No. 105, Original

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF KANSAS, PLAINTIFF

v.

STATE OF COLORADO

ON EXCEPTIONS TO THE SECOND REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE EXCEPTIONS OF COLORADO

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QUESTIONS PRESENTED

The United States will address the following issues:

1. Whether the Special Master erred in recommending that, if the remedy in this case includes money damages, the Eleventh Amendment does not preclude damages to the State of Kansas from being based, in part, on losses incurred by its water users, subject to the overall consideration of fairness (Colorado Exception No. 1).

2. Whether the Special Master erred in recommending that the unliquidated nature of Kansas's claim for money damages or repayment in water does not bar the award of prejudgment interest and that the possible award of prejudgment interest will depend upon the evidence presented in future trial proceedings (Colorado Exception No. 2).

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STATEMENT

The State of Kansas brought this original action against the State of Colorado to resolve disputes under the Arkansas River Compact, Act of May 31, 1949, ch. 155, 63 Stat. 145 (Compact). This Court granted Kansas leave to file its complaint, *Kansas* v. *Colorado*, 475 U.S. 1079 (1986), and the Court appointed the Honorable Wade H. McCree, Jr., to serve as the Special Master. 478 U.S. 1018 (1986). Upon Judge McCree's death, the Court appointed Arthur L. Littleworth as the Special Master, 484 U.S. 910 (1987). Special Master Littleworth granted the United States' unopposed motion for leave to intervene in the action, conducted a trial limited to

questions of liability, and submitted a report recommending that the Court find Colorado to have violated the Compact in certain respects. 513 U.S. 803 (1994). This Court overruled the exceptions of both Kansas and Colorado to the Master's first report. 514 U.S. 673 (1995).

The Master has submitted a second report that addresses preliminary issues respecting a remedy, and this Court has invited the parties to file exceptions. 118 S. Ct. 39 (1997). The United States actively participated in the trial of the liability issues, but has not participated in the trial of remedy issues. Like Kansas, the United States has not filed exceptions to the Master's second report. The United States nevertheless remains a party to this dispute and continues to monitor the progress of this case. The United States files this brief to provide this Court with the federal government's perspective on Colorado's exceptions to the Master's second report.

1. The Arkansas River Basin

The Arkansas River originates on the east slope of the Rocky Mountains in central Colorado and flows south and then east across Colorado and into Kansas. It receives significant in-flows from the Purgatoire River, its major tributary in Colorado, which originates in the Sangre de Cristo mountains in southern Colorado near the New Mexico border. The Purgatoire River flows in a northeasterly direction to join the Arkansas River about 60 miles west of the Kansas border, at Las Animas, Colorado. See *Kansas* v. *Colorado*, 514 U.S. 673, 675-676 (1995).

The United States has constructed three water storage projects on this river system that are relevant to this case. The John Martin Reservoir, located

immediately east of the juncture of the Purgatoire and Arkansas Rivers in Colorado, is operated by the Army Corps of Engineers to control floods and to provide storage water in accordance with the Arkansas River Compact. It has a storage capacity of approximately 700,000 acre-feet. 514 U.S. at 677. The Pueblo Reservoir, located on the Arkansas River about 150 miles upstream of the Kansas border near Pueblo, Colorado, is managed by the Department of the Interior's Bureau of Reclamation as part of the Fryingpan-Arkansas Project. It has a storage capacity of approximately 357,000 acre-feet. *Ibid.* The Trinidad Reservoir, located on the Purgatoire River near Trinidad, Colorado, is jointly managed by the Army Corps of Engineers and the Bureau of Reclamation to control floods and to provide storage water for use by the Bureau of Reclamation's Trinidad Project. It has a storage capacity of approximately 114,000 acre-feet. *Ibid.*

Twenty-three canal systems in Colorado divert water from the Arkansas River for irrigation. Fourteen of those systems are located upstream from John Martin Reservoir, and four of those systems have associated privately-owned, off-channel water storage facilities. Six canal systems in Kansas operate between the Colorado border and Garden City. See 514 U.S. at 677.

