your Honor, it states, "Questions and  
13 suggestions were taken and noted," which I understand to mean  
14 were asked and answered.

15 THE COURT: But it doesn't identify or elaborate on  
16 the question and the answer?

17 MR. KNAPP: Your Honor, the meeting minutes do not,  
18 but there is a separate recording of the meeting that I have  
19 not independently reviewed yet.

20 THE COURT: Is the recording available to the public?

21 MR. KNAPP: Yes, Your Honor.

22 THE COURT: How?

23 MR. KNAPP: On the council's website, there are  
24 transcripts and links to the recordings of the meetings.

25 THE COURT: Okay. Anything else, Mr. Knapp?



1 MR. KNAPP: Your Honor, I believe that is everything,  
2 if Your Honor doesn't have any further questions.

3 THE COURT: All right. Thank you, Mr. Knapp.

4 Mr. George, Mr. Hernandez, anything you want to add?

5 MR. HERNANDEZ: No, Your Honor. I don't think so.

6 MR. GEORGE: No, Your Honor.

7 THE COURT: All right. One more thing. I'm sorry,  
8 Mr. Knapp. I forgot to ask you one more question. So is it  
9 the policy of the current administration that the coal council  
10 is operating in compliance with FACA regarding disclosure?

11 MR. GEORGE: Your Honor, there has been no change in  
12 the government's position?

13 THE COURT: I understand.

14 All right. Thank you for your time. This matter is  
15 submitted. I will have an order out in the next couple weeks,  
16 I hope.

17 MR. GEORGE: Thank you.

18 MR. KNAPP: Thank you, Your Honor.

19 (The proceedings concluded at 10:59 a.m.)

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## REPORTER'S CERTIFICATE

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## REPORTER'S CERTIFICATE

I, Yvette Heinze, a Registered Professional Reporter and Certified Shorthand Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Great Falls, Montana, this 20th day of February, 2021.

*/s/ Yvette Heinze*

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Yvette Heinze  
United States Court Reporter

| #   | 7   |  |   |
|---|---|--|---|
| #8162 [1] - 2:4                             | 70 [3] - 25:25, 32:22, 32:23  | <b>advocates</b> [1] - 35:6  | <b>argue</b> [4] - 3:22, 21:15, 21:17, 32:4   |
| ,   |   | <b>affected</b> [1] - 35:7   | <b>argues</b> [1] - 25:11   |
| '70s [1] - 22:8                             | <b>A</b>  | <b>agencies</b> [2] - 11:3, 11:5   | <b>argument</b> [5] - 6:18, 17:12, 18:23, 23:7, 30:9  |
| /   | <b>a.m</b> [2] - 1:16, 41:19  | <b>Agency</b> [1] - 6:21   | <b>arguments</b> [1] - 25:11  |
| /s [1] - 42:17                              | <b>ability</b> [4] - 23:25, 33:23, 35:8, 35:17  | <b>agency</b> [5] - 8:12, 23:15, 23:16, 25:18, 31:13                         | <b>articles</b> [1] - 6:6   |
| <b>1</b>                                    | <b>able</b> [4] - 27:21, 33:8, 33:14, 35:20   | <b>Agenda</b> [1] - 31:25  | <b>articulated</b> [1] - 24:8   |
| 1 [1] - 31:25                               | <b>accept</b> [1] - 35:19   | <b>agenda</b> [7] - 20:12, 27:8, 27:9, 28:12, 32:13, 32:16                   | <b>aspect</b> [1] - 26:2  |
| 10(a) [2] - 4:4, 18:1                       | <b>access</b> [15] - 4:7, 10:6, 10:8, 10:9, 15:11, 17:12, 17:13, 17:18, 22:1, 28:8, 28:18, 33:3, 33:23, 34:17, 35:3 | <b>agree</b> [3] - 7:1, 31:15, 38:1  | <b>asserted</b> [1] - 4:3   |
| 10(b) [1] - 4:4                             | <b>accessibility</b> [1] - 36:3   | <b>agreement</b> [3] - 16:20, 37:11, 38:7                                    | <b>assessing</b> [1] - 15:21  |
| 10(b) [1] - 18:2                            | <b>according</b> [1] - 23:1   | <b>ahead</b> [9] - 3:24, 4:18, 13:13, 13:15, 21:18, 21:22, 31:5, 39:14, 40:1 | <b>assisted</b> [2] - 1:25, 42:7  |
| 103 [1] - 2:6                               | <b>account</b> [1] - 35:13  | <b>alerting</b> [1] - 14:19  | <b>associated</b> [2] - 7:9, 19:8   |
| 10:00 [1] - 1:16                            | <b>acknowledge</b> [1] - 15:25  | <b>allege</b> [1] - 4:12   | <b>association's</b> [1] - 35:3   |
| 10:59 [1] - 41:19                           | <b>Act</b> [6] - 4:4, 23:2, 23:14, 23:17, 28:7, 28:10   | <b>Alley</b> [1] - 2:6   | <b>attempted</b> [1] - 17:9   |
| 1100 [1] - 2:11                             | <b>action</b> [2] - 42:13   | <b>allow</b> [1] - 23:2  | <b>attempting</b> [2] - 17:3, 19:1  |
| 11:01 [1] - 1:16                            | <b>ad</b> [3] - 8:23, 8:25, 29:11   | <b>almost</b> [1] - 12:17  | <b>attend</b> [1] - 20:10   |
| 120 [6] - 5:1, 5:5, 6:19, 7:11, 7:17, 25:23 | <b>add</b> [2] - 32:15, 41:4  | <b>ALSO</b> [1] - 2:14   | <b>attorney</b> [1] - 42:11   |
| 125 [2] - 1:15, 1:22                        | <b>addressing</b> [2] - 4:16, 15:18   | <b>alter</b> [3] - 23:9, 24:17, 24:18  | <b>attorneys</b> [1] - 42:12  |
| 1440 [1] - 2:4                              | <b>adequate</b> [1] - 25:12   | <b>Aman</b> [2] - 2:3, 3:18  | <b>audible</b> [2] - 3:11, 3:13   |
| 16 [1] - 15:5                               | <b>adequately</b> [1] - 27:4  | <b>amenable</b> [1] - 31:17  | <b>authority</b> [2] - 11:22, 36:8  |
| 1984 [2] - 8:17, 12:16                      | <b>administration</b> [3] - 36:13, 36:14, 41:9  | <b>analysis</b> [4] - 14:5, 15:16, 15:22, 16:13                              | <b>authors</b> [2] - 27:16, 32:18   |
| 1985 [1] - 18:9                             | <b>administrative</b> [7] - 6:12, 9:6, 20:23, 24:3, 24:22, 25:3, 25:4   | <b>annual</b> [1] - 6:16   | <b>available</b> [8] - 4:11, 15:11, 16:24, 28:12, 31:22, 37:2, 37:4, 40:20  |
| <b>2</b>                                    | <b>admittedly</b> [1] - 33:22   | <b>answer</b> [2] - 12:22, 40:16   | <b>Avenue</b> [2] - 1:15, 1:22  |
| 20005 [2] - 2:4, 2:12                       | <b>adopt</b> [1] - 32:1   | <b>answered</b> [1] - 40:14  | <b>aware</b> [2] - 12:22, 36:16   |
| 2018 [2] - 24:24, 25:1                      | <b>advice</b> [2] - 23:16, 24:9   | <b>Anti</b> [2] - 10:12, 25:15   | <b>aye</b> [1] - 27:12  |
| 2019 [1] - 24:24                            | <b>advise</b> [1] - 24:5  | <b>Anti-Hunger</b> [2] - 10:12, 25:15  | <b>B</b>  |
| 2020 [2] - 15:5, 39:19                      | <b>advising</b> [5] - 8:13, 10:14, 15:12, 16:3, 17:9  | <b>appeal</b> [3] - 11:7, 16:7, 16:16  | <b>backward</b> [1] - 14:5  |
| 2021 [2] - 1:16, 42:15                      | <b>Advisory</b> [10] - 4:4, 17:15, 23:1, 23:14, 23:16, 25:16, 26:11, 28:7, 28:9, 30:8                               | <b>appear</b> [1] - 4:1  | <b>balance</b> [2] - 22:3, 22:17  |
| 20th [1] - 42:15                            | <b>advise</b> [16] - 4:6, 8:12, 10:19, 18:3, 22:2, 22:4, 22:11, 22:12, 22:17, 24:19, 28:9, 28:13, 29:20, 37:2       | <b>APPEARANCES</b> [1] - 2:1   | <b>based</b> [1] - 26:19  |
| <b>4</b>                                    | <b>advocate</b> [1] - 35:8  | <b>appendages</b> [1] - 22:3   | <b>basic</b> [1] - 19:21  |
| 40 [5] - 12:17, 20:6, 32:18, 32:21          |   | <b>appendix</b> [1] - 21:6   | <b>basis</b> [1] - 34:24  |
| 406 [1] - 1:24                              |   | <b>application</b> [1] - 15:13   | <b>become</b> [3] - 5:22, 10:19, 22:13  |
| 454-7805 [1] - 1:24                         |   | <b>applies</b> [1] - 16:9  | <b>BEFORE</b> [1] - 1:18  |
| <b>5</b>                                    |   | <b>apply</b> [1] - 31:17   | <b>begin</b> [3] - 4:20, 23:6, 23:7   |
| 5 [1] - 1:16                                |   | <b>appointed</b> [5] - 5:2, 5:8, 6:19, 24:12, 34:4                           | <b>BEHALF</b> [2] - 2:2, 2:9  |
| 50-minute [1] - 32:18                       |   | <b>appoints</b> [1] - 23:24  | <b>behind</b> [1] - 16:19   |
| 50-minutes [1] - 32:21                      |   | <b>appropriate</b> [1] - 38:15   | <b>belong</b> [1] - 4:7   |
| 59404 [2] - 1:15, 1:23                      |   | <b>approval</b> [2] - 12:9, 30:21  | <b>Bernhardt</b> [14] - 13:5, 13:17, 17:14, 30:9, 30:13, 30:15, 30:22, 31:9, 37:7, 38:13,   |
| 59601 [1] - 2:7                             |   | <b>approve</b> [2] - 12:6, 26:3  | 38:16, 39:1, 39:7   |
| <b>6</b>                                    |   | <b>approved</b> [1] - 12:11  | <b>between</b> [3] - 16:1, 24:24, 32:20   |
| 60 [2] - 20:5, 32:22                        |   |  | <b>beyond</b> [2] - 17:10, 28:8   |
|   |   |  | <b>big</b> [3] - 7:17, 7:19, 9:23   |
|   |   |  | <b>bit</b> [1] - 19:13  |
|   |   |  | <b>Boasberg</b> [2] - 15:17, 16:14  |
|   |   |  | <b>Boasberg's</b> [3] - 15:14, 15:16, 16:7  |
|   |   |  | <b>bog</b> [3] - 10:18, 10:22, 11:2   |
|   |   |  | <b>booking</b> [1] - 6:15   |
|   |   |  | <b>box</b> [1] - 40:3   |
|   |   |  | <b>brainstorm</b> [1] - 9:23  |
|   |   |  | <b>Branch</b> [1] - 2:11  |
|   |   |  | <b>break</b> [3] - 7:14, 13:22, 14:11   |
|   |   |  | <b>BRIAN</b> [1] - 1:18   |
|   |   |  | <b>brief</b> [4] - 15:1, 20:18, 21:5, 21:13   |
|   |   |  | <b>bring</b> [3] - 22:3, 22:10, 22:17   |
|   |   |  | <b>broader</b> [1] - 28:14  |
|   |   |  | <b>BROUILLETTE</b> [1] - 1:8  |
|   |   |  | <b>Brouillette</b> [1] - 3:7  |
|   |   |  | <b>bunch</b> [1] - 20:18  |
|   |   |  | <b>business</b> [1] - 18:16   |
|   |   |  | <b>C</b>  |
|   |   |  | <b>calendar</b> [1] - 3:4   |
|   |   |  | <b>campaign</b> [1] - 35:17   |
|   |   |  | <b>capacity</b> [1] - 1:9   |
|   |   |  | <b>carried</b> [1] - 23:4   |
|   |   |  | <b>case</b> [29] - 3:3, 9:13, 10:12, 13:17, 15:17, 15:24, 16:10, 17:11, 17:15, 17:18, 17:25, 22:1, 23:12, 24:17, 26:11, 26:13, 28:24, 30:8, 30:9, 30:13, 30:15, 31:9, 31:20, 34:1, 37:8, 37:14, 38:16, 39:8 |
|   |   |  | <b>Case</b> [1] - 3:6   |
|   |   |  | <b>cases</b> [5] - 16:16, 22:22, 25:15, 30:5, 30:6  |
|   |   |  | <b>category</b> [2] - 19:3, 19:17   |
|   |   |  | <b>Center</b> [3] - 15:14, 16:2, 23:12  |
|   |   |  | <b>CENTER</b> [1] - 2:6   |
|   |   |  | <b>Central</b> [2] - 1:15, 1:22   |
|   |   |  | <b>CEO</b> [1] - 6:9  |
|   |   |  | <b>certain</b> [3] - 15:21,   |

