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 Second Report
Of The Special Master

REPLY BRIEF FOR KANSAS OPPOSING THE EXCEPTIONS OF COLORADO

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QUESTIONS PRESENTED

This Court has held that water or money may be awarded to an aggrieved State for the breach of a compact apportioning an interstate stream. *Texas v. New Mexico*, 482 U.S. 124, 130 (1987). The Court has determined that such a breach occurred in this case. The questions presented are:

1. If the aggrieved State's remedy includes money damages, does the Eleventh Amendment to the United States Constitution preclude those damages from being measured, in part, by the value of the water to water users of the aggrieved State?

2. Does the unliquidated nature of the aggrieved State's claim bar the award of prejudgment interest as a matter of law?

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REPLY BRIEF FOR KANSAS OPPOSING THE EXCEPTIONS OF COLORADO

The State of Kansas submits this Reply Brief in support of the Second Report of Arthur L. Littleworth, Special Master, and in opposition to the State of Colorado's Exceptions and Brief.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The Colorado Exceptions involve:

1. The Eleventh Amendment to the United States Constitution:

> "The 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, or by Citizens or Subjects of any Foreign State."

2. The Arkansas River Compact, 63 Stat. 145 (1949), which is set forth in the Appendix to Colorado's Brief In Support of Colorado's Exceptions to the Second Report of the Special Master.

STATEMENT

The Special Master submitted his Second Report in this proceeding on September 8, 1997, setting forth his recommendations to the Supreme Court on matters tried and briefed since the issuance of the Opinion of the Court

in *Kansas v. Colorado*, 514 U.S. 673 (1995). The Court received and ordered filed the Second Report and set the schedule for filing exceptions and briefs. *Kansas v. Colorado*, 118 S. Ct. 39 (1997). Colorado has filed two Exceptions to the Second Report of the Special Master and a Brief in Support Thereof ("Colorado Brief"). Kansas has filed no exceptions to the Second Report.

In this original action Kansas seeks enforcement of the Arkansas River Compact (Compact) against Colorado. The Special Master found in the First Report of Special Master, *Kansas v. Colorado*, No. 105, Orig. (July 1994) (First Report) that "the evidence clearly showed that postcompact well pumping in Colorado had seriously depleted Arkansas River flows into Kansas in violation of the compact." Second Report 1. The Compact requires that waters of the Arkansas River not be materially depleted in usable quantity or availability for use to the water users of Colorado and Kansas. Article IV-D. In its May 1995 Opinion, the Court accepted the Special Master's conclusion that postcompact well pumping in Colorado had caused material depletions of usable Stateline flows in violation of the Compact. *Kansas v. Colorado*, 514 U.S. 673, 693-694 (1995). Since the Court's Opinion, trial and briefing have proceeded before the Special Master regarding quantification of the depletions in violation of the Compact for the period 1950-1994, consideration of Colorado's efforts to show that it has come into current compliance with the Compact, and consideration of legal issues related to remedies for past depletions. Second Report 2. No evidence has yet been taken on the amount of money damages or on whether repayment should be in water or money.

As a result of these recent proceedings, the Special Master has recommended that the Court find that depletions in violation of the Arkansas River Compact for the period 1950-1985 are the stipulated amount of 328,505 acre-feet[1] and that depletions for the period 1986-1994 are 91,565 acre-feet. In addition, he has recommended approval of his denial of Kansas' Motion For Injunction, by which Kansas sought to require Colorado to come into immediate compliance with the Compact. The Special Master has determined that, although Colorado has yet to show that it is in compliance, it is making sufficient efforts to preclude the need for interim injunctive relief at this point in time. Further, the Special Master has requested that the Stipulation between the States regarding credits associated with the Offset Account in John Martin Reservoir for Colorado Pumping, established by the Arkansas River Compact Administration jointly with the U.S. Army Corps of Engineers in 1997, be approved; that evidence be received on whether the remedy for past damages be in water or in money; that, if money damages are awarded, those damages be based upon Kansas' loss rather than upon any gain to Colorado, subject to the overriding consideration that the remedy provide a fair and equitable solution; that, if the remedy includes money damages, the Eleventh Amendment to the U.S. Constitution be determined not to preclude basing the damages to Kansas, in part, on losses incurred by its water users, again subject to the overall consideration of

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[1] One acre-foot is 325,851 gallons. The Supreme Court Courtroom inside the pillars has a volume of approximately 3⅓ acre-feet.

fairness; and that the unliquidated nature of Kansas' claim not bar the award of prejudgment interest, whether the remedy includes money damages or water repayment. Second Report 112-114, ¶¶ 1-9.