2. The Arkansas River Compact

The Arkansas River Compact apportions the Arkansas River between the States of Kansas and Colorado. The Compact was an outgrowth of two original actions that the States had filed in this Court disputing their respective entitlements to use of the Arkansas River. See 514 U.S. at 678. In each of those

cases, the Court denied Kansas's request for an equitable apportionment. See *Colorado* v. *Kansas*, 320 U.S. 383, 391-392 (1943); *Kansas* v. *Colorado*, 206 U.S. 46, 114-117 (1907).

In the first suit, Kansas sought to enjoin water diversions in Colorado, but the Court denied relief on the ground that Colorado's depletions of the Arkansas River were insufficient at that time to warrant injunctive relief. *Kansas* v. *Colorado*, 206 U.S. at 114-117. In the second suit, Colorado sought to enjoin lower court litigation brought by Kansas water users against Colorado water users, while Kansas sought an equitable apportionment of the Arkansas River. The Court concluded that Colorado was entitled to the injunction it sought, but the Court concluded once again that Kansas had failed to show sufficient injury to warrant an equitable apportionment of the Arkansas River. *Colorado* v. *Kansas*, 320 U.S. at 391-392; see *Kansas* v. *Colorado*, 514 U.S. at 678.

In denying Kansas's second request for judicial relief, the Court suggested that a dispute such as this one calls for "expert administration rather than judicial imposition of a hard and fast rule," and that the controversy "may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution." *Colorado* v. *Kansas*, 320 U.S. at 392. Shortly thereafter, the States appointed commissioners to negotiate an interstate agreement. In 1949, the States approved, and Congress ratified, the Arkansas River Compact, 63 Stat. 145. See generally Colo. Br. App. 1-17 (reprinting text of Compact). The Compact was intended to "[s]ettle existing disputes and remove causes of future controversy" between the States and

their citizens over the use of the Arkansas River. To that end, the Compact was designed to

> [e]quitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes.

Compact Art. I, 63 Stat. 145; Colo. Br. App. 1-2. The Compact accomplishes those goals through two basic mechanisms.

First, the Compact protects the States' respective rights to continued use of the Arkansas River through a limitation on new depletions. Article IV-D of the Compact allows new development in the form of dams, reservoirs, and other water-utilization works in Colorado and Kansas, provided that the "waters of the Arkansas River" are not thereby "materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact." 63 Stat. 147; Colo. Br. App. 5. The Compact defines the term "waters of the Arkansas River," Art. III-B, 63 Stat. 146; Colo. Br. App. 2-3, but it does not expressly define what constitutes a "material" depletion or a "usable" quantity.[1]

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[1] The full text of Article IV-D states as follows:

> D. This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works:

Second, the Compact regulates the storage of water at John Martin Reservoir and specifies the criteria by which each State is entitled to call for water releases. Article V of the Compact, which provides the "basis of apportionment of the waters of the Arkansas River," prescribes the timing of storage at the reservoir and the release criteria. 63 Stat. 147-149; Colo. Br. App. 5-9. Basically, between November 1 and March 31, inflows to the John Martin Reservoir are stored, subject to Colorado's right to demand a limited amount of water. Between April 1 and October 31, the storage of water is largely curtailed, and either State may call for releases at any time in accordance with the flow rates set out in the Compact. *Ibid.*

The Compact creates an interstate agency, the Arkansas River Compact Administration, to administer the Compact. Art. VIII, 63 Stat. 149-151; Colo. Br. App. 11-15. The Compact Administration consists of a non-voting presiding officer designated by the President of the United States and three voting representatives from each State. It is empowered to adopt bylaws, rules, and regulations, prescribe procedures for the administration of the Compact, and perform functions to implement the Compact. See Arts. VIII-B, VIII-C, 63 Stat. 149, 150; Colo. Br. App. 11, 12. Article VIII-H of the Compact directs that the Administration shall "promptly investigate[]" violations of the Compact and report its findings and recommendations

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Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction.