|  |   |  |   |  |
|--|---|--|---|--|
| <p>23:20, 35:10<br/> <b>certainly</b> [5] - 7:3,<br/> 12:14, 15:16, 25:7,<br/> 38:4<br/> <b>CERTIFICATE</b> [1] -<br/> 42:1<br/> <b>Certified</b> [1] - 42:3<br/> <b>certified</b> [1] - 42:9<br/> <b>certify</b> [2] - 42:3,<br/> 42:11<br/> <b>chain</b> [2] - 13:22,<br/> 14:11<br/> <b>chairman</b> [1] - 20:22<br/> <b>change</b> [6] - 34:22,<br/> 34:23, 35:2, 36:16,<br/> 36:18, 41:11<br/> <b>changed</b> [1] - 16:13<br/> <b>changes</b> [1] - 39:18<br/> <b>chapter</b> [2] - 25:1,<br/> 25:4<br/> <b>characterization</b> [3] -<br/> 27:1, 37:18, 38:2<br/> <b>characterize</b> [3] -<br/> 24:4, 34:7, 34:12<br/> <b>charter</b> [9] - 11:25,<br/> 12:9, 14:7, 23:20,<br/> 23:21, 23:23, 24:5,<br/> 24:9, 24:11<br/> <b>chat</b> [1] - 40:3<br/> <b>CHIEF</b> [1] - 1:19<br/> <b>choices</b> [1] - 33:9<br/> <b>chooses</b> [1] - 16:16<br/> <b>cite</b> [2] - 20:15, 20:18<br/> <b>cited</b> [5] - 15:2, 21:5,<br/> 25:15, 38:19, 39:6<br/> <b>Civil</b> [2] - 1:6, 2:11<br/> <b>claim</b> [6] - 17:11,<br/> 17:25, 18:1, 26:18,<br/> 29:23<br/> <b>claims</b> [9] - 4:3, 4:16,<br/> 4:20, 7:4, 7:8, 17:18,<br/> 17:22, 17:24, 23:5<br/> <b>clarify</b> [3] - 7:7, 36:4,<br/> 40:9<br/> <b>clear</b> [3] - 11:16,<br/> 23:17, 25:20<br/> <b>clearly</b> [2] - 22:3,<br/> 36:24<br/> <b>CLERK</b> [1] - 3:5<br/> <b>Clerk</b> [1] - 3:3<br/> <b>Coal</b> [9] - 4:9, 4:24,<br/> 5:4, 8:15, 8:17, 23:3,<br/> 23:23, 25:5, 25:23<br/> <b>coal</b> [17] - 24:8, 26:24,<br/> 29:17, 31:25, 32:9,<br/> 32:12, 33:6, 34:3,<br/> 34:5, 34:11, 35:7,<br/> 35:9, 35:12, 37:15,<br/> 38:24, 41:9<br/> <b>Coalition</b> [2] - 10:12,</p> | <p>25:15<br/> <b>codified</b> [2] - 22:23,<br/> 33:5<br/> <b>Cody</b> [1] - 2:10<br/> <b>collaterally</b> [1] - 6:7<br/> <b>colleague</b> [1] - 13:4<br/> <b>collect</b> [1] - 14:3<br/> <b>color</b> [1] - 6:15<br/> <b>Columbia</b> [1] - 10:12<br/> <b>comment</b> [2] - 14:24,<br/> 39:4<br/> <b>committed</b> [2] - 8:12,<br/> 31:13<br/> <b>Committee</b> [11] - 4:4,<br/> 5:4, 17:15, 23:2,<br/> 23:14, 23:17, 25:16,<br/> 26:11, 28:7, 28:10,<br/> 30:8<br/> <b>committee</b> [20] - 4:6,<br/> 5:15, 7:12, 7:20,<br/> 8:13, 11:1, 13:22,<br/> 18:4, 22:2, 24:19,<br/> 28:9, 28:13, 31:3,<br/> 37:2, 37:3, 37:12,<br/> 39:4, 39:9, 39:12<br/> <b>committees</b> [15] -<br/> 4:22, 4:24, 5:18,<br/> 5:23, 8:14, 8:23,<br/> 8:25, 9:11, 12:3,<br/> 22:4, 22:11, 22:12,<br/> 22:17, 29:20, 36:10<br/> <b>common</b> [4] - 4:5,<br/> 11:7, 29:19, 29:22<br/> <b>complaining</b> [1] - 33:7<br/> <b>complaint</b> [9] - 4:2,<br/> 4:12, 4:14, 9:14,<br/> 15:3, 20:5, 25:25,<br/> 29:12, 32:23<br/> <b>compliance</b> [1] -<br/> 41:10<br/> <b>composition</b> [3] -<br/> 4:23, 4:24, 4:25<br/> <b>comprised</b> [1] - 39:8<br/> <b>computer</b> [2] - 1:25,<br/> 42:7<br/> <b>computer-assisted</b><br/> [2] - 1:25, 42:7<br/> <b>concern</b> [1] - 4:5<br/> <b>concerned</b> [1] - 22:12<br/> <b>concerns</b> [3] - 35:13,<br/> 35:14<br/> <b>concluded</b> [1] - 41:19<br/> <b>conclusion</b> [1] - 31:16<br/> <b>conduct</b> [3] - 3:5,<br/> 13:23, 33:24<br/> <b>Congress</b> [5] - 6:22,<br/> 6:24, 6:25, 22:3,<br/> 22:7<br/> <b>Congress's</b> [4] -<br/> 22:10, 22:19, 22:20,</p> | <p>22:21<br/> <b>congressionally</b> [1] -<br/> 6:18<br/> <b>consider</b> [3] - 8:3,<br/> 9:21, 27:8<br/> <b>considered</b> [2] -<br/> 12:25, 26:8<br/> <b>consistent</b> [1] - 34:1<br/> <b>constitute</b> [2] - 31:22,<br/> 32:5<br/> <b>consult</b> [1] - 5:20<br/> <b>consulted</b> [1] - 16:18<br/> <b>content</b> [6] - 27:13,<br/> 27:14, 27:21, 32:21,<br/> 34:17, 37:15<br/> <b>contentious</b> [1] -<br/> 26:14<br/> <b>contents</b> [5] - 8:5, 8:7,<br/> 14:23, 14:24, 32:17<br/> <b>Contreras</b> [1] - 17:16<br/> <b>coordinate</b> [1] - 6:10<br/> <b>coordination</b> [1] -<br/> 20:22<br/> <b>copy</b> [2] - 28:3, 42:9<br/> <b>corporate</b> [3] - 23:4,<br/> 24:9, 25:2<br/> <b>corporation</b> [38] -<br/> 4:25, 5:25, 6:8, 6:9,<br/> 6:10, 7:10, 9:6, 9:10,<br/> 9:14, 15:19, 16:1,<br/> 16:3, 17:23, 18:3,<br/> 18:8, 18:13, 18:18,<br/> 19:2, 19:10, 20:24,<br/> 23:6, 23:8, 23:9,<br/> 23:17, 23:21, 23:22,<br/> 23:24, 24:1, 24:5,<br/> 24:7, 24:11, 24:16,<br/> 24:21, 25:8, 36:23,<br/> 36:24, 37:4<br/> <b>corporation's</b> [2] -<br/> 24:2, 37:3<br/> <b>correct</b> [12] - 6:3,<br/> 6:20, 7:12, 16:8,<br/> 26:25, 32:10, 33:5,<br/> 34:6, 34:16, 34:20,<br/> 37:21, 42:4<br/> <b>costs</b> [1] - 18:14<br/> <b>coterminous</b> [1] -<br/> 23:22<br/> <b>Council</b> [9] - 4:9, 4:24,<br/> 8:15, 8:17, 10:24,<br/> 11:16, 23:23, 25:5,<br/> 25:23<br/> <b>council</b> [81] - 4:13,<br/> 4:16, 5:2, 5:6, 5:11,<br/> 5:16, 6:8, 6:11, 6:13,<br/> 6:19, 7:2, 7:5, 7:8,<br/> 8:5, 9:3, 9:7, 9:15,<br/> 9:19, 9:20, 11:20,<br/> 12:16, 13:23, 14:6,</p> | <p>14:10, 14:15, 14:25,<br/> 15:7, 15:12, 16:1,<br/> 16:5, 17:2, 17:5,<br/> 18:12, 18:15, 18:22,<br/> 19:4, 19:8, 19:9,<br/> 19:14, 19:17, 19:22,<br/> 20:19, 20:22, 21:7,<br/> 23:10, 24:17, 24:24,<br/> 25:17, 25:19, 25:21,<br/> 26:1, 26:2, 26:5,<br/> 26:8, 26:9, 26:24,<br/> 27:2, 27:18, 29:1,<br/> 29:17, 30:3, 30:20,<br/> 31:1, 31:11, 31:25,<br/> 32:9, 32:12, 33:6,<br/> 34:3, 34:9, 34:23,<br/> 35:12, 35:22, 36:25,<br/> 37:4, 37:16, 37:18,<br/> 38:2, 38:24, 41:9<br/> <b>council's</b> [6] - 12:9,<br/> 15:8, 25:12, 29:1,<br/> 35:9, 40:23<br/> <b>Council's</b> [1] - 23:3<br/> <b>COUNCILS</b> [1] - 1:5<br/> <b>Councils</b> [3] - 3:7,<br/> 3:19, 21:25<br/> <b>counsel</b> [1] - 21:24<br/> <b>counsel's</b> [1] - 25:10<br/> <b>couple</b> [1] - 41:15<br/> <b>course</b> [1] - 13:2<br/> <b>Court</b> [12] - 1:21, 3:5,<br/> 12:25, 16:13, 18:23,<br/> 21:24, 26:12, 26:13,<br/> 31:10, 36:22, 42:10,<br/> 42:18<br/> <b>COURT</b> [134] - 1:1,<br/> 1:19, 3:3, 3:8, 3:10,<br/> 3:12, 3:14, 3:16,<br/> 3:20, 3:24, 4:18,<br/> 4:23, 5:5, 5:8, 5:11,<br/> 5:14, 5:23, 6:2, 6:5,<br/> 6:12, 6:17, 6:23,<br/> 6:25, 7:4, 7:11, 7:14,<br/> 7:23, 8:15, 8:19,<br/> 8:25, 9:5, 9:9, 9:17,<br/> 10:7, 10:21, 11:9,<br/> 11:12, 11:18, 11:20,<br/> 11:22, 12:1, 12:5,<br/> 12:10, 12:15, 13:7,<br/> 13:15, 14:13, 15:13,<br/> 16:6, 16:9, 16:22,<br/> 17:11, 17:22, 18:7,<br/> 18:10, 18:17, 18:22,<br/> 19:12, 19:21, 20:2,<br/> 20:8, 20:10, 20:12,<br/> 20:14, 20:16, 20:20,<br/> 20:24, 21:1, 21:9,<br/> 21:12, 21:15, 21:18,<br/> 21:20, 21:22, 22:7,<br/> 22:19, 22:24, 26:18,</p> | <p>26:23, 27:7, 27:21,<br/> 27:24, 28:1, 28:6,<br/> 29:4, 29:6, 29:16,<br/> 29:22, 30:6, 30:12,<br/> 30:19, 30:22, 31:2,<br/> 31:5, 31:19, 31:24,<br/> 32:6, 32:8, 32:11,<br/> 33:3, 33:7, 34:2,<br/> 34:9, 34:14, 34:17,<br/> 34:21, 35:22, 36:2,<br/> 36:7, 36:12, 36:15,<br/> 36:20, 37:7, 37:10,<br/> 37:14, 37:20, 37:22,<br/> 37:24, 38:1, 38:6,<br/> 38:11, 38:23, 39:7,<br/> 39:14, 39:22, 40:1,<br/> 40:9, 40:15, 40:20,<br/> 40:22, 40:25, 41:3,<br/> 41:7, 41:13<br/> <b>court</b> [5] - 3:2, 22:22,<br/> 23:10, 24:15, 31:17<br/> <b>Court's</b> [3] - 3:4, 4:19,<br/> 22:20<br/> <b>Courthouse</b> [2] - 1:14,<br/> 1:22<br/> <b>courts</b> [3] - 22:9,<br/> 25:14, 28:19<br/> <b>coverage</b> [1] - 15:18<br/> <b>COVID</b> [1] - 20:2<br/> <b>create</b> [3] - 11:9,<br/> 11:13, 11:17<br/> <b>created</b> [15] - 5:11,<br/> 6:19, 6:21, 8:24,<br/> 12:19, 12:20, 13:1,<br/> 14:2, 18:8, 18:11,<br/> 19:23, 29:7, 29:11,<br/> 29:15, 34:4<br/> <b>creation</b> [5] - 12:6,<br/> 12:7, 12:8, 12:11,<br/> 35:11<br/> <b>CSR</b> [1] - 1:21<br/> <b>current</b> [2] - 36:13,<br/> 41:9<br/> <b>CV-20-98-GF-BMM</b> [2]<br/> - 1:7, 3:6</p> |
| <b>D</b>   |   |  |   |  |
| <p><b>DAN</b> [1] - 1:8<br/> <b>DC</b> [3] - 2:4, 2:12,<br/> 21:21<br/> <b>DDFO</b> [2] - 39:21,<br/> 39:22<br/> <b>death</b> [1] - 12:15<br/> <b>debate</b> [3] - 26:14,<br/> 26:16, 34:19<br/> <b>decide</b> [1] - 11:3<br/> <b>decided</b> [5] - 11:13,<br/> 11:16, 11:20, 12:25,<br/> 37:8</p>   |   |  |   |  |