In the first trial phase, Colorado offered its own model to quantify the effects of postcompact pumping. After the 1995 Opinion, Colorado withdrew its own model in light of the fact that it showed greater depletions than the original Kansas H-I Model. *Id.*, at 7-10, 19. In his Second Report, the Special Master approved changes to the Kansas H-I Model that cause it to account for depletions due to postcompact well pumping that are considerably greater than those produced in the first trial phase by the original version of the H-I Model. *Id.*, at 20. Based on that earlier version of the H-I Model, the States stipulated that the depletions by Colorado of usable flow in violation of the Compact, for the period 1950-1985 were 328,505 acre-feet. *Id.*, at 11. The Special Master has determined, however, that there are "solid indications" that the H-I Model as used to arrive at the 328,505 figure "may well underestimate depletions." *Id.*, at 11, 20. This conclusion was based on testimony by experts for both States. See *id.*, at 20. In fact, for the period 1986-1994, the Kansas H-I Model approved by the Special Master showed depletions to usable Stateline flow of 91,565 acre-feet while the unchanged H-I Model proposed by Colorado calculated usable depletions of only 30,700 acre-feet. Second Report 46. The ratio of depletions of Stateline flow to postcompact pumping varies depending on the time period selected. See, *e.g.*, *id.*, at 19.

The Colorado Statement of the Case asserts that Kansas complained for the first time about postcompact well

development in Colorado in 1984. Colorado Brief 2, 4. While this is true, Colorado neglects to point out the Special Master's conclusion that Kansas was not guilty of inexcusable delay in making its well-pumping claim and that Colorado had not been prejudiced by Kansas' failure to press its claim earlier. *Kansas v. Colorado*, 514 U.S., at 687. The Court overruled Colorado's exception to that determination. *Id.*, at 687-689. Moreover, as late as 1985, Colorado officials refused to permit an investigation by the Arkansas River Compact Administration of well development in Colorado because, they claimed, the evidence produced by Kansas did not suggest that well development in Colorado had had an impact on usable Stateline flow. *Id.*, at 689.

The Colorado Statement also asserts that the Special Master described Colorado's compliance efforts as showing "a most impressive record" and "remarkable" progress. Colorado Brief 3. Actually, the "most impressive record" referred to by Colorado is taken from this statement of the Special Master: "These reports, and the extensive testimony of the Colorado State Engineer and others, show a most impressive record in *beginning* to control postcompact pumping." Second Report 47 (emphasis added). Likewise, Colorado's claim of "remarkable" progress refers to this statement of the Special Master: "*[G]iven the ineffectual and frustrating history of Colorado's previous efforts to regulate wells,* the State's current progress is quite remarkable." *Ibid.* (emphasis added); see also, *e.g.*, First Report 139 ("Colorado allowed hundreds of wells to be constructed in the river alluvium without regard to their impact upon the surface flows of the Arkansas River, either in Colorado or in Kansas."). The

Special Master also noted that Kansas has substantial concerns about the sufficiency of the current efforts, which is still unproved by Colorado. Second Report 47, 54-56. To date, Colorado has not shown that it has brought its water users into compliance with the Compact. See Second Report 113, ¶ 4.

SUMMARY OF ARGUMENT

With regard to its first Exception, the State of Colorado would have this Court upend much of its jurisprudence regarding the status, interpretation, and enforcement of interstate compacts approved by Congress. Colorado seeks to achieve this goal by asking the Court to ignore the Court's precedents with regard to interstate compacts in favor of Colorado's arguments based on cases that did not involve compacts.

Colorado also seeks to avoid this Court's precedents by suggesting that Kansas is seeking money damages owed to Kansas' water users which could be collected directly by the water users but for the Eleventh Amendment to the U.S. Constitution. The State of Kansas seeks nothing of the kind. Kansas simply seeks a contract remedy for breach of the Arkansas River Compact, which is, after all, a contract. The Special Master has determined that Colorado has violated its obligations under the Arkansas River Compact by failing to deliver some 420,000 acre-feet of water for the period 1950-1994. Colorado has filed no exception on that point. Kansas asks for the value of the water which should have been delivered to the State of Kansas at the Stateline, and related losses,

including diminution in the value of Colorado's performance occasioned by its delay.

This Court has stated in no uncertain terms that it has complete judicial power to provide one State a remedy for the breach by another State of an interstate compact. The effect of adopting Colorado's position on its Exceptions would be to eviscerate the remedy the Court has declared it will provide. Colorado asserts that Kansas is entitled to recover for its proprietary and quasi-sovereign interests so long as Kansas does not recover losses to its citizens. But there is little recovery left if Kansas' losses cannot be measured, in part, by the value of water to the Kansas farmers and other Kansas citizens.