63 Stat. 147; Colo. Br. App. 5.

to the appropriate state official. 63 Stat. 151; Colo. Br. App. 15. That Article further states that it is "the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights." *Ibid.*

3. The Current Proceedings

Kansas brought this action in 1985 to enforce the provisions of the Arkansas River Compact. Special Master Littleworth filed his initial report with the Court in July 1994 addressing issues of liability. He recommended that the Court find that post-Compact well pumping in Colorado had violated Article IV-D of the Compact and that Colorado be held liable for that violation. The Master also recommended that the Court find no violation of the Compact with respect to Kansas's claims arising from the operation of the Trinidad Reservoir and the Winter Water Storage Program. The Court adopted all of the Master's recommendations and remanded for determination of the unresolved issues—primarily relating to what remedy, if any, Kansas was entitled to as a result of Colorado's breach—in a manner not inconsistent with the Court's opinion. *Kansas* v. *Colorado*, 514 U.S. at 694.

On remand, the Master conducted further proceedings and prepared a report providing his preliminary recommendations on the issues of: (a) quantifying the depletions in Stateline flow for the period 1950-1985; (b) quantifying depletions for the period subsequent to 1985; (c) bringing Colorado into current compliance with the provisions of the Compact; and (d) a remedy for past depletions. See Rep. 2, 112. After hearing evidence and receiving briefs addressing those issues,

the Master issued his second report, which recommends, in essence, that:

(1) the Court approve the Master's order denying Kansas' motion for an injunction;

(2) the Court approve the States' stipulation quantifying depletions to usable Stateline flow caused by post-Compact pumping in Colorado for the period 1950-1985 in the amount of 328,505 acre-feet;

(3) depletions of usable Stateline flow for the period 1986-1994 be determined to be 91,565 acre-feet;

(4) Colorado's efforts to bring the State into current compliance with its Compact obligations have been sufficient to preclude any immediate need for interim injunctive relief or revision of Colorado's Measurement or Use Rules, that Colorado's activities in those regards continue to be closely monitored, and that depletions for 1995 and compliance for 1996 and subsequent years be determined;

(5) the Court approve an Offset Account in John Martin Reservoir for the storage and delivery of replacement water to Kansas to offset depletions of usable Stateline flow;

(6) evidence be received on a suitable remedy for past Compact violations, whether such remedy be in water or in money;

(7) if a suitable remedy in this case should include money damages, those damages should be based upon Kansas's loss rather than upon any gain to Colorado, subject to the overriding con-

sideration that the remedy provide a fair and equitable solution;

(8) if the remedy includes money damages, the Eleventh Amendment does not preclude damages to Kansas from being based, in part, on losses incurred by its water users, again subject to the overall consideration of fairness; and

(9) the unliquidated nature of Kansas's claim for damages does not, in and of itself, bar the award of prejudgment interest, whether the remedy includes money damages or water repayment, and the possible award of prejudgment interest will depend upon the evidence presented in future trial proceedings.

See Rep. 112-114. The Court has invited the parties to file exceptions to the recommendations contained in the Master's report. See 118 S. Ct. 39 (1997).

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Kansas brought this action to enforce its rights under the Arkansas River Compact, which apportions the flow of the Arkansas River between Kansas and Colorado. This Court resolved the issues of liability in an earlier decision, *Kansas* v. *Colorado*, 514 U.S. 673 (1995), which accepted the Master's recommendation that Colorado be held liable for violations of Article IV-D of the Compact resulting from post-Compact well pumping in Colorado. On remand, the Master heard evidence and prepared a thorough report dealing with a series of issues related to what remedy Kansas may obtain as a result of Colorado's breach.