|   |  |   |  |   |   |  |
|---|--|---|--|---|---|--|
| <p><b>decides</b> [1] - 36:6</p> <p><b>deciding</b> [1] - 15:18</p> <p><b>decision</b> [7] - 13:5, 16:2, 16:3, 16:7, 16:13, 36:2, 38:12</p> <p><b>decisions</b> [2] - 7:16, 21:3</p> <p><b>deeply</b> [1] - 12:13</p> <p><b>DEFENDANT</b> [1] - 2:9</p> <p><b>Defendants</b> [1] - 1:11</p> <p><b>defendants</b> [13] - 3:21, 4:2, 4:9, 4:10, 9:4, 13:21, 13:24, 14:11, 14:12, 16:4, 17:4, 18:6, 21:8</p> <p><b>deficient</b> [1] - 7:5</p> <p><b>defraying</b> [1] - 18:13</p> <p><b>degree</b> [2] - 35:2, 35:18</p> <p><b>delay</b> [1] - 19:13</p> <p><b>deliberate</b> [2] - 33:1, 37:19</p> <p><b>deliberating</b> [1] - 28:16</p> <p><b>deliberation</b> [16] - 25:18, 26:7, 28:25, 30:3, 30:17, 30:18, 31:11, 31:24, 32:5, 32:20, 33:15, 33:21, 37:15, 38:10, 38:22, 38:24</p> <p><b>deliberations</b> [8] - 9:16, 13:23, 28:21, 30:23, 31:2, 31:21, 37:11, 39:18</p> <p><b>delved</b> [1] - 12:13</p> <p><b>DEMOCRACY</b> [1] - 2:3</p> <p><b>denied</b> [1] - 4:7</p> <p><b>department</b> [2] - 11:19, 12:2</p> <p><b>Department</b> [19] - 2:10, 2:15, 6:19, 6:22, 11:5, 11:12, 12:1, 12:9, 12:11, 14:2, 14:7, 15:9, 15:20, 15:22, 22:5, 23:1, 23:18, 33:24, 35:18</p> <p><b>DEPARTMENT</b> [1] - 1:9</p> <p><b>deputy</b> [1] - 39:23</p> <p><b>described</b> [2] - 23:4, 27:15</p> <p><b>describes</b> [1] - 10:13</p> <p><b>deserve</b> [1] - 23:5</p> <p><b>designated</b> [1] - 39:23</p> <p><b>detailed</b> [1] - 25:24</p> <p><b>determine</b> [2] - 33:8, 38:21</p> <p><b>develop</b> [1] - 8:2</p> | <p><b>developed</b> [1] - 35:10</p> <p><b>developing</b> [1] - 35:14</p> <p><b>different</b> [2] - 17:16, 17:17</p> <p><b>direct</b> [1] - 28:24</p> <p><b>directing</b> [1] - 14:21</p> <p><b>directly</b> [3] - 4:9, 9:14, 28:23</p> <p><b>disagree</b> [2] - 27:1, 38:9</p> <p><b>disagreement</b> [2] - 16:21, 31:9</p> <p><b>disagrees</b> [2] - 15:16, 16:6</p> <p><b>disclosed</b> [5] - 4:14, 11:4, 13:19, 19:4, 19:18</p> <p><b>disclosure</b> [3] - 13:3, 19:5, 41:10</p> <p><b>discreet</b> [1] - 25:25</p> <p><b>discrete</b> [1] - 32:23</p> <p><b>discretion</b> [1] - 31:13</p> <p><b>discussed</b> [4] - 10:5, 30:5, 30:6, 30:8</p> <p><b>discussing</b> [1] - 23:12</p> <p><b>discussion</b> [13] - 14:9, 14:14, 26:17, 26:20, 27:13, 27:19, 28:1, 32:2, 32:12, 32:20, 33:2, 34:19, 39:2</p> <p><b>discussions</b> [3] - 7:16, 7:17, 31:22</p> <p><b>dismiss</b> [7] - 3:21, 4:2, 17:19, 23:25, 25:7, 38:13, 38:15</p> <p><b>dismissed</b> [1] - 4:14</p> <p><b>dismissible</b> [1] - 24:12</p> <p><b>dispute</b> [3] - 37:15, 37:18, 38:4</p> <p><b>disruption</b> [3] - 13:6, 19:11, 33:18</p> <p><b>dissenting</b> [1] - 26:3</p> <p><b>distinct</b> [2] - 19:10, 19:15</p> <p><b>distinction</b> [1] - 31:6</p> <p><b>distinguish</b> [1] - 30:12</p> <p><b>distinguishes</b> [1] - 38:15</p> <p><b>distinguishing</b> [1] - 31:8</p> <p><b>District</b> [1] - 10:12</p> <p><b>DISTRICT</b> [3] - 1:1, 1:2, 1:19</p> <p><b>Division</b> [1] - 2:11</p> <p><b>DIVISION</b> [1] - 1:3</p> <p><b>Docket</b> [1] - 1:6</p> <p><b>documents</b> [6] - 14:17, 15:21, 28:12, 28:14, 28:15, 36:24</p> | <p><b>dominated</b> [1] - 34:23</p> <p><b>done</b> [2] - 7:21, 12:2</p> <p><b>down</b> [3] - 10:18, 10:22, 11:2</p> <p><b>draft</b> [3] - 14:21, 29:11, 33:11</p> <p><b>drafting</b> [1] - 10:16</p> <p><b>drafts</b> [1] - 28:11</p> <p><b>Drone</b> [4] - 17:14, 25:16, 26:11, 30:7</p> | <p style="text-align: center;"><b>E</b></p> <p><b>editor</b> [1] - 24:25</p> <p><b>effectively</b> [6] - 6:7, 16:13, 18:13, 20:7, 35:16, 39:24</p> <p><b>ego</b> [3] - 23:10, 24:17, 24:18</p> <p><b>either</b> [3] - 4:7, 4:10, 31:16</p> <p><b>elaborate</b> [1] - 40:15</p> <p><b>electronically</b> [1] - 42:9</p> <p><b>employed</b> [1] - 42:11</p> <p><b>employee</b> [4] - 6:9, 15:22, 24:22, 25:2</p> <p><b>end</b> [3] - 4:20, 27:12, 32:19</p> <p><b>Energy</b> [31] - 1:9, 2:15, 5:9, 6:19, 6:22, 11:5, 11:12, 12:5, 12:11, 15:9, 15:20, 15:22, 22:5, 23:18, 23:24, 24:6, 24:8, 24:10, 24:13, 25:8, 26:6, 26:10, 26:17, 28:24, 33:24, 34:4, 34:5, 34:10, 35:18, 36:7</p> <p><b>ENERGY</b> [1] - 1:10</p> <p><b>Energy's</b> [1] - 14:8</p> <p><b>engages</b> [1] - 15:12</p> <p><b>entire</b> [2] - 10:4, 32:16</p> <p><b>entirely</b> [2] - 16:20, 23:22</p> <p><b>entirety</b> [1] - 33:1</p> <p><b>entities</b> [6] - 14:2, 17:4, 17:7, 18:21, 29:18, 35:11</p> <p><b>entities's</b> [1] - 4:10</p> <p><b>entity</b> [8] - 6:3, 7:10, 13:20, 17:9, 19:22, 23:5, 24:11, 36:5</p> <p><b>environmental</b> [1] - 35:13</p> <p><b>ENVIRONMENTAL</b> [1] - 2:6</p> <p><b>essence</b> [1] - 9:18</p> <p><b>evaluate</b> [1] - 31:10</p> | <p><b>evaluating</b> [1] - 31:18</p> <p><b>evidence</b> [1] - 10:16</p> <p><b>evidenced</b> [1] - 39:17</p> <p><b>evolved</b> [2] - 33:12, 34:18</p> <p><b>exact</b> [2] - 23:11</p> <p><b>exactly</b> [7] - 8:21, 13:17, 16:19, 29:5, 38:20, 39:1, 39:5</p> <p><b>example</b> [7] - 23:21, 24:23, 25:25, 26:11, 27:17, 30:7, 35:8</p> <p><b>exclusively</b> [1] - 39:8</p> <p><b>exempt</b> [1] - 11:14</p> <p><b>existed</b> [2] - 8:16, 8:20</p> <p><b>existence</b> [3] - 4:12, 12:16, 13:2</p> <p><b>exists</b> [1] - 14:21</p> <p><b>expect</b> [2] - 25:3, 39:11</p> <p><b>expenditures</b> [1] - 6:11</p> <p><b>experience</b> [1] - 29:16</p> <p><b>expert</b> [1] - 5:21</p> <p><b>explain</b> [1] - 35:20</p> <p><b>explicit</b> [2] - 29:13, 33:19</p> <p><b>explicitly</b> [1] - 23:23</p> <p><b>extent</b> [7] - 15:24, 16:9, 16:10, 16:15, 22:25, 39:16, 40:5</p> <p><b>extremely</b> [2] - 25:20, 30:4</p> <p><b>eye</b> [3] - 8:10, 10:15, 22:14</p> | <p style="text-align: center;"><b>F</b></p> <p><b>FACA</b> [46] - 4:9, 4:22, 7:2, 7:18, 7:22, 8:9, 8:14, 8:18, 9:1, 10:13, 10:17, 10:25, 11:7, 11:14, 13:19, 14:1, 15:18, 17:5, 17:6, 17:10, 17:21, 18:4, 18:19, 18:21, 19:22, 22:5, 22:7, 22:10, 23:8, 23:19, 24:20, 25:9, 25:14, 26:13, 28:20, 29:3, 30:11, 33:19, 33:20, 36:23, 36:25, 37:5, 37:6, 41:10</p> <p><b>FACA's</b> [2] - 10:20, 13:3</p> <p><b>FACAs</b> [1] - 30:1</p> <p><b>fact</b> [4] - 10:21, 10:22, 14:20, 17:20</p> <p><b>facts</b> [3] - 8:3, 23:20, 24:15</p> | <p><b>fading</b> [1] - 13:12</p> <p><b>fairly</b> [2] - 29:19, 29:22</p> <p><b>FALLS</b> [1] - 1:3</p> <p><b>Falls</b> [3] - 1:15, 1:23, 42:14</p> <p><b>far</b> [1] - 36:17</p> <p><b>fashion</b> [1] - 29:23</p> <p><b>favor</b> [3] - 22:16, 27:12, 32:2</p> <p><b>favorable</b> [1] - 16:14</p> <p><b>February</b> [2] - 1:16, 42:15</p> <p><b>federal</b> [17] - 8:12, 10:5, 10:14, 10:20, 14:19, 17:20, 22:2, 22:4, 22:11, 22:12, 22:14, 23:10, 24:18, 24:19, 29:14, 29:20, 39:23</p> <p><b>Federal</b> [9] - 1:14, 1:22, 2:11, 4:4, 23:1, 23:14, 23:16, 28:7, 28:9</p> <p><b>filed</b> [2] - 3:21, 42:9</p> <p><b>final</b> [3] - 28:8, 28:14, 33:6</p> <p><b>finalized</b> [1] - 27:20</p> <p><b>financial</b> [1] - 16:4</p> <p><b>financially</b> [1] - 42:13</p> <p><b>first</b> [4] - 18:5, 18:23, 30:15, 30:22</p> <p><b>flaw</b> [1] - 4:5</p> <p><b>flawed</b> [1] - 35:21</p> <p><b>focused</b> [1] - 8:9</p> <p><b>FOIA</b> [2] - 15:17, 24:18</p> <p><b>FOR</b> [1] - 1:2</p> <p><b>foregoing</b> [1] - 42:4</p> <p><b>forgot</b> [1] - 41:8</p> <p><b>formed</b> [1] - 8:22</p> <p><b>forth</b> [1] - 11:24</p> <p><b>forward</b> [2] - 14:2, 35:19</p> <p><b>FORWARD</b> [1] - 2:3</p> <p><b>forward-looking</b> [1] - 14:2</p> <p><b>FOUNDATION</b> [1] - 2:3</p> <p><b>four</b> [1] - 7:15</p> <p><b>Friday</b> [1] - 1:16</p> <p><b>full</b> [9] - 8:5, 8:13, 9:3, 13:22, 14:9, 30:3, 30:20, 39:9</p> <p><b>function</b> [1] - 12:19</p> <p><b>functioning</b> [1] - 12:21</p> <p><b>functions</b> [1] - 10:14</p> <p><b>future</b> [1] - 15:19</p> |
|---|--|---|--|---|---|--|

