

2008

# How Much Can Be Charged for Expert-Witness Appearance Fees in Interstate Water Litigation?

Robert H. Abrams

*Florida A&M University College of Law*, [robert.abrams@famuc.edu](mailto:robert.abrams@famuc.edu)

Follow this and additional works at: <http://commons.law.famuc.edu/faculty-research>



Part of the [Environmental Law Commons](#), and the [Water Law Commons](#)

---

## Recommended Citation

Robert H. Abrams, How Much Can Be Charged for Expert-Witness Appearance Fees in Interstate Water Litigation? 36 Preview U.S. Sup. Ct. Cas. 188 (2008)

This Article is brought to you for free and open access by the Faculty Works at Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Journal Publications by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact [linda.barrette@famuc.edu](mailto:linda.barrette@famuc.edu).

# Case at a Glance

Kansas and Colorado have long disputed water rights to the Arkansas River. After two trips to the Court, the states eventually entered into a water-rights compact.

In spite of this, post-compact groundwater pumping in Colorado depleted the river's flow and led to this current round of litigation.

Kansas proved Colorado's violation of the compact.

Now, in settling the award of costs, Kansas is seeking full reimbursement for expert-witness appearance fees.

Colorado supports the Special Master's ruling that those fees are limited to a federal statutory amount.



## W A T E R L A W

### How Much Can Be Charged for Expert-Witness Appearance Fees in Interstate Water Litigation?

by Robert H. Abrams

PREVIEW of United States Supreme Court Cases, pages 188-190. © 2008 American Bar Association.

Robert Abrams is Professor of Law at Florida A&M University College of Law. Professor Abrams is a coauthor of *Legal Control of Water Rights*. He is a past Chair and currently is a Vice-Chair of the ABA Water Resources Committee and is an elected member of the American Law Institute.

He can be reached at robert.abrams@fam.u.edu or (407) 254-4001.

This is, one would hope, the tail end of the century-long litigation between Kansas and Colorado over the Arkansas River. In this most recent round of litigation in the Supreme Court, Kansas won a ruling that groundwater pumping in Colorado improperly depleted the flow of the Arkansas River by 428,005 acre-feet over a 46-year period culminating in 1996. The Court entered judgment for more than \$34 million. Colorado has since paid this amount. Additionally, the Court, when it announced its 2004 judgment, remanded the case to the Special Master, Arthur Littleworth, for a determination of costs.

The current dispute focuses on those taxed costs. More specifically, the states disagree on how costs should be calculated for the appearance fees of the expert witnesses who designed the computer model

of the groundwater and surface-water flows in the basin and subsequently appeared before the Special Master in hearings conducted in the case. Kansas is seeking to have costs taxed for those witnesses' attendance at hearings reimbursed at the amount paid; Colorado seeks to apply a statutory limit found in 28 U.S.C. §1821(b) of \$40 per day for witness fees taxed as costs.

#### ISSUE

Do federal statutes, in particular 28 U.S.C §1821(b) and 28 U.S.C. §1920, govern the award of costs for expert-witness appearance fees in cases tried pursuant to the original jurisdiction of the United States Supreme Court?

#### FACTS

The parties are the states of Kansas and Colorado, who now have been litigating about the proper allocation of the waters of the Arkansas River Basin for more than a century. Cases of this sort fall within the Article III, Section 2 constitutional grant of original jurisdiction in suits "in which a State shall be a Party." In this iteration of the litigation, Kansas, the downstream state,

KANSAS v. COLORADO  
DOCKET NO. 105, ORIG.

ARGUMENT DATE:  
DECEMBER 1, 2008  
FROM: ORIGINAL JURISDICTION



alleged that Colorado was violating the 1949 interstate compact the states had reached, by withdrawing groundwater in amounts so great that the flows of the river were depleted to Kansas's detriment and in violation of amounts assured Kansas by the compact. The case was assigned to a Special Master for taking of evidence and filing of a report. Kansas prevailed on the merits, which resulted in an award of damages against Colorado for its past under-delivery of water, an injunction that required the groundwater withdrawals to be considered in calculating compact compliance in the future, and, as a prevailing party, the award of costs. As to the costs, the case was remanded to the Special Master for a recommendation on the amount of costs to be taxed against Colorado.