Among the Master's recommendations, Colorado takes exception to only two. Colorado challenges the

Master's determinations that (1) if Kansas is entitled to a remedy and that remedy is money damages, the Eleventh Amendment does not bar the Master from recommending a damage award that is based, in part, on evidence of the actual losses suffered by individual Kansas water users as a result of Colorado's Compact violations; and (2) if Kansas is entitled to a remedy, the Master may recommend an award of prejudgment interest if the evidence produced in future proceedings suggests that such an award is warranted. Colo. Excepts. 1-2; see Colo. Br. 6-7. Colorado's exceptions should be overruled without prejudice to Colorado's right to renew those exceptions, if necessary, once the Master has recommended a final remedy in this case.

I. The resolution of Colorado's Eleventh Amendment challenge should await completion of the remedial proceedings. The Master's recommendation concerning the use of evidence of losses sustained by individual Kansas water users has uncertain significance at this stage of the remedial proceedings. The Master has merely recommended that, *if* Kansas is entitled to a remedy and *if* the appropriate remedy is money damages, he may consider evidence of losses sustained by individual Kansas water users in determining the amount of damages to which Kansas is entitled. If the Master ultimately concludes that Kansas is entitled to no remedy or that the appropriate remedy should take the form of replacement water rather than money damages, and the Court adopts those recommendations, then there would be no reason to decide Colorado's constitutional objections. On the other hand, if the Master determines that a monetary award is appropriate, and the Master imposes a remedy that raises Eleventh Amendment concerns,

the issue can be resolved at that time in the context of the specific remedy that the Master proposes.

The Court should be particularly reluctant to resolve Colorado's exception at this time because that exception rests on what appears to be an inaccurate interpretation of the Master's recommendation. Colorado characterizes the Master's recommendation as allowing Kansas to recover from Colorado the actual losses suffered by individual Kansas water users. The Master's report, however, suggests instead that the Master has simply concluded that evidence concerning individual loss may be relevant in determining the injury that Kansas has suffered to its quasi-sovereign interest in protecting the economic well-being of its citizens. If the Master ultimately uses individual losses in some other way to quantify Kansas's damages, the Court will have ample opportunity to address any Eleventh Amendment concerns in the course of its review of the Master's final remedy. The Court should therefore overrule Colorado's exception without prejudice to Colorado's renewing that exception, if necessary, at the conclusion of the remedial proceedings.

II. The resolution of Colorado's challenge to the possible award of prejudgment interest should also await completion of the remedial proceedings. The Master's recommendation on that matter similarly has uncertain significance at this stage of the proceedings, and Colorado's exception presents the same possibility of premature and piecemeal consideration. The Master provided sound reasons for his determination that he has discretion to recommend an award of prejudgment interest in appropriate cases. The relevance of that ruling, however, depends, as a threshold matter, on whether the Master ultimately determines

that Kansas is entitled to a remedy. In addition, the Master emphasized that "the possible award of pre-judgment interest will depend upon the evidence presented in future trial proceedings." Rep. 114. In light of the current uncertainties, the Court should overrule Colorado's exception without prejudice to Colorado's renewal of that exception, if necessary, after the Master has recommended a final remedy.

ARGUMENT

COLORADO'S EXCEPTIONS SHOULD BE OVERRULED WITHOUT PREJUDICE BECAUSE THEY ARE NOT APPROPRIATE FOR RESOLUTION AT THIS STAGE OF THE MASTER'S PROCEEDINGS

This Court has considerable latitude in the conduct of original proceedings. In most instances, the Court appoints a Special Master, who controls the scope of trial proceedings and submits a report at the conclusion of those proceedings setting forth his recommendations respecting issues of fact and law. In complex cases, the Master may choose to submit reports at intermediate stages of the litigation. In this case, the Master has submitted a report at an intermediate phase of the remedial proceedings to set out his intended course in determining a remedy.