| G  | H  |  |   | KNAPP [79] - 3:11,   |
|--|--|--|---|--|
| <p><b>gathering</b> [1] - 10:17<br/> <b>Gellici</b> [4] - 6:9, 20:23, 24:22, 24:25<br/> <b>generally</b> [1] - 34:10<br/> <b>generating</b> [1] - 33:14<br/> <b>GEORGE</b> [51] - 3:18, 21:19, 21:21, 21:23, 22:8, 22:21, 22:25, 26:21, 26:25, 27:14, 27:23, 27:25, 28:5, 28:7, 29:5, 29:8, 29:19, 29:25, 30:7, 30:14, 30:20, 30:25, 31:4, 31:7, 31:20, 32:4, 32:7, 32:10, 32:14, 33:5, 33:10, 34:7, 34:12, 34:16, 34:20, 35:1, 35:24, 36:4, 36:11, 36:14, 36:16, 36:21, 37:9, 37:13, 37:17, 37:21, 37:23, 37:25, 41:6, 41:11, 41:17<br/> <b>George</b> [18] - 2:3, 3:17, 3:18, 9:19, 13:9, 21:17, 21:18, 21:20, 26:18, 27:7, 29:16, 33:3, 34:2, 35:23, 36:20, 37:7, 37:24, 41:4<br/> <b>George's</b> [1] - 38:2<br/> <b>given</b> [2] - 22:22, 42:5<br/> <b>Gosh</b> [1] - 34:24<br/> <b>govern</b> [1] - 15:23<br/> <b>governed</b> [1] - 16:20<br/> <b>government</b> [19] - 10:5, 10:14, 10:20, 15:16, 16:6, 16:15, 17:7, 17:21, 18:14, 19:5, 19:19, 28:10, 29:14, 36:5, 36:18, 37:1, 37:18<br/> <b>government's</b> [2] - 16:20, 41:12<br/> <b>governmental</b> [1] - 17:7<br/> <b>governs</b> [2] - 17:6<br/> <b>grant</b> [1] - 18:24<br/> <b>GREAT</b> [1] - 1:3<br/> <b>Great</b> [3] - 1:15, 1:23, 42:14<br/> <b>group</b> [5] - 5:24, 7:17, 7:19, 10:4, 23:14<br/> <b>GSA</b> [1] - 28:19<br/> <b>guess</b> [2] - 16:9, 22:22</p> | <p><b>hand</b> [1] - 42:14<br/> <b>hear</b> [3] - 3:15, 13:14, 21:11<br/> <b>heard</b> [2] - 36:18, 37:17<br/> <b>hearing</b> [1] - 3:6<br/> <b>Hearing</b> [1] - 1:13<br/> <b>hearings</b> [3] - 14:6, 15:10<br/> <b>Heinze</b> [4] - 1:21, 42:2, 42:17, 42:18<br/> <b>held</b> [4] - 22:2, 22:9, 26:12, 28:15<br/> <b>Helena</b> [1] - 2:7<br/> <b>help</b> [1] - 34:21<br/> <b>helpful</b> [1] - 17:15<br/> <b>helps</b> [1] - 6:10<br/> <b>hereinbefore</b> [1] - 42:5<br/> <b>Hernandez</b> [5] - 2:5, 3:8, 9:19, 13:9, 41:4<br/> <b>HERNANDEZ</b> [3] - 3:9, 21:17, 41:5<br/> <b>hiding</b> [1] - 23:3<br/> <b>hiding</b> [1] - 10:9<br/> <b>historical</b> [1] - 19:6<br/> <b>hoc</b> [3] - 8:23, 8:25, 29:11<br/> <b>hold</b> [4] - 5:5, 13:7, 27:3, 40:9<br/> <b>Honor</b> [122] - 3:9, 3:15, 3:18, 3:23, 3:25, 4:19, 5:1, 5:7, 5:10, 5:13, 5:16, 6:1, 6:4, 6:14, 7:3, 7:6, 7:13, 7:22, 8:1, 8:21, 9:2, 9:8, 9:12, 10:2, 10:10, 11:3, 11:11, 11:21, 11:24, 12:22, 12:23, 13:4, 13:14, 13:16, 13:25, 14:18, 15:1, 15:4, 15:15, 16:8, 16:12, 17:1, 17:14, 17:24, 18:20, 18:25, 19:16, 19:25, 20:9, 20:11, 20:13, 20:17, 20:21, 20:25, 21:4, 21:10, 21:17, 21:19, 21:21, 21:23, 22:8, 22:21, 23:6, 24:3, 24:15, 24:23, 25:6, 25:10, 26:12, 26:21, 26:25, 27:14, 27:23, 28:5, 29:5, 29:8, 29:12, 29:19, 29:25, 30:7, 30:14, 31:4, 31:7, 31:16, 31:20, 32:4, 32:7,</p> | <p>32:14, 33:5, 33:10, 34:8, 34:13, 34:16, 34:20, 35:1, 35:24, 36:4, 36:11, 36:14, 36:17, 36:21, 37:9, 37:13, 37:17, 37:21, 37:23, 38:4, 38:14, 38:25, 39:10, 39:15, 39:19, 40:8, 40:12, 40:17, 40:21, 41:1, 41:2, 41:5, 41:6, 41:11, 41:18<br/> <b>Honor's</b> [1] - 4:15<br/> <b>HONORABLE</b> [1] - 1:18<br/> <b>hope</b> [1] - 41:16<br/> <b>hotel</b> [2] - 6:15, 9:9<br/> <b>hotels</b> [1] - 24:4<br/> <b>Hunger</b> [2] - 10:12, 25:15</p>   | <p><b>inquiry</b> [1] - 25:14<br/> <b>instances</b> [1] - 5:19<br/> <b>instead</b> [1] - 4:6<br/> <b>intended</b> [3] - 10:13, 22:3, 22:16<br/> <b>intent</b> [5] - 22:10, 22:19, 22:20, 22:21, 22:23<br/> <b>interact</b> [1] - 35:17<br/> <b>interest</b> [2] - 23:15, 35:6<br/> <b>interested</b> [2] - 10:23, 42:13<br/> <b>interests</b> [2] - 22:13, 22:16<br/> <b>internal</b> [1] - 8:12<br/> <b>interpretation</b> [1] - 22:20<br/> <b>interpreted</b> [1] - 22:23<br/> <b>interrogate</b> [1] - 8:7<br/> <b>interrupt</b> [1] - 18:7<br/> <b>involve</b> [1] - 10:15<br/> <b>involved</b> [2] - 12:6, 16:3<br/> <b>involves</b> [1] - 9:14<br/> <b>issue</b> [9] - 10:18, 12:14, 15:3, 17:18, 17:25, 26:2, 27:4, 29:4, 39:8<br/> <b>issues</b> [2] - 9:21, 16:17<br/> <b>item</b> [3] - 27:9, 32:16<br/> <b>Item</b> [1] - 31:25<br/> <b>items</b> [1] - 32:13<br/> <b>itself</b> [7] - 18:3, 23:8, 24:19, 25:19, 27:2, 36:23, 37:5</p> | <p>3:13, 3:15, 3:23, 3:25, 4:19, 5:1, 5:7, 5:10, 5:13, 5:16, 6:1, 6:4, 6:6, 6:14, 6:21, 6:24, 7:3, 7:6, 7:13, 7:19, 8:1, 8:17, 8:21, 9:2, 9:8, 9:12, 10:2, 10:10, 11:3, 11:11, 11:16, 11:19, 11:21, 11:24, 12:4, 12:8, 12:13, 12:22, 13:14, 13:16, 14:18, 15:15, 16:8, 16:12, 17:1, 17:13, 17:24, 18:9, 18:11, 18:20, 18:25, 19:16, 19:25, 20:4, 20:9, 20:11, 20:13, 20:15, 20:17, 20:21, 20:25, 21:4, 21:10, 21:14, 38:4, 38:7, 38:14, 38:25, 39:10, 39:15, 39:23, 40:2, 40:12, 40:17, 40:21, 40:23, 41:1, 41:18<br/> <b>Knapp</b> [34] - 2:10, 3:10, 3:22, 4:23, 6:18, 8:15, 10:22, 13:7, 14:13, 15:13, 16:22, 18:7, 19:12, 19:22, 21:9, 23:12, 24:2, 24:21, 25:11, 25:15, 25:22, 27:1, 29:8, 30:8, 30:9, 35:25, 38:1, 38:23, 39:7, 40:9, 40:25, 41:3, 41:8<br/> <b>Knapp's</b> [1] - 27:1<br/> <b>Koernig</b> [1] - 2:15<br/> <b>Kristin</b> [1] - 2:15</p> |
|  |  | <b>I</b>   | <b>J</b>  | <b>L</b>   |
|  |  | <p><b>idea</b> [2] - 14:13, 27:7<br/> <b>ideas</b> [1] - 9:23<br/> <b>identified</b> [2] - 19:3, 19:18<br/> <b>identify</b> [2] - 6:7, 40:15<br/> <b>illuminate</b> [1] - 29:1<br/> <b>impacted</b> [1] - 35:8<br/> <b>implied</b> [1] - 31:9<br/> <b>IN</b> [2] - 1:1, 42:14<br/> <b>in-person</b> [3] - 19:23, 19:25, 20:6<br/> <b>inappropriate</b> [1] - 31:10<br/> <b>incorporation</b> [1] - 6:6<br/> <b>incur</b> [1] - 18:15<br/> <b>independent</b> [2] - 7:8, 11:22<br/> <b>independently</b> [1] - 40:19<br/> <b>indication</b> [2] - 16:2, 40:6<br/> <b>indistinguishable</b> [3] - 23:9, 24:16, 24:18<br/> <b>individuals</b> [1] - 18:11<br/> <b>industry</b> [5] - 34:5, 34:6, 34:11, 34:23, 35:2<br/> <b>industry-dominated</b> [1] - 34:23<br/> <b>influence</b> [2] - 22:14, 35:11<br/> <b>inform</b> [1] - 24:5<br/> <b>information</b> [3] - 10:25, 33:13, 34:25<br/> <b>input</b> [1] - 9:10<br/> <b>inquire</b> [1] - 4:19</p> | <p><b>Janet</b> [3] - 6:9, 20:22, 24:22<br/> <b>JUDGE</b> [1] - 1:19<br/> <b>Judge</b> [12] - 13:5, 13:12, 13:17, 15:14, 15:16, 15:17, 16:7, 16:14, 17:16, 30:10, 30:16, 39:2<br/> <b>judge</b> [1] - 31:9<br/> <b>judgment</b> [3] - 30:16, 37:8, 38:12<br/> <b>judicial</b> [2] - 31:14, 31:17<br/> <b>July</b> [2] - 15:5, 39:19<br/> <b>jurisdiction</b> [1] - 18:24<br/> <b>Justice</b> [1] - 2:10</p>   | <p><b>lacking</b> [1] - 28:6<br/> <b>lacks</b> [1] - 18:24<br/> <b>landowners</b> [1] - 35:14<br/> <b>language</b> [3] - 10:11, 39:2, 39:20<br/> <b>last</b> [2] - 19:13, 36:21<br/> <b>LAW</b> [1] - 2:6<br/> <b>law</b> [1] - 34:1<br/> <b>law's</b> [1] - 22:6<br/> <b>lead</b> [2] - 25:1, 25:4<br/> <b>least</b> [1] - 30:2<br/> <b>less</b> [1] - 10:19<br/> <b>level</b> [6] - 28:17, 29:1, 30:2, 33:17, 35:4, 38:24<br/> <b>light</b> [1] - 22:12</p>  |
|  |  | <b>K</b>   | <b>K</b>  |  |
|  |  |  | <p><b>kinds</b> [2] - 29:17</p>   |  |