The Colorado argument against allowing "recovery for losses to Kansas farmers" dissipates when it is realized that the loss to Kansas farmers is merely a measure, perhaps the best available measure, of a part of the damages to the State of Kansas. The damages to the State of Kansas consist in part of the value of some 420,000 acre-feet not delivered by Colorado in violation of the Arkansas River Compact between 1950 and 1994. Appraisals of the value of water at the time that Colorado illegally withheld it may also be available, and, if reliable, such evidence would be offered by Kansas in support of its claim for damages. It is anticipated, however, that for much of the period of Colorado's noncompliance the method of valuing the water illegally withheld will consist of evidence of the value the water would have had in the hands of Kansas farmers. That is not to say that Kansas is seeking recovery for its farmers or that it stands in the shoes of its farmers. Rather, Kansas is seeking damages in its own right as a sovereign State and party to

the Compact, and it expects to measure those damages, in part, by the value of the water in question to Kansas farmers in some or all of the years in question.

Further, as explained below, Kansas' quasi-sovereign interests provide an independent basis, consistent with the Eleventh Amendment, for the recovery Kansas seeks.

With regard to Colorado's second Exception, this Court has held that the award of prejudgment interest is in no way punitive, but rather, is a basic element of a complete remedy. This Court has long recognized that claims that are unliquidated when brought should nevertheless normally constitute the basis for awarding interest to the aggrieved party for the loss in value resulting from the defendant's delay in performance. This doctrine has been recognized not only between private parties, but also where a State is the defendant. Awarding such interest simply provides the aggrieved plaintiff with a complete remedy for losses suffered.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR KANSAS' CLAIM FOR BREACH OF THE COMPACT IN THIS PROPER ORIGINAL ACTION

The Special Master determined that a case between sister States involving sovereignty or quasi-sovereignty is regarded strictly as state litigation, to which the Eleventh Amendment does not apply. Second Report 103 (citing *Maryland v. Louisiana*, 451 U.S. 725, 745, n. 21 (1981)). The Special Master relied, in particular, on this Court's pronouncement in *Texas v. New Mexico*, 482 U.S. 124 (1987), that "[i]n *proper original actions, the Eleventh Amendment is*

no barrier, for by its terms, it applies only to suits by citizens against a State." Second Report 102 (quoting *Texas v. New Mexico,* 482 U.S., at 130) (emphasis in Second Report).

The Special Master's determination finds strong support in this Court's Eleventh Amendment decisions dating from the time of the Amendment's adoption through the present day. As this Court most recently emphasized, the sovereign immunity enacted by the Eleventh Amendment does not extend to cases "where there has been ' "a surrender of this immunity in the plan of the convention." ' " *Idaho v. Coeur d'Alene Tribe,* 117 S. Ct. 2028, 2033 (1997) (quoting *Principality of Monaco v. Mississippi,* 292 U.S. 313, 322-323 (1934) (quoting The Federalist No. 81)). One of the types of cases in which there has been a surrender of immunity is suits between sister States. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1991); *Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 720 (1838). The States, by ratifying the plan of the convention, consented to this Court's "complete judicial power to adjudicate disputes among them" in original actions. *Texas v. New Mexico,* 482 U.S., at 128.[2] No such judicial power could be exercised if the States had reserved their sovereign immunity to such suits.

In short, this Court's

> "original jurisdiction is not affected by the provisions of the Eleventh Amendment which only withholds federal judicial power in suits against

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[2] This surrender of immunity was deemed necessary in the plan of the convention to effect resolution of disputes between the States by means other than diplomacy and war. *Alfred L. Snapp & Son v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 601 (1982); *Kansas v. Colorado,* 206 U.S. 46, 97 (1907).

> a State 'by Citizens of another State, or by Citizens or Subjects of any Foreign State.' Thus, an original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals." *Maryland v. Louisiana*, 451 U.S. 725, 745, n. 21 (1981).

The Court's qualification is necessary to prevent circumvention of the Eleventh Amendment "by the simple expedient of bringing an action in the name of a State" to redress private grievances; a State may not invoke this Court's original jurisdiction "to prosecute purely personal claims of [its] citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). Rather,

> "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Ibid.*

The Special Master concluded that Kansas' suit is no mere expedient by which to raise private grievances of its citizens:

> "Of course, this action is no mere contrivance by Kansas to obtain damages for its water users. Rather, it is the State of Kansas that seeks damages, which it contends should be measured in part by the losses suffered by individual farmers." Second Report 88.

The Special Master added,

> "So long as the suit is not a subterfuge for recovery by individuals on their individual claims, quasi-sovereignty militates against rejection of any relevant evidence of injury." *Id.*, at 101.

Again, the Special Master's conclusion is well grounded in this Court's decisions, including *Texas v. New Mexico* in particular. It is unmistakable from that decision that this Court contemplated a damages remedy based on losses to water users in the plaintiff State, Texas. In reference to the question of who should actually receive such a remedy, this Court acknowledged,

> "It might be said that *those users who have suffered the water shortages* caused by New Mexico's underdeliveries over the years, rather than the State, *should be the recipients of damages* . . . . " 482 U.S., at 131 (emphasis added).