We suggest that this Court should overrule Colorado's exceptions to the Master's recommendations without prejudice to renewal at the conclusion of the remedial phase. Colorado's challenges have uncertain importance at this stage of the proceedings. This Court's resolution of those issues might provide the parties with greater certainty in the progress of this particular case, but it would thrust the Court into the position of deciding important issues conclusively—

and perhaps unnecessarily—without the benefit of the Master's final recommendation on an appropriate remedy. The Master's proposed approach to fashioning a remedy appears sound, and this Court should therefore postpone review until the Master has recommended a specific remedy, which may either eliminate the current controversies or sharpen the precise issues in dispute.

I. COLORADO'S ELEVENTH AMENDMENT CHALLENGE IS NOT RIPE FOR CONCLUSIVE RESOLUTION BY THIS COURT

Colorado challenges (Br. 7-24) the Special Master's recommendation that, if money damages are awarded to Kansas, the amount of damages may be based, in part, on evidence of the injury to Kansas's individual water users as a result of Colorado's breach. Colorado specifically relies on the Eleventh Amendment, which bars the federal courts from hearing suits "commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. Amend. XI. According to Colorado, the Master's consideration of individual losses transforms Kansas's suit against Colorado from a suit between two sovereign States, over which this Court has original jurisdiction, to a suit between individual citizens of Kansas and the sovereign State of Colorado, which would be barred by the Eleventh Amendment. Colorado's exception should be overruled because it is premature and because it rests on an unwarranted interpretation of the Master's recommendation.

A. Colorado asks this Court to resolve definitively a constitutional issue that has uncertain importance at this stage of the proceedings. That request is contrary to this Court's settled practice:

> "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944). It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied. . . . .'" *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

Clinton v. *Jones*, 117 S. Ct. 1636, 1642 n.11 (1997) (quoting *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 570 n.34 (1947)) (parallel citations omitted).

The main issue currently before the Master is what remedy, if any, Kansas should receive as a result of Colorado's breach of the Compact. This Court ruled in *Texas* v. *New Mexico*, 482 U.S. 124 (1987), that, where an interstate compact does not specify the appropriate remedy for a breach, the Court has discretion to award "a suitable remedy, whether in water or money." *Id.* at 130. In this case, Kansas advocates a remedy of money damages, while Colorado advocates a remedy in the form of "make-up water." See Rep.

72-74. The Master has not determined which remedy is appropriate. Rep. at 113.

In progressing toward resolution of that issue, the Master has made uncontested final recommendations regarding the levels of depletions of usable Stateline flow caused by Colorado's breach during the periods of 1950-1985 and 1986-1994. Rep. 11, 46 (setting depletions for 1950-1985 at 328,505 acre-feet and for 1986-1994 at 91,565 acre-feet). Stateline depletions, however, do not necessarily result in compensable injuries. Kansas is entitled to damages only if those depletions actually caused injury to Kansas. The Master concluded that, if he chooses to award money damages, the Eleventh Amendment would not bar him from determining Kansas's damages based, in part, on evidence of injury to the State's water users. See Rep. 85-104, 113.

In light of this Court's established policy against deciding abstract, hypothetical, or contingent issues, the Court should not conclusively resolve Colorado's Eleventh Amendment challenge to the Master's proposed course of action at this time. If the Master ultimately recommends that Kansas is not entitled to a remedy or that the remedy should take the form of replacement water, and the Court agrees with that recommendation, there will be no need to resolve Colorado's constitutional challenge.[2] And if the Master ultimately recommends that Kansas is entitled to money damages, Colorado will be free to challenge the Master's method of calculating those damages at that time. There is no pressing need for the Court to

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[2] Colorado concedes (Br. 22) that the Eleventh Amendment would not preclude this Court from awarding replacement water to Kansas.

resolve the constitutional issue unless and until the Master recommends a final remedy that squarely presents the question in a concrete setting.[3]

B. This Court should be particularly reluctant to resolve Colorado's exception because it rests on an unwarranted interpretation of the Master's recommendation. Colorado characterizes the Master's recommendation as allowing Kansas to recover, on behalf of individual Kansas water users, the actual losses suffered by those citizens. See, *e.g.*, Colo. Br. 6, 9. We read the Master's report to suggest a more limited use of individual-loss evidence. The Master carefully articulated the distinction between suits in which a State sues as a trustee for individual citizens and suits in which a State sues as parens patriae. His analysis indicates that he is sensitive to the limitations that the Eleventh Amendment imposes in suits brought under this Court's original jurisdiction. See Rep. 85-98.

