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Is Kansas Entitled to Money Damages for Breach of the Arkansas River Compact?

by Robert H. Abrams

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Kansas and Colorado spent the entire twentieth century embroiled in disputes over the proper division of the beneficial use of the Arkansas River. Litigation brought by Kansas in the first half of that century ended with a suggestion that the two states enter into a binding Interstate Compact allocating the river's water. They did. In the latter half of that century, Kansas began to complain that Colorado groundwater withdrawals were resulting in material harms to Kansas farmers who received less water than anticipated under the Arkansas River Compact.

ISSUES

Does the proper measure of damages for underdelivery of water under an Interstate Compact include compensation based on the losses of individual water users in the downstream state?

What is the necessary predicate for awarding prejudgment interest on

damage awards for underdelivery of water under an Interstate Compact?

Does the Eleventh Amendment bar an award of damages against a state in favor of a sister state when the damages are calculated with reference to the losses suffered by individuals in the downstream state?

FACTS

The Arkansas River rises in Colorado, at an elevation of 14,000 feet on the eastern slope of the Colorado Rockies. The river was first explored by Zebulon Pike two years after the basin became part of the United States in the Louisiana Purchase of 1803. The 1,450-mile-long river flows steeply southward before turning east where it flows through the Royal Gorge, and thereafter it traverses eastern Colorado and parts of Kansas, Oklahoma, and Arkansas before joining the Mississippi River. The part of the

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KANSAS v. COLORADO
DOCKET NO. 105, ORIGINAL

ARGUMENT DATE:
MARCH 19, 2001

Case at a Glance

In 1995, Kansas was successful in winning a judgment in the U.S. Supreme Court that Colorado had violated the Arkansas River Compact. This case continues the remedy stage of that litigation and raises primarily two issues: one a multimillion dollar question pertaining to the availability of prejudgment interest in the earliest years of underdelivery, the other an Eleventh Amendment defense that contends Kansas cannot be awarded a money judgment because it is acting as a surrogate for the injured individuals rather than as *parens patriae*.





river in controversy is the part below the Royal Gorge that is heavily used for irrigation in both Colorado and Kansas. Also important is the fact that the aquifer that underlies the Arkansas River Valley in that region is hydrologically connected to the river. Pumping of groundwater in sufficient quantities depletes streamflow.

The two upper states on the Arkansas—Colorado and Kansas—seem never to have been in harmony over the division of the river's water. In the early years of the twentieth century, Kansas filed a suit against Colorado in the U.S. Supreme Court seeking an equitable apportionment decree allocating the use of the river on the ground that Colorado was taking an unfairly large share of the water. Although Kansas lost that historic case, the Court noted that conditions could change and that Kansas would then be entitled to come before the Court again to seek an equitable apportionment. And come Kansas did, resulting in a second decision of the Court in 1943 that did not reach the merits. Instead, the Court suggested to the parties that with the pending construction of the federal John Martin Reservoir, they should be able to agree on a flow regime and enter into an Interstate Compact on that basis. The two states did so and entered into the Arkansas River Compact in 1949.

In the years since entering the Compact, flows reaching Kansas diminished despite the fact that Colorado users of the river's direct flow and stored water had not substantially increased their use of the river's water. What had changed was the amount of groundwater being pumped in Colorado from the regional aquifer that underlies and feeds the Arkansas River. That usage increased almost immediately after entry into the Compact and,

almost as quickly, became a source of concern and dissatisfaction to Kansas. Although the Arkansas River Compact established a Commission with the power to redress claims of its violation, the Compact requires a unanimous vote for the exercise of that authority, and each state has one vote in the Commission. Colorado refused to vote to take action against its groundwater users.

After threats of renewed litigation and efforts at negotiation that spanned several more decades, Kansas filed again in the U.S. Supreme Court, this time alleging breach of the Arkansas River Compact occasioned by the groundwater pumping. In 1995, the Court ruled in favor of Kansas, agreeing that the groundwater withdrawals in Colorado had violated section IV-D of the Compact. That section expressly "is not intended to impede or prevent future beneficial development of the Arkansas River Basin in Colorado or Kansas ..." but nevertheless required that the development contemplated by that phrase "shall not [cause the waters of the Arkansas to] be materially depleted in usable quantity or availability for use to the water users in Colorado or Kansas. ..." The case was remanded to a Special Master to determine damages. That aspect of the case is now under review in the Supreme Court.

CASE ANALYSIS

Although there is very little dispute about the facts, the parties differ as to their relevance. The 1995 decision of the Court established that Colorado groundwater pumping caused a material adverse impact on the flow regime to the detriment of Kansas and in violation of the Arkansas River Compact. The Special Master found that for the period 1950 through 1968, Colorado was not aware of the effect that the

groundwater withdrawal was having on the required delivery of water to Kansas. On that basis, the Special Master found that it was appropriate to provide compensation for the underdelivery that occurred during the period, but that it would be inequitable to charge prejudgment interest. The parties are divided on the relevance of the fact that Colorado was unaware of the violation. Colorado supports the Special Master, while Kansas takes the position that intent is not relevant to the compensatory damage calculations and that the matter of allowing prejudgment interest is not discretionary. Although the compounding of interest for half a century makes the monetary amount involved rise above \$10 million, the Court's decision on this issue will be of very limited significance so long as it is limited to the Interstate Water Compact arena.

The other central issue in the case is, if it is possible, even more rarefied. It is, however, a far more challenging legal question that may provide some insight into how the Court views *parens patriae* suits in relation to the Eleventh Amendment. The damages proven by Kansas, in large measure, are not damages suffered by the state itself, but by members of her citizenry. Typically, when that is the case, states that bring suit do so as *parens patriae* (that is, in their capacity as legal guardian for the injured parties), and the damages collected are held by the state for the benefit of all her citizens, not just the few that are affected. Kansas claims that is the case here, and that therefore the Eleventh Amendment is not a bar to federal court jurisdiction of suits against states seeking monetary relief where another state is the suitor. If the case is perceived as that and no more, there are numerous precedents that squarely favor the Kansas analysis.



Colorado, however, suggests that this is not a typical *parens patriae* lawsuit. Two separate facts undergird a different line of analysis. To simplify the facts and the claims based on them slightly, Colorado first asserts that the quantifiable measure of damages that Kansas adduced was proof of the crop losses of individual Kansas farmers. Second, Colorado points to the Kansas legislation that authorized this lawsuit and dedicated the proceeds to repaying the costs of litigation to the state and thereafter placed the remainder into a dedicated fund that would be used to provide benefits to the affected farmers. Based on those facts, Colorado tries to characterize the lawsuit, despite its "State v. State" form, as substantively a suit brought seeking monetary relief from Colorado for the benefits of the citizens of another state. On that characterization, the Eleventh Amendment becomes a plausible bar to the monetary relief sought.

SIGNIFICANCE

As already noted, the Court's decision on the damages issue will be of very limited significance so long as it is limited to the Interstate Water Compact arena. In addition, however, the Court's decision may also provide some insight into how the Court views *parens patriae* suits in relation to the Eleventh Amendment.

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