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ISSUES

Should the Supreme Court appoint a river master to administer its decree in this case?

Should the special master calculate prejudgment interest from 1985 to present on all amounts owed to Kansas for water shortages suffered in and before 1985, the year in which Kansas filed this lawsuit, or is prejudgment interest only owed on amounts for which Colorado is liable that were incurred after filing of the current lawsuit in 1985?

Did the special master err in fixing a 10-year period, rather than annual measurements, as the basis for determining Arkansas River Compact (ARC) compliance by Colorado?

Did the special master correctly decide that calculations that are critical to assessing ARC compliance by Colorado should rely on data developed by the Colorado Water Courts?

Did the special master correctly find that Colorado was in compliance with its ARC obligations for the years 1997–1999?

Should the special master be required to make recommendations on all issues pending before him?

FACTS

Kansas and Colorado have been wrangling over the use of Arkansas River water since the end of the century—the nineteenth century, that is. The crux of the dispute is, and always has been, that Kansas believes Colorado is taking more Arkansas River water than is consistent with the rights of Kansas. As touched on more fully in the Case Analysis section, the theories and legal backdrops have evolved over time. Twice before in decisions

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KANSAS V. COLORADO
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Case at a Glance

The Arkansas River serves many water users in the states of Colorado and Kansas. The current litigation is at least the fourth major effort in the last 100 years by these neighboring states to settle issues of Arkansas River water allocation between them. The nub of the current dispute is the proper administration and enforcement of a plan that has been devised to take account of the substantial amount of groundwater pumping in Colorado that affects the river's flow in Kansas.

announced in 1906 and 1943, Kansas sought relief in the United States Supreme Court and was rebuffed. The second time, the Court urged the states to negotiate an interstate compact to govern their water relations on the Arkansas River. They did and in 1948 entered into the ARC.

The ARC sought to "[e]quitably divide and apportion" the river's water and the benefits of the John Martin reservoir, which is built on the river's mainstem. ARC, Art. I. A point of importance was to allow continued development in the region using the river's waters, but the waters, "shall not be materially depleted in usable quantities or availability" by post-ARC activities. ARC Art. IV-D. The ARC created an implementing agency, the Arkansas River Compact Authority (ARCA). The states are equally represented, each has one vote on ARCA, there is a non-voting federal chairman, and "every decision, authorization or other action shall require unanimous vote." ARC Art. VIII.

The current proceedings have endured for a score of years, having been commenced by Kansas in 1985, alleging violations of Article IV-D. In 1990, the special master filed his First Report. Both states objected, and in 1995, the Supreme Court overruled all objections (i.e., upheld the special master's decision) and ruled that increased post-ARC groundwater pumping in Colorado had violated the ARC and remanded the case to the special master. 514 U.S. 673 (1995). In the next decade, the special master, Arthur Littleworth, took on the task of assessing the amount of the violations from 1950–1994, and later for 1995 and 1996, and also addressed the issue of remedy for the violations. He filed his Second, Third, and Fourth Reports in 1997, 2000, and 2003, respectively.

During that period, the Supreme Court issued another opinion resolving several remedial issues, deciding that the Eleventh Amendment does not prevent Kansas from recovering losses that are attributable to losses of its individual citizens, permitting an award of prejudgment interest to Kansas despite the unliquidated (no pun intended) nature of Kansas's damage claims, upholding the interest rate adopted by the special master, but sustaining Colorado's objection to the award of prejudgment interest for prefiling years (i.e. 1950–1985). The Court also upheld the method used by the special master to value the crop losses of Kansas water users. 533 U.S. 1 (2001).