The Eleventh Amendment provides in relevant part 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

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[3] See *Illinois* v. *Kentucky*, 500 U.S. 380, 389 (1991) (rejecting as "premature" Kentucky's exception regarding the location of the low-water mark of the Ohio River because of the need for further recommendations by the Special Master); *United States* v. *Louisiana*, 485 U.S. 88, 92-93 (1988) (overruling Mississippi's exceptions to Special Master's Report without prejudice to allow Special Master time to address the issue); cf. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J. dissenting) ("Almost all other litigants must go through at least two other courts before their case receives our attention. It has become our practice in original-jurisdiction cases to require preliminary proceedings before a special master, to evaluate the facts and sharpen the issues.").

United States by Citizens of another State." U.S. Const. Amend. XI. As the Master recognized, the Eleventh Amendment also prevents a State from suing as a "trustee" seeking to enforce the rights of individual citizens. See Rep. 85-98. See *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923).

The Eleventh Amendment does not bar, however, a suit brought by a State acting as parens patriae "to prevent or repair harm to its 'quasi-sovereign' interests." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 258 (1972). As the Court stated in *North Dakota*:

> The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister State.

263 U.S. at 375-376; see also *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals."); *Hawaii*, 405 U.S. at 259 n.12 ("An action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals.").

The *New Hampshire* and *North Dakota* decisions illustrate that distinction. In *New Hampshire*, citizens of New Hampshire and New York held bonds issued by the State of Louisiana, payment of which was in default. The individual holders assigned the

bonds to their respective States, which brought an original action in this Court to recover the amount due on the bonds. The Court concluded that the States' action was barred by the Eleventh Amendment because it was a mere subterfuge for recovery on behalf of the individual bondholders. The States, according to the Court, were "nothing more nor less than * * * mere collecting agent[s] of the owners of the bonds and coupons, and while the suits are in the names of the states, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them." *New Hampshire*, 108 U.S. at 89.[4]

In *North Dakota*, the Court ruled that the Eleventh Amendment barred North Dakota from bringing a damages claim against Minnesota seeking $1 million "for its inhabitants whose farms were injured and whose crops were lost" as a result of flooding allegedly caused by Minnesota's use of the Mustinka River. 263 U.S. at 374. The Court observed:

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[4] Among other things, the individual owners were required to fund all costs and expenses of the litigation, and state law required that all moneys collected be kept by the State's Attorney General, as special trustee, in a separate account. Those moneys were to be paid over to the owner of the bond after the litigation costs were deducted. *New Hampshire*, 108 U.S. at 89. In the case of New Hampshire, the individual bondholders also had the right to choose their own counsel to pursue the claim, and their consent was required before the claims could be settled. *Ibid.* Based on those facts, the Court declared that "[n]o one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons." *Ibid.*

> The evidence discloses that nearly all the Dakota farm owners, whose crops, lands, and property were injured in these floods, contributed to a fund which has been used to aid the preparation and prosecution of this cause. It further appears that each contributor expects to share in the benefit of the decree for damages here sought, in proportion to the amount of his loss. Indeed it is inconceivable that North Dakota is prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled.