|   |  |  |  |  |
|---|--|--|--|--|
| <p><b>link</b> [1] - 14:21<br/> <b>links</b> [1] - 40:24<br/> <b>listed</b> [3] - 24:5, 24:25, 25:1<br/> <b>located</b> [1] - 21:20<br/> <b>logistical</b> [1] - 18:15<br/> <b>look</b> [8] - 9:18, 23:20, 24:23, 25:16, 25:18, 27:6, 28:24, 38:21<br/> <b>looked</b> [1] - 30:1<br/> <b>looking</b> [7] - 14:2, 14:5, 24:4, 26:20, 26:21, 39:16, 40:6<br/> <b>low</b> [1] - 30:4<br/> <b>lower</b> [1] - 30:4</p>  | <p>40:24<br/> <b>member</b> [6] - 9:20, 21:7, 23:24, 23:25, 24:12, 26:1<br/> <b>members</b> [21] - 5:2, 5:5, 5:14, 5:15, 5:17, 5:20, 5:22, 6:2, 6:5, 6:7, 6:8, 8:6, 14:23, 14:25, 15:7, 25:23, 27:18, 29:15, 32:12, 39:9, 39:11<br/> <b>membership</b> [4] - 5:17, 23:22, 34:6, 35:6<br/> <b>mentioned</b> [4] - 12:2, 30:10, 37:7, 42:5<br/> <b>microphones</b> [1] - 13:10<br/> <b>might</b> [6] - 11:7, 18:14, 32:17, 32:21, 33:17, 35:21<br/> <b>mind</b> [2] - 34:23, 35:3<br/> <b>minutes</b> [22] - 15:2, 15:5, 16:23, 19:7, 21:5, 26:20, 26:22, 27:5, 28:11, 32:8, 32:11, 38:8, 38:10, 38:18, 38:19, 38:23, 39:6, 39:17, 39:19, 40:7, 40:17<br/> <b>missing</b> [1] - 27:24<br/> <b>Missouri</b> [2] - 1:14, 1:22<br/> <b>Molloy</b> [6] - 13:12, 13:17, 30:10, 30:16, 31:9, 39:2<br/> <b>Molloy's</b> [1] - 13:5<br/> <b>moment</b> [1] - 18:23<br/> <b>Montana</b> [1] - 42:15<br/> <b>MONTANA</b> [1] - 1:2<br/> <b>morning</b> [5] - 3:8, 3:9, 3:10, 3:18, 3:25<br/> <b>MORRIS</b> [1] - 1:18<br/> <b>most</b> [1] - 32:23<br/> <b>mostly</b> [1] - 20:3<br/> <b>Motion</b> [1] - 1:13<br/> <b>motion</b> [7] - 3:5, 3:21, 17:19, 18:23, 25:7, 38:13, 38:14<br/> <b>mount</b> [1] - 35:16<br/> <b>move</b> [2] - 19:6, 35:19<br/> <b>moved</b> [1] - 4:2<br/> <b>MR</b> [133] - 3:9, 3:11, 3:13, 3:15, 3:18, 3:23, 3:25, 4:19, 5:1, 5:7, 5:10, 5:13, 5:16, 6:1, 6:4, 6:6, 6:14, 6:21, 6:24, 7:3, 7:6, 7:13, 7:19, 8:1, 8:17, 8:21, 9:2, 9:8, 9:12,</p> | <p>10:2, 10:10, 11:3, 11:11, 11:16, 11:19, 11:21, 11:24, 12:4, 12:8, 12:13, 12:22, 13:14, 13:16, 14:18, 15:15, 16:8, 16:12, 17:1, 17:13, 17:24, 18:9, 18:11, 18:20, 18:25, 19:16, 19:25, 20:4, 20:9, 20:11, 20:13, 20:15, 20:17, 20:21, 20:25, 21:4, 21:10, 21:14, 21:17, 21:19, 21:21, 21:23, 22:8, 22:21, 22:25, 26:21, 26:25, 27:14, 27:23, 27:25, 28:5, 28:7, 29:5, 29:8, 29:19, 29:25, 30:7, 30:14, 30:20, 30:25, 31:4, 31:7, 31:20, 32:4, 32:7, 32:10, 32:14, 33:5, 33:10, 34:7, 34:12, 34:16, 34:20, 35:1, 35:24, 36:4, 36:11, 36:14, 36:16, 36:21, 37:9, 37:13, 37:17, 37:21, 37:23, 37:25, 38:4, 38:7, 38:14, 38:25, 39:10, 39:15, 39:23, 40:2, 40:12, 40:17, 40:21, 40:23, 41:1, 41:5, 41:6, 41:11, 41:17, 41:18<br/> <b>MT</b> [3] - 1:15, 1:23, 2:7<br/> <b>muddling</b> [1] - 15:25<br/> <b>must</b> [1] - 4:13<br/> <b>muted</b> [3] - 3:12, 3:14, 13:10</p>   | <p>16:2, 23:12<br/> <b>nobody</b> [1] - 27:19<br/> <b>noncommittee</b> [1] - 5:20<br/> <b>nongovernmental</b> [1] - 17:6<br/> <b>normal</b> [2] - 30:1, 30:2<br/> <b>note</b> [1] - 36:21<br/> <b>noted</b> [6] - 24:15, 25:22, 29:12, 36:25, 40:4, 40:13<br/> <b>notice</b> [1] - 14:19<br/> <b>noticed</b> [2] - 20:8, 36:1<br/> <b>notices</b> [1] - 20:18<br/> <b>notion</b> [1] - 17:16<br/> <b>nullity</b> [1] - 22:6<br/> <b>Number</b> [1] - 3:6<br/> <b>number</b> [3] - 5:3, 22:22, 26:14<br/> <b>NW</b> [2] - 2:4, 2:11</p> | <p>22:11<br/> <b>operations</b> [1] - 16:5<br/> <b>opinion</b> [1] - 15:14<br/> <b>opportunity</b> [9] - 4:1, 8:6, 8:10, 14:23, 21:13, 27:19, 27:20, 32:25, 40:10<br/> <b>opposed</b> [2] - 16:4, 27:12<br/> <b>opted</b> [1] - 11:6<br/> <b>option</b> [1] - 16:23<br/> <b>order</b> [1] - 41:15<br/> <b>ORGANIZATION</b> [1] - 1:5<br/> <b>Organization</b> [3] - 3:6, 3:19, 21:24<br/> <b>organization</b> [2] - 4:8, 35:6<br/> <b>organizations</b> [1] - 17:8<br/> <b>ostensively</b> [1] - 26:5<br/> <b>otherwise</b> [2] - 4:12, 18:14<br/> <b>outcome</b> [2] - 16:21, 34:22<br/> <b>own</b> [1] - 14:8</p>  |
| <b>M</b>  |  | <b>N</b>   |  | <b>P</b>   |
| <p><b>machine</b> [2] - 1:25, 42:6<br/> <b>Madam</b> [1] - 3:3<br/> <b>main</b> [1] - 27:17<br/> <b>maintained</b> [2] - 15:8, 15:20<br/> <b>majority</b> [1] - 23:2<br/> <b>mandates</b> [1] - 22:6<br/> <b>manner</b> [3] - 10:19, 16:14, 29:11<br/> <b>manual</b> [1] - 14:8<br/> <b>materials</b> [6] - 11:4, 13:18, 19:4, 19:19, 28:21, 29:21<br/> <b>matter</b> [3] - 13:2, 15:19, 41:14<br/> <b>matters</b> [1] - 24:7<br/> <b>mean</b> [5] - 7:23, 7:24, 31:24, 36:5, 40:13<br/> <b>meaning</b> [2] - 23:18, 25:9<br/> <b>meant</b> [1] - 30:24<br/> <b>meeting</b> [30] - 9:25, 14:9, 14:14, 14:16, 14:20, 14:22, 15:2, 15:5, 19:6, 20:20, 21:5, 27:5, 27:10, 27:15, 28:11, 28:12, 31:25, 35:22, 35:25, 38:8, 38:19, 38:23, 39:6, 39:16, 39:19, 39:20, 40:7, 40:17, 40:18<br/> <b>meetings</b> [28] - 4:5, 4:6, 4:11, 4:13, 6:16, 7:22, 10:3, 14:4, 15:2, 16:23, 17:3, 19:2, 19:17, 19:24, 20:1, 20:7, 20:8, 25:12, 27:3, 30:18, 32:8, 36:9, 36:13, 38:18, 38:20, 39:25,</p> | <p><b>might</b> [6] - 11:7, 18:14, 32:17, 32:21, 33:17, 35:21<br/> <b>mind</b> [2] - 34:23, 35:3<br/> <b>minutes</b> [22] - 15:2, 15:5, 16:23, 19:7, 21:5, 26:20, 26:22, 27:5, 28:11, 32:8, 32:11, 38:8, 38:10, 38:18, 38:19, 38:23, 39:6, 39:17, 39:19, 40:7, 40:17<br/> <b>missing</b> [1] - 27:24<br/> <b>Missouri</b> [2] - 1:14, 1:22<br/> <b>Molloy</b> [6] - 13:12, 13:17, 30:10, 30:16, 31:9, 39:2<br/> <b>Molloy's</b> [1] - 13:5<br/> <b>moment</b> [1] - 18:23<br/> <b>Montana</b> [1] - 42:15<br/> <b>MONTANA</b> [1] - 1:2<br/> <b>morning</b> [5] - 3:8, 3:9, 3:10, 3:18, 3:25<br/> <b>MORRIS</b> [1] - 1:18<br/> <b>most</b> [1] - 32:23<br/> <b>mostly</b> [1] - 20:3<br/> <b>Motion</b> [1] - 1:13<br/> <b>motion</b> [7] - 3:5, 3:21, 17:19, 18:23, 25:7, 38:13, 38:14<br/> <b>mount</b> [1] - 35:16<br/> <b>move</b> [2] - 19:6, 35:19<br/> <b>moved</b> [1] - 4:2<br/> <b>MR</b> [133] - 3:9, 3:11, 3:13, 3:15, 3:18, 3:23, 3:25, 4:19, 5:1, 5:7, 5:10, 5:13, 5:16, 6:1, 6:4, 6:6, 6:14, 6:21, 6:24, 7:3, 7:6, 7:13, 7:19, 8:1, 8:17, 8:21, 9:2, 9:8, 9:12,</p>  | <p>10:2, 10:10, 11:3, 11:11, 11:16, 11:19, 11:21, 11:24, 12:4, 12:8, 12:13, 12:22, 13:14, 13:16, 14:18, 15:15, 16:8, 16:12, 17:1, 17:13, 17:24, 18:9, 18:11, 18:20, 18:25, 19:16, 19:25, 20:4, 20:9, 20:11, 20:13, 20:15, 20:17, 20:21, 20:25, 21:4, 21:10, 21:14, 21:17, 21:19, 21:21, 21:23, 22:8, 22:21, 22:25, 26:21, 26:25, 27:14, 27:23, 27:25, 28:5, 28:7, 29:5, 29:8, 29:19, 29:25, 30:7, 30:14, 30:20, 30:25, 31:4, 31:7, 31:20, 32:4, 32:7, 32:10, 32:14, 33:5, 33:10, 34:7, 34:12, 34:16, 34:20, 35:1, 35:24, 36:4, 36:11, 36:14, 36:16, 36:21, 37:9, 37:13, 37:17, 37:21, 37:23, 37:25, 38:4, 38:7, 38:14, 38:25, 39:10, 39:15, 39:23, 40:2, 40:12, 40:17, 40:21, 40:23, 41:1, 41:5, 41:6, 41:11, 41:17, 41:18<br/> <b>MT</b> [3] - 1:15, 1:23, 2:7<br/> <b>muddling</b> [1] - 15:25<br/> <b>must</b> [1] - 4:13<br/> <b>muted</b> [3] - 3:12, 3:14, 13:10</p>   | <b>O</b>   | <p><b>p.m</b> [1] - 1:16<br/> <b>pages</b> [1] - 32:22<br/> <b>panelists</b> [1] - 40:3<br/> <b>papers</b> [1] - 28:11<br/> <b>parallel</b> [1] - 23:4<br/> <b>pardon</b> [1] - 20:16<br/> <b>parent</b> [1] - 4:21<br/> <b>part</b> [4] - 10:20, 10:24, 16:18, 33:20<br/> <b>participate</b> [1] - 8:10<br/> <b>participation</b> [1] - 22:15<br/> <b>particular</b> [2] - 34:14, 39:13<br/> <b>parties</b> [2] - 9:11, 42:12<br/> <b>party</b> [1] - 10:23<br/> <b>pass</b> [1] - 22:7<br/> <b>passed</b> [5] - 13:24, 21:8, 22:5, 25:17, 26:17<br/> <b>passing</b> [1] - 22:10<br/> <b>people</b> [3] - 6:20, 7:11, 14:16<br/> <b>per</b> [2] - 12:9, 38:8<br/> <b>percent</b> [2] - 20:5, 20:6<br/> <b>performs</b> [1] - 24:22<br/> <b>period</b> [2] - 15:3, 20:4<br/> <b>permission</b> [1] - 4:15<br/> <b>person</b> [5] - 19:23,</p>  |
| <p><b>obligated</b> [1] - 11:9<br/> <b>obligation</b> [1] - 10:25<br/> <b>obtain</b> [1] - 27:21<br/> <b>obtaining</b> [1] - 23:15<br/> <b>occurred</b> [2] - 32:21, 33:17<br/> <b>occurs</b> [2] - 28:17, 38:8<br/> <b>OF</b> [5] - 1:2, 1:5, 1:9, 2:2, 2:9<br/> <b>officer</b> [1] - 39:24<br/> <b>official</b> [1] - 1:8<br/> <b>officials</b> [1] - 35:18<br/> <b>often</b> [1] - 8:23<br/> <b>older</b> [1] - 15:10<br/> <b>ON</b> [2] - 2:2, 2:9<br/> <b>once</b> [1] - 32:17<br/> <b>one</b> [13] - 15:22, 18:12, 19:21, 24:21, 25:1, 27:15, 32:15, 32:23, 32:24, 35:25, 36:1, 41:7, 41:8<br/> <b>open</b> [7] - 14:4, 14:16, 15:7, 18:1, 33:21, 36:9, 36:10<br/> <b>Open</b> [1] - 3:2<br/> <b>opening</b> [2] - 20:18, 30:8<br/> <b>operate</b> [2] - 29:23, 29:24<br/> <b>operated</b> [2] - 12:18, 22:18<br/> <b>operates</b> [1] - 6:10<br/> <b>operating</b> [2] - 29:10, 41:10<br/> <b>operation</b> [2] - 22:4,</p>  | <p><b>obligated</b> [1] - 11:9<br/> <b>obligation</b> [1] - 10:25<br/> <b>obtain</b> [1] - 27:21<br/> <b>obtaining</b> [1] - 23:15<br/> <b>occurred</b> [2] - 32:21, 33:17<br/> <b>occurs</b> [2] - 28:17, 38:8<br/> <b>OF</b> [5] - 1:2, 1:5, 1:9, 2:2, 2:9<br/> <b>officer</b> [1] - 39:24<br/> <b>official</b> [1] - 1:8<br/> <b>officials</b> [1] - 35:18<br/> <b>often</b> [1] - 8:23<br/> <b>older</b> [1] - 15:10<br/> <b>ON</b> [2] - 2:2, 2:9<br/> <b>once</b> [1] - 32:17<br/> <b>one</b> [13] - 15:22, 18:12, 19:21, 24:21, 25:1, 27:15, 32:15, 32:23, 32:24, 35:25, 36:1, 41:7, 41:8<br/> <b>open</b> [7] - 14:4, 14:16, 15:7, 18:1, 33:21, 36:9, 36:10<br/> <b>Open</b> [1] - 3:2<br/> <b>opening</b> [2] - 20:18, 30:8<br/> <b>operate</b> [2] - 29:23, 29:24<br/> <b>operated</b> [2] - 12:18, 22:18<br/> <b>operates</b> [1] - 6:10<br/> <b>operating</b> [2] - 29:10, 41:10<br/> <b>operation</b> [2] - 22:4,</p>   | <p><b>obligated</b> [1] - 11:9<br/> <b>obligation</b> [1] - 10:25<br/> <b>obtain</b> [1] - 27:21<br/> <b>obtaining</b> [1] - 23:15<br/> <b>occurred</b> [2] - 32:21, 33:17<br/> <b>occurs</b> [2] - 28:17, 38:8<br/> <b>OF</b> [5] - 1:2, 1:5, 1:9, 2:2, 2:9<br/> <b>officer</b> [1] - 39:24<br/> <b>official</b> [1] - 1:8<br/> <b>officials</b> [1] - 35:18<br/> <b>often</b> [1] - 8:23<br/> <b>older</b> [1] - 15:10<br/> <b>ON</b> [2] - 2:2, 2:9<br/> <b>once</b> [1] - 32:17<br/> <b>one</b> [13] - 15:22, 18:12, 19:21, 24:21, 25:1, 27:15, 32:15, 32:23, 32:24, 35:25, 36:1, 41:7, 41:8<br/> <b>open</b> [7] - 14:4, 14:16, 15:7, 18:1, 33:21, 36:9, 36:10<br/> <b>Open</b> [1] - 3:2<br/> <b>opening</b> [2] - 20:18, 30:8<br/> <b>operate</b> [2] - 29:23, 29:24<br/> <b>operated</b> [2] - 12:18, 22:18<br/> <b>operates</b> [1] - 6:10<br/> <b>operating</b> [2] - 29:10, 41:10<br/> <b>operation</b> [2] - 22:4,</p> | <b>O</b>   | <p><b>obligated</b> [1] - 11:9<br/> <b>obligation</b> [1] - 10:25<br/> <b>obtain</b> [1] - 27:21<br/> <b>obtaining</b> [1] - 23:15<br/> <b>occurred</b> [2] - 32:21, 33:17<br/> <b>occurs</b> [2] - 28:17, 38:8<br/> <b>OF</b> [5] - 1:2, 1:5, 1:9, 2:2, 2:9<br/> <b>officer</b> [1] - 39:24<br/> <b>official</b> [1] - 1:8<br/> <b>officials</b> [1] - 35:18<br/> <b>often</b> [1] - 8:23<br/> <b>older</b> [1] - 15:10<br/> <b>ON</b> [2] - 2:2, 2:9<br/> <b>once</b> [1] - 32:17<br/> <b>one</b> [13] - 15:22, 18:12, 19:21, 24:21, 25:1, 27:15, 32:15, 32:23, 32:24, 35:25, 36:1, 41:7, 41:8<br/> <b>open</b> [7] - 14:4, 14:16, 15:7, 18:1, 33:21, 36:9, 36:10<br/> <b>Open</b> [1] - 3:2<br/> <b>opening</b> [2] - 20:18, 30:8<br/> <b>operate</b> [2] - 29:23, 29:24<br/> <b>operated</b> [2] - 12:18, 22:18<br/> <b>operates</b> [1] - 6:10<br/> <b>operating</b> [2] - 29:10, 41:10<br/> <b>operation</b> [2] - 22:4,</p> |