In the main, the parties were able to agree on the bill of costs, and the Special Master approved and recommended the agreed amount to the Court. In that agreement, however, the parties expressly reserved the right of "taking exception to the legal issue decided by [the Special Master's] Orders, and their subsequent inclusion in a Decree [of the Court]." One legal determination that the Special Master was called upon to make in taxing the costs was the rate to be paid for the attendance of expert witnesses at the hearings. The usual practice in the federal system is governed by statutes that appear in Title 28 of the United States Code, but as more fully described below, the applicability of those statutes to proceedings in the Supreme Court is not expressly ordained. Kansas sought to have those witness-appearance fees taxed at their actual cost, while Colorado sought application of the statutory fee of \$40 per day. The Special Master, in his Fifth and Final Report, opted for the statutory amount. Kansas thereupon exer-

cised its reserved right to take exception, and that ruling relating to the proposed bill of costs returned to the Supreme Court as a contested matter.

Superficially, it would seem that the difference between actual amount and \$40 per day would be significant, but not enough so as to prevent a compromise when the alternative to compromise is another round of briefing and argument in the United States Supreme Court. That, however, is not the case. The proceedings before the Special Master were protracted, to say the least, involving 270 days of hearings spread over a 13-year period. Those hearings included the introduction of more than 2,900 exhibits. Moreover, a key element in the dispute was the hydrogeologic modeling of the basin and the model's calculation of past under-deliveries of water by Colorado as well as future employment of the model to calculate the impact on delivery obligations of future groundwater withdrawals in Colorado. Due to the centrality of the model, experts were needed in almost every facet of the hearings.

As a result of the extensive use of experts in the hearings before the Special Master, the difference between an actual cost figure for expert-witness attendance that Kansas is seeking and the statutory \$40-per-day figure that Colorado is seeking is the difference between \$9,214,727.81, and \$162,927.94 (a difference of \$9,051,799.87). That disparity in potential taxed costs explains why this litigation is continuing.

### CASE ANALYSIS

This case presents a single issue. If Kansas were to try to state the issue in a manner favorable to its side, the issue would be whether taxed

costs for expert-witness appearance fees in Supreme Court proceedings are governed by congressionally enacted statutes that do not specifically mention the Supreme Court, or whether they are to be set by the Court as part of its inherent power when performing its constitutionally vested original jurisdiction. The final phrasing is the nub of the argument—the special status of cases within the constitutionally vested original jurisdiction is a basis for making the separation of powers argument that "Congress lacks the constitutional authority to dictate the procedures the [Supreme] Court will apply in original jurisdiction cases." Kansas Sur-Reply at 1. That line of argument also counsels a narrow reading of the statutes, which do not expressly mention the Supreme Court as covered by their provisions.

Colorado would frame the issue as being whether procedural federal statutes relating to mundane matters such as costs addressed to "Courts of the United States" are also applicable to the Supreme Court. Colorado is seeking application of a very specific provision that states, "a witness shall be paid an attendance fee of \$40 per day for each day's attendance." 28 U.S.C. §1821(b). A prior subsection had announced that the section is applicable in "any court of the United States" which is further referenced and defined in 28 U.S.C. §451 which expressly includes the Supreme Court as a "court of the United States." Kansas attempts to counter by noting that the general statute on taxing costs, 28 U.S.C. § 1920, uses the phrase "[a] judge or clerk of any court of the United States," [emphasis added] which language fails to include justices, and therefore does not intend to include the Supreme Court within its purview.

*(Continued on Page 190)*



### **SIGNIFICANCE**

This is a case of modest significance. Any precedent set by the Court will be applicable only to cases within its original jurisdiction. That jurisdiction is not very extensive, encompassing slightly more than one hundred cases in two-plus centuries. Many of those cases are of the state-versus-state variety, and many of those cases, like water apportionments or boundary disputes, are likely to involve significant reliance on experts. If the Court rules in favor of Kansas, this ruling will place an added economic premium on being the prevailing party.

### **ATTORNEYS FOR THE PARTIES**

**For Kansas** (John B. Draper (505) 982-3873)

**For Colorado** (David W. Robbins (303) 296-8100)