Id. at 375. The Court ruled that North Dakota was acting, not as parens patriae, but as a trustee, seeking to present and enforce individual claims of its citizens. *Ibid.*

In this case, the Master determined that Kansas had commenced the current action as parens patriae to protect its sovereign and quasi-sovereign interests under the Arkansas River Compact, and not as a trustee for individual Kansas citizens. See Rep. 88 ("Of course, this action is no mere contrivance by Kansas to obtain damages for its water users."). He concluded that Kansas is the real party in interest and is seeking recovery for injuries to its legitimate interests in the general economic well-being and property of its citizens, interests which are "independent of and behind the titles of its citizens." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 604 (1982) (quoting *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

In light of this Court's decisions, the Master properly concluded that, so long as the end to be achieved is compensating a State for injury to its own legitimate interests, as distinguished from compen-

sating designated citizens for injuries to their individual rights, the Eleventh Amendment allows consideration of evidence of individual losses that is relevant in calculating the proper measure of the State's damages. The Master's recommendation is consistent with the Court's invocation of broad discretion in formulating a fair and equitable remedy in cases under the Court's original jurisdiction. See *Texas* v. *New Mexico*, 482 U.S. at 130 (the Constitution entrusts the Court with sufficient judicial power to "order[ ] a suitable remedy, whether in water or money," and "the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State").[5]

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[5] There is a passage in the Master's report that suggests a broader use of individual loss evidence. In addressing Kansas's claim that the Compact itself requires treating individual water users and the State as one, the Master stated that "the State of Kansas is the signatory to the Arkansas River Compact, and the only party that can sue to protect the Stateline flows guaranteed for use by Kansas water users. * * * If a money remedy is awarded for past compact violations, the damages should include all losses that have occurred as a result of such violations, including those suffered by individual water users, subject only to the overriding consideration that the remedy must finally be a 'fair and equitable solution.'" Rep. 103 (quoting *Texas* v. *New Mexico*, 482 U.S. 124, 134 (1987)). That passage, however, does not necessarily herald an Eleventh Amendment transgression. In any event, as we have noted, the Master's definition of the scope of Kansas's interests and his use of evidence of individual losses in calculating damages will be fully reviewable once he recommends a final remedy.

II. COLORADO'S CHALLENGE TO THE POSSIBLE AWARD OF PREJUDGMENT INTEREST IS NOT RIPE FOR CONCLUSIVE RESOLUTION BY THIS COURT

Colorado also takes issue (Br. 24-26) with the Master's recommendation that, if Kansas proves that it is entitled to compensation, either in the form of money damages or make-up water, the award may, depending on future evidence adduced at trial on the remedy issue, include prejudgment interest. See Rep. 113. According to Colorado (Br. 24), the Court is bound by the traditional common law rule that prejudgment interest is not allowed on unliquidated claims. Colorado's second exception, like its first, should be overruled because it does not present an issue that is ripe for resolution at this time.

A. This Court has never directly considered whether there is a categorical rule against prejudgment interest in original jurisdiction cases. The United States' liability for interest in original actions, like its liability in other cases, is governed by the usual principles respecting federal sovereign immunity.[6] The liability of the individual States, however, remains an open question. Colorado asks this Court to address the issue in an abstract and hypothetical context in which any award would be contingent on future proceedings before the Master. We suggest that the Court should decline that

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[6] This Court has held that "in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress." *United States* v. *New York Rayon Co.*, 329 U.S. 654, 658-659 (1947). See also *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

invitation and overrule Colorado's exception without prejudice.

The question whether a State may obtain prejudgment interest in an original proceeding should be resolved in a concrete factual context. That context is missing in this case. The Master has made no decision whether prejudgment interest should be awarded to Kansas. Indeed, the Master has not yet determined what, if any, remedy would be appropriate and whether that remedy should take the form of replacement water or money damages. Rather, the Master has stated that "the possible award of prejudgment interest will depend upon the evidence presented in future trial proceedings." Rep. 114. Like its Eleventh Amendment challenge, Colorado's challenge to the use of prejudgment interest may become moot depending on how the Master resolves future evidentiary questions at trial. If the Master ultimately recommends an award of some measure of prejudgment interest, the issue will be fully reviewable by the Court at that time.