|  |   |  |  |  |
|--|---|--|--|--|
| <p>19:25, 20:3, 20:6, 27:10</p> <p><b>persuasion</b> [1] - 35:16</p> <p><b>persuasive</b> [1] - 16:11</p> <p><b>phase</b> [1] - 38:13</p> <p><b>place</b> [1] - 42:5</p> <p><b>Plaintiff</b> [1] - 1:6</p> <p><b>PLAINTIFF</b> [1] - 2:2</p> <p><b>plaintiff</b> [10] - 3:19, 4:7, 19:3, 19:18, 21:11, 21:15, 38:19, 39:6, 39:16, 40:5</p> <p><b>plaintiff's</b> [7] - 4:3, 4:16, 4:20, 19:5, 19:9, 19:14, 21:5</p> <p><b>plaintiffs</b> [5] - 7:7, 15:1, 17:3, 17:9, 18:5</p> <p><b>plausible</b> [1] - 25:7</p> <p><b>plausibly</b> [1] - 4:12</p> <p><b>point</b> [17] - 8:11, 10:8, 10:11, 10:17, 13:4, 13:16, 13:18, 13:25, 15:4, 17:14, 18:25, 31:7, 31:8, 37:10, 39:19, 40:6</p> <p><b>pointed</b> [1] - 26:14</p> <p><b>points</b> [1] - 30:14</p> <p><b>Policy</b> [1] - 5:4</p> <p><b>policy</b> [7] - 22:14, 24:8, 32:23, 32:25, 33:3, 36:12, 41:9</p> <p><b>portions</b> [1] - 27:17</p> <p><b>posit</b> [1] - 24:17</p> <p><b>position</b> [2] - 36:19, 41:12</p> <p><b>possession</b> [1] - 15:21</p> <p><b>posted</b> [5] - 19:19, 20:12, 27:4, 39:21, 40:2</p> <p><b>posture</b> [1] - 38:16</p> <p><b>PowerPoint</b> [1] - 19:7</p> <p><b>practical</b> [1] - 10:18</p> <p><b>practice</b> [1] - 15:19</p> <p><b>prepare</b> [3] - 8:4, 8:24, 29:21</p> <p><b>prepared</b> [5] - 8:23, 28:13, 37:1, 37:3</p> <p><b>preparing</b> [2] - 5:21, 28:16</p> <p><b>PRESENT</b> [3] - 2:2, 2:9, 2:14</p> <p><b>present</b> [2] - 27:16, 27:17</p> <p><b>presentation</b> [5] - 8:5, 14:23, 19:7, 25:24, 32:18</p> <p><b>presentations</b> [1] - 19:7</p> | <p><b>presented</b> [9] - 8:3, 10:5, 11:1, 14:17, 26:16, 26:19, 32:17, 33:2, 39:4</p> <p><b>pretend</b> [1] - 16:19</p> <p><b>principal</b> [1] - 24:25</p> <p><b>principle</b> [2] - 4:21, 4:22</p> <p><b>private</b> [8] - 4:8, 6:3, 7:10, 9:10, 17:8, 18:11, 22:13, 22:16</p> <p><b>pro</b> [1] - 34:5</p> <p><b>pro-coal</b> [1] - 34:5</p> <p><b>problem</b> [1] - 17:2</p> <p><b>problems</b> [1] - 13:8</p> <p><b>proceeding</b> [1] - 15:10</p> <p><b>proceedings</b> [6] - 10:18, 13:18, 16:18, 41:19, 42:5, 42:6</p> <p><b>Proceedings</b> [1] - 1:25</p> <p><b>PROCEEDINGS</b> [1] - 3:1</p> <p><b>process</b> [2] - 15:12, 36:8</p> <p><b>processing</b> [1] - 18:15</p> <p><b>produced</b> [3] - 1:25, 26:5, 36:24</p> <p><b>product</b> [1] - 7:1</p> <p><b>production</b> [1] - 35:7</p> <p><b>Professional</b> [1] - 42:2</p> <p><b>Programs</b> [1] - 2:11</p> <p><b>proliferated</b> [1] - 22:13</p> <p><b>promote</b> [1] - 34:11</p> <p><b>proposing</b> [1] - 10:4</p> <p><b>provide</b> [4] - 6:12, 9:6, 10:24, 24:9</p> <p><b>provided</b> [2] - 26:5, 26:6</p> <p><b>providing</b> [1] - 16:4</p> <p><b>public</b> [36] - 4:11, 8:6, 8:10, 10:1, 10:6, 10:7, 10:15, 10:16, 10:24, 11:4, 14:9, 14:14, 14:16, 14:20, 14:24, 15:8, 15:11, 20:10, 22:14, 22:15, 23:3, 28:8, 28:10, 28:17, 28:22, 33:19, 33:20, 33:21, 35:16, 36:6, 36:10, 37:1, 37:5, 38:22, 39:4, 40:20</p> <p><b>public's</b> [2] - 22:1, 33:22</p> <p><b>publicly</b> [1] - 13:19</p> <p><b>published</b> [1] - 29:13</p> <p><b>pull</b> [1] - 10:11</p> | <p><b>purely</b> [4] - 24:3, 24:22, 25:2, 25:3</p> <p><b>purpose</b> [5] - 10:20, 24:4, 24:8, 24:13, 33:20</p> <p><b>put</b> [1] - 24:24</p> <p><b>puts</b> [1] - 25:5</p> | <p><b>recommended</b> [1] - 33:9</p> <p><b>recommends</b> [1] - 14:15</p> <p><b>reconsider</b> [1] - 7:24</p> <p><b>reconsiders</b> [1] - 7:20</p> <p><b>record</b> [10] - 19:6, 26:7, 26:15, 26:23, 27:13, 30:23, 31:22, 38:22, 39:3, 42:4</p> <p><b>recorded</b> [1] - 1:25</p> <p><b>recording</b> [2] - 40:18, 40:20</p> <p><b>recordings</b> [1] - 40:24</p> <p><b>records</b> [36] - 4:6, 4:7, 4:11, 4:13, 7:8, 7:9, 14:3, 15:19, 17:3, 18:1, 19:2, 19:10, 19:11, 19:14, 19:15, 19:17, 22:2, 25:12, 27:2, 28:8, 28:21, 29:13, 30:17, 33:13, 33:18, 33:20, 35:3, 35:12, 36:3, 36:6, 36:19, 37:1, 37:3, 37:5</p> <p><b>reduced</b> [2] - 42:7, 42:8</p> <p><b>Reeder's</b> [1] - 2:6</p> <p><b>reevaluate</b> [1] - 7:23</p> <p><b>reevaluates</b> [1] - 7:21</p> <p><b>reflect</b> [3] - 32:11, 38:23, 38:25</p> <p><b>reflected</b> [1] - 26:15</p> <p><b>regarding</b> [4] - 17:12, 18:19, 36:13, 41:10</p> <p><b>regardless</b> [1] - 13:1</p> <p><b>register</b> [1] - 14:19</p> <p><b>Registered</b> [1] - 42:2</p> <p><b>regulations</b> [1] - 28:19</p> <p><b>rejected</b> [2] - 17:16, 17:18</p> <p><b>related</b> [1] - 42:12</p> <p><b>relationship</b> [4] - 16:1, 17:4, 17:5, 17:6</p> <p><b>relationships</b> [1] - 17:8</p> <p><b>relied</b> [1] - 33:13</p> <p><b>relief</b> [1] - 18:24</p> <p><b>rely</b> [1] - 29:20</p> <p><b>relying</b> [1] - 17:19</p> <p><b>renewals</b> [1] - 8:18</p> <p><b>repeat</b> [2] - 13:11, 19:13</p> <p><b>repeatedly</b> [1] - 22:9</p> <p><b>report</b> [31] - 4:8, 8:4, 9:3, 9:24, 14:21, 14:24, 15:7, 17:20, 21:7, 24:25, 25:24, 26:2, 27:9, 27:11,</p> | <p>27:13, 27:15, 27:16, 27:18, 27:20, 28:3, 28:4, 28:14, 28:17, 28:18, 28:25, 29:11, 32:1, 32:17, 32:18, 33:2</p> <p><b>reported</b> [1] - 42:6</p> <p><b>Reporter</b> [4] - 1:21, 42:3, 42:18</p> <p><b>REPORTER'S</b> [1] - 42:1</p> <p><b>reports</b> [17] - 5:21, 8:2, 8:4, 8:7, 8:23, 8:24, 9:10, 24:24, 25:1, 25:5, 26:4, 27:3, 27:22, 28:9, 32:22, 33:6</p> <p><b>reports'</b> [1] - 27:16</p> <p><b>representative</b> [1] - 39:24</p> <p><b>request</b> [3] - 19:5, 19:9, 19:14</p> <p><b>requests</b> [2] - 24:10, 24:14</p> <p><b>require</b> [1] - 4:10</p> <p><b>required</b> [6] - 11:6, 13:19, 13:21, 38:10, 39:1, 39:3</p> <p><b>requirements</b> [3] - 11:14, 13:3, 17:21</p> <p><b>requires</b> [2] - 28:10, 37:1</p> <p><b>residual</b> [2] - 19:3, 19:17</p> <p><b>resolve</b> [1] - 12:24</p> <p><b>Resource</b> [3] - 3:7, 3:19, 21:25</p> <p><b>RESOURCE</b> [1] - 1:5</p> <p><b>respect</b> [2] - 24:7, 30:3</p> <p><b>respectful</b> [1] - 31:8</p> <p><b>respond</b> [1] - 24:14</p> <p><b>response</b> [5] - 3:11, 3:13, 15:1, 19:4, 24:10</p> <p><b>responsive</b> [1] - 19:9</p> <p><b>review</b> [1] - 31:14</p> <p><b>reviewed</b> [4] - 14:22, 27:5, 39:12, 40:19</p> <p><b>rise</b> [1] - 22:22</p> <p><b>River</b> [2] - 1:14, 1:22</p> <p><b>role</b> [2] - 9:5, 25:4</p> <p><b>room</b> [1] - 9:24</p> <p><b>rooms</b> [5] - 6:15, 7:15, 9:9, 9:21, 9:22</p> <p><b>RPR</b> [1] - 1:21</p> <p><b>rubber</b> [6] - 25:19, 25:21, 28:2, 29:4, 31:23, 38:2</p> <p><b>ruber</b> [1] - 37:20</p> |
| <b>Q</b>   |   |  |  |  |
| <p><b>quality</b> [1] - 31:11</p> <p><b>quantity</b> [1] - 31:11</p> <p><b>quasi</b> [1] - 17:7</p> <p><b>quasi-governmental</b> [1] - 17:7</p> <p><b>Questions</b> [1] - 40:12</p> <p><b>questions</b> [15] - 12:24, 14:25, 15:6, 15:17, 21:10, 32:12, 33:1, 39:17, 39:21, 40:2, 40:3, 40:7, 40:10, 40:11, 41:2</p> <p><b>quickly</b> [1] - 36:22</p>   |   |  |  |  |
| <b>R</b>   |   |  |  |  |
| <p><b>ranchers</b> [1] - 35:14</p> <p><b>rather</b> [2] - 9:14, 38:12</p> <p><b>read</b> [3] - 22:6, 39:1, 39:20</p> <p><b>ready</b> [1] - 3:22</p> <p><b>really</b> [7] - 4:20, 8:9, 10:13, 10:17, 13:20, 14:1, 15:11</p> <p><b>reason</b> [1] - 12:1</p> <p><b>reasoning</b> [1] - 16:10</p> <p><b>reasons</b> [1] - 18:5</p> <p><b>rebuttal</b> [2] - 21:13, 38:1</p> <p><b>receive</b> [2] - 9:10, 25:23</p> <p><b>recent</b> [1] - 32:23</p> <p><b>recently</b> [1] - 12:20</p> <p><b>recognized</b> [1] - 13:17</p> <p><b>recommendation</b> [7] - 10:23, 30:21, 32:25, 34:18, 35:15, 39:3</p> <p><b>recommendations</b> [34] - 8:8, 8:11, 11:1, 13:21, 13:24, 14:8, 14:10, 24:6, 25:17, 25:20, 25:25, 26:15, 30:25, 31:3, 31:12, 32:24, 33:4, 33:8, 33:11, 33:14, 33:15, 33:16, 34:10, 34:14, 34:19, 35:9, 35:10, 35:12, 35:19, 35:20, 37:12, 37:16, 37:19, 38:3</p>  |   |  |  |  |



