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Supreme Court Struggles with Damage Assessment in Water Dispute as Interstate Compact Breaks Down

In *Kansas v. Colorado*, 533 U.S. 1 (2001), the Supreme Court issued a multi-faceted opinion assessing the damages that Colorado must pay Kansas for violating the Arkansas River Compact (hereinafter the Compact). The opinion illustrates the problems with money damages in interstate water disputes, as well as the shortcomings of common legal devices to settle such disputes.¹

In 1949, Kansas and Colorado agreed to apportion the waters of the Arkansas River among themselves via the Compact.² Under the Constitution, disputes arising from the Compact may be resolved by invoking the original jurisdiction of the Supreme Court.³ Although Kansas first invoked the Court's original jurisdiction to resolve water issues with Colorado in 1901,⁴ the instant case involves a complaint filed by Kansas in 1985.⁵ The 1985 complaint alleged that groundwater pumping in Colorado "materially depleted" the waters of the Arkansas River in violation of the Compact.⁶ In 1995, the Court acknowledged the hydrologic connection between groundwater and surface water and held that Colorado had breached the Compact.⁷ The Court then assigned the task of assessing damages to Special Master Arthur Littleworth.⁸

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1. Such devices include litigation and compacts. On rare occasions, congressional apportionment and the dormant commerce clause have been utilized to allocate interstate waters. See *Joseph L. Sax et al.*, *Legal Control of Water Resources* 719 (3rd ed. 2000).
6. *Id.* at 680. Article IV-D of the Compact states: "the waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas."
7. 514 U.S. at 694.
The Special Master recommended that the damages should:
(1) be measured by Kansas' losses since 1950, when Colorado's groundwater pumping began violating the Compact; (2) be paid in money, not water; and (3) include interest calculated from 1969, the year Colorado knew or should have known it was violating the Compact.\(^9\) Colorado filed four objections to the Special Master's recommendations.\(^10\) First, Colorado asserted that Kansas was not a "real party" to the litigation, but a "nominal party" on behalf of individual farmers.\(^11\) As a result, Colorado argued that because of the Eleventh Amendment Kansas should not recover monetary damages.\(^12\) In the alternative, Colorado argued that if damages were awarded, they should not include interest.\(^13\) Third, Colorado claimed that the interest award was excessive due to the interest rate used and the base year chosen by the Special Master.\(^14\) Fourth, Colorado objected to the method used to calculated Kansas' losses from the violations to the Compact.\(^15\) Kansas also filed an objection, arguing that the damages should include interest since 1950, the year the Special Master found that Colorado had begun violating the Compact.\(^16\)

The Court overruled all the states' objections except for part of Colorado's third claim. Colorado's relevant argument was that damages should not include interest until 1985, the year the complaint was filed.\(^17\) While the Court acknowledged that either 1969 or 1985 represented logical starting points for the accrual of interest, it decided upon the later date simply to "produce a majority for a judgment."\(^18\) The Court then remanded the case to the Special Master for a final determination as to damages.\(^19\)

The Court's opinion was unanimous on all but Colorado's second and third claims.\(^20\) The dissenting justices contended that, when the Compact was created, Colorado would not have

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9. Id.
10. Id.
11. See id. at 8-9.
12. Id. at 7; see also U.S. CONST. amend. Xl (stating that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state") (emphasis added).
14. Id. at 12.
15. Id. at 16.
16. Id. at 12.
17. Id. at 9, 12, 16, 20.
18. Id. at 15 n.5.
19. Id. at 20.
20. Id. (O'Connor, J., dissenting).
contemplated that violations of the Compact would result in damages including interest. The relevant law at that time did not clearly allow interest on unliquidated claims (such as that filed by Kansas). As a result, the dissenting justices agreed with Colorado's second and third objections.

This case illustrates the shortcomings of compacts to resolve interstate water disputes. While compacts offer the possibility of avoiding the costs, risks, and delays of judicial equitable apportionment, this case shows that this promise may not be fulfilled. For example, Kansas' suit against Colorado has languished in the court system since 1985, bouncing back and forth between the Special Master and the Supreme Court. Meanwhile, the water use landscape in the states has changed significantly. In September 2001, the states entered into mediation proceedings to resolve their outstanding issues without protracted litigation.

In addition, while the case may generate a substantial monetary payment to Kansas, such a remedy does not allow the state to properly pursue its "general public interest." As Justice Holmes famously remarked, "few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished."

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21. Id. at 21.
22. Id. at 21-25.
23. Id. at 20.
26. But see Texas v. New Mexico, 482 U.S. 124, 132 n.7 (1987) (holding that enforcement of an interstate compact is of "general public interest" and that money damages can be freely spent by a state "in the way it determines is in the public interest").
27. Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908). This case has been resurrected by relatively recent cases such as Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (implying that a state may conserve water for its citizens in times of shortage).
unique nature of water, interstate water compacts should not be viewed like other contracts where an efficient breach may be acceptable. Simply put, money damages will not put water back in the Arkansas River. By allowing to Colorado “purchase” compliance, the Court allows Colorado to shirk its duty to maintain usable flows for water users in Kansas. Thus, the Court’s decision demonstrates that the Compact is not properly designed meet its stated objectives. As interstate compacts break down, litigation and alternative dispute resolution will play an increasingly important role in future water disputes.

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28. See Joseph W. Girardot, Toward a Rational Scheme of Interstate Water Compact Adjudication, 23 U. Mich. J.L. Ref. 151, 164 (1989) (“A remedy that substitutes money for water clearly frustrates congressional intent, for Congress has stated that it intends [interstate water compacts] to provide for the equitable distribution of the present available water supply.”)