In the wake of the 2001 Supreme Court opinion, the legal issues largely were decided, leaving only more-or-less technical problems such as the need to measure the effect that groundwater pumping in Colorado has on the flow of the Arkansas in Kansas. Computer modeling drives the subsequent calculation of whether there has been any shortfall by Colorado under the ARC and, thereafter, the imputed crop losses and monetary damage amounts. The parties tried unsuccessfully to settle and thereafter proceeded to trial before the special master. A major issue at trial was how to model the system to calculate compliance or the extent of the violation. The parties had already agreed to use a computer model referred to as the Hydrologic-Institutional Model (H-I Model), but its use is not totally mechanical, raising issues about what data should be used and how to interpret that data. As might be suspected at this point, the parties disagreed on those issues and several others, such as the meaning of the Supreme Court's 2001 ruling on prejudgment interest and whether Colorado had violated the ARC in 1997–1999. Importantly, Kansas, anticipating that violations might continue into the future, wanted a "river master" appointed and to have violations calculated every year. The special master recommended otherwise and also left unresolved several issues that Kansas had raised and wanted addressed.

Case Analysis

The Arkansas River, which rises near Aspen and flows south and east, is itself an important source of water for Colorado's East Slope residents. The critical dispute in more recent years relates to groundwater pumping in Colorado that affects the river, rather than withdrawals from the river and reservoir operations. As a hydrogeological matter, groundwater pumping in Colorado affects the flow of the Arkansas River as it flows through Kansas. Stated somewhat differently, groundwater that is withdrawn upgradient in Colorado reduces the base flow of the Arkansas in the state of Kansas. At this stage in time, that much is not in dispute. Moreover, in this round of litigation, Kansas and Colorado have agreed on a model to use for calculating and quantifying those effects. Along with a number of ancillary questions regarding administration of the Arkansas River in the future and the dollar amount to be paid for past ARC violations, the most vital questions in this case revolve around what data and judgments are to be employed in the H-I operating river model.

This particular case marks the third time that Kansas has invoked the original jurisdiction of the United States Supreme Court to adjudicate its grievances with Colorado in regard to the Arkansas River. In the first litigation, matters of great legal import were decided by the Supreme Court regarding the relative rights among states that are alongside

(riparian to) the same watercourse. In the second litigation, the Supreme Court summarized its first decision, rendered in two stages in 1902 and 1906 as follows:

> The court [in 1902] denied Kansas' contention that she was entitled to have the stream flow as it flowed in a state of nature. It denied Colorado's claim that she could dispose of all the waters within her borders, and owed no obligation to pass any of them on to Kansas. It declared [in 1906] that as each state had an equality of right each stood before the court on the same level as the other; that inquiry was not confined to the question whether any portion of the river waters were withheld by Colorado but must include the effect of what had been done upon the conditions in the respective states; and that the court must adjust the dispute on the basis of equality of rights to secure, so far as possible, to Colorado, the benefits of irrigation, without depriving Kansas of the benefits of a flowing stream. The measure of the reciprocal rights and obligations of the states was declared to be an equitable apportionment of the benefits of the river. The court added that, before the developments in Colorado consequent upon irrigation were to be destroyed or materially affected, Kansas must show not merely some technical right but one which carried corresponding benefits. *Kansas v. Colorado*, 320 U.S. 383, 385–386 (1943)

The second litigation again resulted in no relief for Kansas, but the Supreme Court advised the two states that they would best be served by negotiating an interstate compact to govern their respective uses of the Arkansas River. Following the Court's decision, the ARC was relatively quickly negotiated and ratified, and it went into effect in 1948. Almost immediately, Kansas began to claim that groundwater pumping in Colorado was violating the ARC. The matter was of grave concern to Colorado, for the groundwater pumping on its Front Range/Easy Slope was vital to continued development and growth—all surface streams there were already fully appropriated. The dispute simmered for 35 years, at which point Kansas, for the third time, was granted leave to invoke the original jurisdiction of the United States Supreme Court. This time, rather than seeking relief as an equitable apportionment case, Kansas claimed that Colorado was violating the ARC. Similar compact enforcement litigation had achieved prominence in relation to the Pecos River Compact. In 1983, the state of Texas won the right to have its claims of underdelivery by the upstream state adjudicated. See *Texas v. New Mexico I*, 462 U.S. 554 (1983). Shortly after this case was filed, Texas won an impressive victory that called upon New Mexico to remedy its underdeliveries. See *Texas v. New Mexico II*, 482 U.S. 124 (1987).