|  |  |  |  |  |
|--|--|--|--|--|
| <p><b>rule</b> [1] - 14:1<br/> <b>run</b> [1] - 20:21<br/> <b>running</b> [1] - 27:10<br/> <b>runs</b> [1] - 20:20</p> | <p><b>similar</b> [1] - 29:18<br/> <b>simply</b> [9] - 15:21,<br/> 16:4, 26:16, 26:19,<br/> 27:2, 28:8, 28:14,<br/> 31:21, 32:15<br/> <b>single</b> [4] - 4:21,<br/> 24:12, 26:1, 26:3<br/> <b>sit</b> [1] - 14:16<br/> <b>situation</b> [2] - 18:18,<br/> 38:11<br/> <b>sole</b> [2] - 24:4, 24:13<br/> <b>sometimes</b> [2] -<br/> 16:16, 29:11<br/> <b>sorry</b> [5] - 13:7, 18:8,<br/> 19:12, 39:23, 41:7<br/> <b>sort</b> [16] - 8:10, 8:12,<br/> 9:9, 9:15, 10:15,<br/> 11:7, 13:22, 14:1,<br/> 14:5, 15:3, 18:15,<br/> 19:7, 20:23, 31:12,<br/> 33:21, 38:17<br/> <b>sorts</b> [1] - 28:20<br/> <b>sought</b> [1] - 18:12<br/> <b>source</b> [2] - 33:8,<br/> 34:24<br/> <b>specific</b> [1] - 4:13<br/> <b>specifically</b> [2] -<br/> 26:13, 39:10<br/> <b>spirit</b> [1] - 29:2<br/> <b>squared</b> [1] - 28:20<br/> <b>staff</b> [1] - 6:10<br/> <b>stage</b> [4] - 10:16,<br/> 17:19, 25:7<br/> <b>stamp</b> [4] - 25:19,<br/> 25:21, 29:4, 37:20<br/> <b>stamping</b> [2] - 28:2,<br/> 31:23<br/> <b>stamps</b> [1] - 38:2<br/> <b>standards</b> [1] - 31:17<br/> <b>start</b> [1] - 4:15<br/> <b>started</b> [3] - 8:17,<br/> 13:11, 13:12<br/> <b>starting</b> [1] - 19:14<br/> <b>States</b> [3] - 1:21, 2:10,<br/> 42:18<br/> <b>STATES</b> [3] - 1:1, 1:9,<br/> 1:19<br/> <b>states</b> [1] - 40:12<br/> <b>stems</b> [1] - 7:22<br/> <b>still</b> [1] - 3:14<br/> <b>straight</b> [1] - 7:22<br/> <b>streaming</b> [1] - 16:23<br/> <b>Street</b> [2] - 2:4, 2:11<br/> <b>strengths</b> [1] - 33:16<br/> <b>stretch</b> [1] - 17:10<br/> <b>strongest</b> [1] - 17:11<br/> <b>studies</b> [1] - 28:11<br/> <b>subcommittee</b> [30] -<br/> 4:20, 7:21, 9:11,<br/> 10:3, 13:18, 13:20,</p> | <p>14:6, 14:8, 14:15,<br/> 17:25, 19:1, 19:15,<br/> 26:24, 27:9, 27:11,<br/> 28:16, 28:17, 28:22,<br/> 28:23, 30:21, 31:12,<br/> 32:1, 33:4, 33:17,<br/> 36:3, 36:6, 36:19,<br/> 37:12, 37:16, 38:3<br/> <b>subcommittee's</b> [3] -<br/> 25:17, 30:25, 31:3<br/> <b>subcommittees</b> [66] -<br/> 4:8, 4:17, 4:21, 5:3,<br/> 5:12, 5:15, 5:17,<br/> 5:24, 7:9, 7:14, 8:2,<br/> 8:13, 8:19, 8:22, 9:3,<br/> 9:15, 9:21, 9:25,<br/> 10:8, 11:2, 11:4,<br/> 11:10, 11:13, 11:17,<br/> 12:6, 12:7, 12:8,<br/> 12:12, 12:18, 13:1,<br/> 14:4, 14:12, 17:12,<br/> 17:13, 17:17, 17:19,<br/> 17:20, 18:18, 19:10,<br/> 23:5, 25:11, 25:13,<br/> 26:5, 26:12, 29:7,<br/> 29:9, 29:10, 29:14,<br/> 29:18, 29:20, 29:23,<br/> 29:24, 30:4, 30:10,<br/> 30:16, 30:19, 30:24,<br/> 33:13, 33:23, 34:15,<br/> 35:4, 36:10, 37:19,<br/> 39:8<br/> <b>subcommittees's</b> [1] -<br/> 25:19<br/> <b>subject</b> [22] - 4:22,<br/> 7:2, 7:17, 8:14, 8:18,<br/> 8:25, 12:8, 13:3,<br/> 14:9, 17:21, 18:21,<br/> 19:22, 23:8, 23:16,<br/> 24:20, 25:13, 26:13,<br/> 30:11, 31:13, 36:23,<br/> 36:25, 37:5<br/> <b>subjected</b> [1] - 39:4<br/> <b>submitted</b> [2] - 24:7,<br/> 41:15<br/> <b>substance</b> [2] - 31:10,<br/> 33:15<br/> <b>substantive</b> [1] - 9:15<br/> <b>succeed</b> [1] - 18:2<br/> <b>suddenly</b> [2] - 22:14,<br/> 34:23<br/> <b>suffer</b> [1] - 4:5<br/> <b>suffices</b> [1] - 29:1<br/> <b>sufficient</b> [1] - 22:15<br/> <b>suggest</b> [1] - 25:13<br/> <b>suggested</b> [1] - 24:2<br/> <b>suggestions</b> [4] -<br/> 15:6, 39:18, 40:3,<br/> 40:13<br/> <b>suggests</b> [1] - 26:8</p> | <p><b>summary</b> [3] - 30:16,<br/> 37:8, 38:12<br/> <b>support</b> [4] - 6:11, 9:6,<br/> 16:4, 18:12<br/> <b>supposed</b> [1] - 33:20<br/> <b>Supreme</b> [1] - 16:13<br/> <b>systematically</b> [1] -<br/> 26:4</p>  | <p><b>theme</b> [1] - 22:10<br/> <b>themselves</b> [3] -<br/> 25:13, 25:14, 27:4<br/> <b>theory</b> [1] - 17:8<br/> <b>thereabouts</b> [1] - 5:7<br/> <b>thereafter</b> [1] - 29:2<br/> <b>they've</b> [1] - 13:2<br/> <b>thinking</b> [1] - 29:2<br/> <b>third</b> [1] - 5:24<br/> <b>three</b> [8] - 7:14, 7:15,<br/> 9:20, 9:24, 15:2,<br/> 38:18<br/> <b>three-member</b> [1] -<br/> 9:20<br/> <b>tilted</b> [1] - 22:16<br/> <b>today</b> [2] - 4:2, 12:24<br/> <b>together</b> [1] - 7:20<br/> <b>tom</b> [1] - 39:20<br/> <b>took</b> [1] - 35:13<br/> <b>transcript</b> [4] - 1:13,<br/> 1:25, 42:4, 42:9<br/> <b>transcription</b> [2] -<br/> 1:25, 42:8<br/> <b>transcripts</b> [5] - 15:10,<br/> 19:6, 27:3, 28:11,<br/> 40:24<br/> <b>transmission</b> [3] -<br/> 13:8, 19:13, 28:25<br/> <b>transmitted</b> [3] - 8:8,<br/> 8:11, 28:23<br/> <b>transparency</b> [2] -<br/> 22:4, 22:17<br/> <b>transparent</b> [3] -<br/> 16:24, 17:2, 36:9<br/> <b>true</b> [1] - 42:4<br/> <b>try</b> [1] - 22:16<br/> <b>turn</b> [1] - 25:10<br/> <b>two</b> [7] - 8:18, 17:17,<br/> 17:24, 18:4, 20:7,<br/> 24:23, 30:14<br/> <b>two-year</b> [1] - 8:18<br/> <b>type</b> [1] - 33:18<br/> <b>types</b> [1] - 33:19<br/> <b>typewriting</b> [2] - 42:7,<br/> 42:8</p> |
|  |  |  | <b>T</b>   |  |
|  |  |  | <p><b>tasked</b> [1] - 29:15<br/> <b>tenable</b> [1] - 17:23<br/> <b>testimony</b> [3] - 14:17,<br/> 21:1, 33:16<br/> <b>THE</b> [138] - 1:1, 1:2,<br/> 1:18, 2:2, 2:9, 3:3,<br/> 3:5, 3:8, 3:10, 3:12,<br/> 3:14, 3:16, 3:20,<br/> 3:24, 4:18, 4:23, 5:5,<br/> 5:8, 5:11, 5:14, 5:23,<br/> 6:2, 6:5, 6:12, 6:17,<br/> 6:23, 6:25, 7:4, 7:11,<br/> 7:14, 7:23, 8:15,<br/> 8:19, 8:25, 9:5, 9:9,<br/> 9:17, 10:7, 10:21,<br/> 11:9, 11:12, 11:18,<br/> 11:20, 11:22, 12:1,<br/> 12:5, 12:10, 12:15,<br/> 13:7, 13:15, 14:13,<br/> 15:13, 16:6, 16:9,<br/> 16:22, 17:11, 17:22,<br/> 18:7, 18:10, 18:17,<br/> 18:22, 19:12, 19:21,<br/> 20:2, 20:8, 20:10,<br/> 20:12, 20:14, 20:16,<br/> 20:20, 20:24, 21:1,<br/> 21:9, 21:12, 21:15,<br/> 21:18, 21:20, 21:22,<br/> 22:7, 22:19, 22:24,<br/> 26:18, 26:23, 27:7,<br/> 27:21, 27:24, 28:1,<br/> 28:6, 29:4, 29:6,<br/> 29:16, 29:22, 30:6,<br/> 30:12, 30:19, 30:22,<br/> 31:2, 31:5, 31:19,<br/> 31:24, 32:6, 32:8,<br/> 32:11, 33:3, 33:7,<br/> 34:2, 34:9, 34:14,<br/> 34:17, 34:21, 35:22,<br/> 36:2, 36:7, 36:12,<br/> 36:15, 36:20, 37:7,<br/> 37:10, 37:14, 37:20,<br/> 37:22, 37:24, 38:1,<br/> 38:6, 38:11, 38:23,<br/> 39:7, 39:14, 39:22,<br/> 40:1, 40:9, 40:15,<br/> 40:20, 40:22, 40:25,<br/> 41:3, 41:7, 41:13<br/> <b>thee</b> [1] - 20:7</p> |  |
|  |  |  | <b>U</b>   |  |
|  |  |  | <p><b>unable</b> [2] - 33:11,<br/> 33:12<br/> <b>under</b> [6] - 4:3, 8:18,<br/> 13:19, 15:18, 18:4,<br/> 23:14<br/> <b>undertaken</b> [1] - 30:17<br/> <b>undertakes</b> [1] - 30:3<br/> <b>undue</b> [1] - 35:11<br/> <b>UNITED</b> [3] - 1:1, 1:9,<br/> 1:19<br/> <b>United</b> [3] - 1:21, 2:10,</p>   |  |