B. This Court should be reluctant to resolve Colorado's exception at this point in the absence of a strong showing that the Master's preliminary recommendation is misguided. Colorado has not made such a showing. To the contrary, the Master has identified a number of considerations that provide a sensible basis, at least in the context of an award of money damages, for rejecting Colorado's contention that this Court should adopt a categorical rule prohibiting prejudgment interest. See Rep. 105-111.

First, although the Court has acknowledged the traditional common law approach to prejudgment interest, see, *e.g.*, *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 338-339 (1988) (concluding that

Congress intended to incorporate the common law rule against prejudgment interest into the Federal Employers' Liability Act), the Court has repeatedly noted that the distinction between liquidated and unliquidated damages is questionable and that the rule against prejudgment interest is inconsistent with the goal of full compensation. See *City of Milwaukee* v. *Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 197 (1995) ("[T]he liquidated/unliquidated distinction has faced trenchant criticism for a number of years."); *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163, 168-169 (1933) ("It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of the breach and nothing is added for the delay in obtaining the award of damages.").

Second, the rule against prejudgment interest for unliquidated claims has not been as absolute as Colorado portrays. For example, prejudgment interest has been allowed in instances of "bad faith or other exceptional circumstances." *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 653 (1983) (noting that under the common law rule, "prejudgment interest could not be awarded where damages were unliquidated, absent bad faith or other exceptional circumstances"). Moreover, the courts have not always felt bound even by that construction of the rule. As this Court noted in *Funkhouser*, because the common law rule provided inadequate compensation, "the rule with respect to unliquidated damages has been in evolution, and in the absence of legislation the courts have

dealt with the question of allowing interest according to their conception of the demands of justice and practicality." 290 U.S. at 168-169 (citation omitted).[7]

Third, this Court has never addressed the issue of prejudgment interest in the context of interstate original actions. While the Court is certainly free to adopt the common law rule here, the nature of this Court's original jurisdiction and its broad discretion in formulating fair and equitable remedies in such cases, see *Texas* v. *New Mexico*, 482 U.S. at 130, may provide a basis for the Court to modify or reject a common law rule developed in other contexts. For example, in *Texas* v. *New Mexico*, the Court rejected New Mexico's contention that it was precluded from awarding post-judgment interest in the absence of any statute authorizing such interest. *Id.* at 133 n.8.[8]

In sum, the Master has provided a sound basis for rejecting Colorado's categorical rule at this interme-

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[7] Furthermore, the courts have recognized an established exception to the rule against prejudgment interest for suits in admiralty, where the rule was that prejudgment interest was recoverable except in "peculiar" or "exceptional" circumstances. See *City of Milwaukee*, 515 U.S. at 194 (collecting cases). A similar exception existed for parties owing debts to the Federal Government, including debts owed by state and local governments. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 533-534 (1993); *Board of Comm'rs* v. *United States*, 308 U.S. 343, 350-353 (1939).

[8] New Mexico had relied in part on the Court's opinion in *Pierce* v. *United States*, 255 U.S. 398, 406 (1921), which, after noting the common law rule that judgments do not bear interest, held that post-judgment interest may not be awarded in the absence of statutory authority. Emphasizing its broad discretion in original jurisdiction cases, the Court declared that "we are not bound by this rule in exercising our original jurisdiction." *New Mexico*, 482 U.S. at 133 n. 8.

diate stage of the remedial proceedings. We submit that the ultimate merits of those arguments are best evaluated in the context of the Master's recommendation of a final remedy. We accordingly urge the Court to overrule Colorado's exception on the ground that it is not yet ripe for this Court's conclusive resolution.

CONCLUSION

The exceptions of Colorado to the second report of the Special Master should be overruled without prejudice to Colorado's right to renew those exceptions, if necessary, at the conclusion of the Master's remedial proceedings.

Respectfully submitted.

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