As this case plodded along, it generated little fanfare but bred much frustration. Were it not for claiming to protect state sovereignty, it might be fair to characterize this case as one in which the process of disputing has come to overshadow the dispute. As an annual average, the amounts of water "won" by Kansas total approximately 10,000 acre-feet per year. (An acre foot of water is a typical agricultural measure of quantity: it is roughly 325,000 gallons, or the amount of water that covers one acre of land to a depth of one foot. In this portion of the Arkansas River Valley, a typical farmer might apply between two and four acre-feet per acre, per year, depending on the crop and the timing of rainfall in relation to the maturity of the plants under cultivation.) The value of that water in agricultural use is rather modest, certainly less than $100 per acre foot, so that the 10,000 acre feet involved as an annual average translates to less than $1 million per year. That is a very small amount in relation to the size of the regional agricultural economy. To sound a sardonic note, it is probable that the states' annual litigation costs have greatly exceeded that amount.

SIGNIFICANCE

Like many interstate water disputes, this case does not seem destined to have much influence and application beyond its factual setting. In this case, it is unlikely that what is being decided will even have a profound impact on residents of the region, even though the Arkansas River is a key source of supply. That is because the larger questions of water use and water for future economic development were settled by the ARC, or in the earlier phases of this litigation, and all that remains are questions at the margin. The matters still at issue in this case involve very small amounts of water and, when the nature of the debtor and the debt are considered, rather small amounts of money. More specifically, what are at stake are small variations in model operations and the administrative process and a $24 million ambiguity in the 2001 Supreme Court opinion regarding the calculation of prejudgment interest. Even that number is not large when one considers it involves a state's liability for obligations that were imposed for actions taken during the period 1950 to 1985, and that it is that large only as a result of 20 years of compounding interest on 30 previous years of indebtedness.

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There are two possible exceptions to the generalization that this case has little significance, but both are rather subtle and grow out of the presence of an interstate compact. The first possible area of larger significance in this case relates to the ongoing administration of the ARC. At least a few other interstate water compacts have a voting mechanism, similar to that of the ARC, which create the possibility of impasse when a significant dispute arises. Kansas contends that the likelihood of the need for ongoing administration and judgment in the application of the H-I Model augers in favor of the appointment of a "river master" who would have continuing authority to resolve computer-modeling issues. This approach, Kansas argues, would avoid the need for a periodic renewal of litigation under the auspices of a special master.

At bottom, this request poses a somewhat larger issue of institutional arrangements and of the role of the Supreme Court in the exercise of its jurisdiction to adjudicate suits among the states when there also is an interstate compact in place. In the main, the Court itself, citing strong separation of powers arguments, is quite hesitant to become involved in compact administration, due to the special status of compacts as instruments entered into by states and requiring the express consent of Congress under Article I, section 10 of the United States Constitution. Nevertheless, Kansas points to the efficiency and low-profile success that has been had in another high-profile case in which the Court appointed a river master. That case involved the Pecos River dispute between Texas and New Mexico, a case with a similar provision for unanimous decision making that, like this one, resulted in protracted and extremely expensive Supreme Court litigation. The aftermath on the Pecos, however, has been relative calm and has been facilitated by the ongoing work of a river master.

The second area of potential broader interest in this case concerns the special master's decision to calculate compliance using a 10-year period, rather than making an annual calculation. A decision to uphold the 10-year calculation tends to favor the upstream state by allowing de facto averaging of water deliveries. Thus, for example, the upstream state in a dry year could underdeliver and make up for it in a wet year. In that scenario, the downstream state is put at risk in a dry year. Conversely, an every-year measure of compliance, as advocated by Kansas (the downstream state) puts the risk of dry years entirely on the upstream state. Neither approach is entirely equitable, but the difficulty of measuring and adapting to in-year dry conditions to share the available water fairly eliminates what might otherwise be the most equitable option for dealing with the problem. Almost certainly, the Court will seek to adhere strictly to the language of the ARC itself on this point, which will make this case turn on the interpretation of the ARC. Even so, much like the Kremlinologists who used to follow the machinations of the USSR's politburo, the water law community will find hints in the Court's opinion regarding the Court's broader disposition toward how such dilemmas are to be solved.

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