|   |  |
|---|--|
| <p>42:18<br/> <b>universe</b> [1] - 38:17<br/> <b>up</b> [8] - 8:4, 9:23, 20:8,<br/> 25:4, 27:9, 32:1,<br/> 33:21, 36:9<br/> <b>useful</b> [1] - 10:19<br/> <b>utilized</b> [4] - 18:5,<br/> 23:15, 23:18, 25:8</p>   | <p style="text-align: center;"><b>Y</b></p> <p><b>year</b> [2] - 8:18, 20:7<br/> <b>years</b> [2] - 12:17<br/> <b>yourself</b> [1] - 13:11<br/> <b>Yvette</b> [4] - 1:21, 42:2,<br/> 42:17, 42:18<br/> <b>yvette_heinze@mtd.uscourts.gov</b> [1] -<br/> 1:23</p> |
| <b>V</b>  | <b>Z</b>   |
| <p><b>vast</b> [1] - 23:2<br/> <b>vehicle</b> [2] - 16:17,<br/> 22:13<br/> <b>versus</b> [2] - 3:7, 30:1<br/> <b>via</b> [6] - 2:3, 2:5, 2:10,<br/> 2:15, 27:17, 40:2<br/> <b>video</b> [7] - 2:3, 2:5,<br/> 2:10, 2:15, 13:5,<br/> 19:11, 33:18<br/> <b>view</b> [4] - 23:3, 28:2,<br/> 28:22, 37:20<br/> <b>violate</b> [1] - 29:2<br/> <b>virtual</b> [3] - 20:1, 20:6,<br/> 22:6<br/> <b>virtually</b> [1] - 4:1<br/> <b>vote</b> [7] - 7:24, 26:3,<br/> 27:11, 27:20, 32:2,<br/> 32:19<br/> <b>voted</b> [3] - 21:7,<br/> 26:16, 26:19<br/> <b>votes</b> [3] - 21:2, 21:4,<br/> 26:3<br/> <b>voting</b> [1] - 37:19<br/> <b>vs</b> [1] - 1:7</p> | <p><b>zero</b> [4] - 30:18, 31:21,<br/> 31:24, 33:25</p>   |
| <b>W</b>  |  |
| <p><b>Washington</b> [3] - 2:4,<br/> 2:12, 21:21<br/> <b>watch</b> [1] - 15:9<br/> <b>weaknesses</b> [1] -<br/> 33:16<br/> <b>website</b> [4] - 15:8,<br/> 19:8, 19:20, 40:23<br/> <b>WebX</b> [1] - 27:17<br/> <b>weeks</b> [1] - 41:15<br/> <b>West</b> [2] - 1:15, 1:22<br/> <b>Western</b> [3] - 3:6,<br/> 3:19, 21:24<br/> <b>WESTERN</b> [2] - 1:5,<br/> 2:6<br/> <b>WHEREOF</b> [1] - 42:14<br/> <b>whole</b> [4] - 7:19, 19:6,<br/> 36:8, 38:17<br/> <b>WITNESS</b> [1] - 42:14<br/> <b>wondering</b> [1] - 12:17<br/> <b>WORC</b> [3] - 35:5, 35:7,<br/> 35:16</p>   |  |