This Court also acknowledged Texas's objection to a monetary remedy on the ground that "a money judgment might find its way into the general coffers of the State, *rather than benefit those who were hurt.*" *Id.*, at 132, n. 7 (emphasis added). This Court ruled, however, that

> "the basis on which Texas was permitted to bring this original action is that enforcement of the Compact was of such general public interest that the sovereign State was a proper plaintiff," *ibid.*,

and that Texas accordingly "should recover any damages that may be awarded, money it would be free to spend in the way it determines is in the public interest." *Ibid.* This is a determination not that the Eleventh Amendment precludes evidence of losses sustained by "users who have suffered the water shortages," but that the plaintiff State is the proper party to seek recovery in the general public interest for a breach of the compact. Referring to *Texas v. New Mexico*, the Special Master in this case concluded, "It is the same situation here. Any damages will

go to the State of Kansas, to be spent as it decides, and not to individual water users." Second Report 89.

Colorado nonetheless insists that Kansas is seeking "to present and enforce individual claims of its citizens." Colorado Brief 9. The Special Master carefully considered and rejected this contention. Unlike the cases on which Colorado relies, Kansas' suit is not a subterfuge for recovery by individuals on their individual claims. Rather, as a sovereign party to the Arkansas River Compact and the representative of the general public interest within Kansas, the State of Kansas is asserting both sovereign and quasi-sovereign interests that it alone can enforce.

Colorado thus misapprehends the nature of Kansas' claim in this suit. Kansas does not purport "to present and enforce individual claims of its citizens," Colorado Brief 9. Rather, Kansas simply seeks to recover the value of the water that Colorado failed to deliver to it at the Stateline. One method of proving that value, and often the only available method, is to determine the value that the water likely would have produced for individual users (as measured in crop yields, for example). Restoration of that value to Kansas is not a recovery on individual claims, but merely a measure of the damages that Kansas itself has suffered as a result of Colorado's breach of the Compact.

As the Special Master correctly recognized, Kansas does not act as a collecting agent for individuals' claims when it asserts its own claim for breach of the Arkansas River Compact. Second Report 88. Kansas brings this action as a sovereign party to the Compact. As such it asserts a *sovereign* interest in enforcing its rights under

the Compact. Kansas' demand for recognition of these rights by another sovereign is an "easily identified" sovereign interest that is properly asserted in this interstate action. *Alfred L. Snapp & Son v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 601 (1982). The classic example of one State's demand for recognition from another is a border dispute. *Ibid.*; see, *e.g., Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 725 (1838). Just as a State may demand another sovereign's recognition of rights in land divided by a border, Kansas here seeks Colorado's recognition of rights in interstate waters divided by the Compact. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 106 (1938) (States' authority to apportion waters of interstate stream by compact is equivalent to their authority to adjust State boundaries by compact, which is "a part of the general right of sovereignty") (quoting *Poole v. Fleeger,* 36 U.S. (11 Pet.) 185, 209 (1837)).

" '[A] Compact is, after all, a contract.' " *Texas v. New Mexico,* 482 U.S., at 128 (quoting *Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)). Kansas is one of the two sovereign parties to that contract, and this Court has stated firmly that it can and will "provide one State a remedy for the breach of another," whether in water or in money. *Id.,* at 128-130. Kansas does not raise private or personal claims of individuals under the Compact for the simple reason that no such claims exist. As the Special Master recognized, Kansas is the party to the Compact while its water users are not. Second Report 103. Indeed, Colorado itself asserts that "Kansas water users do not have a remedy" for Colorado's breach of the Compact. *Id.,* at 100; accord Colorado Brief 23. At Colorado's request, this Court

enjoined Kansas water users from prosecuting individual claims to water in the Arkansas River in the case that formed the basis for the Compact. *Colorado v. Kansas*, 320 U.S. 383, 388, 391 (1943); see Arkansas River Compact, Article II.

The plain language of the Compact similarly establishes that Kansas citizens have no claim to waters of the Arkansas River except under Kansas' authority. The Compact provides that its references to the State of Kansas "shall be construed to include any person" claiming rights to the Arkansas River under the State's authority. Arkansas River Compact, Article VII-A. Moreover, a stated purpose of the Compact was to settle controversies not only between the States of Kansas and Colorado but also "between citizens of one and citizens of the other State." Arkansas River Compact, Article I-A. These terms confirm that Kansas' rights under the Compact subsume the interests of its citizens and that Kansas is the only party that can seek enforcement of those rights and interests.[3]

Colorado contradictorily argues that the Eleventh Amendment does not bar Kansas' remedy as long as the remedy takes the form of water rather than money. Colorado Brief 22; see Second Report 89-90 (observing that

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[3] Colorado argues that although the Compact settles disputes between one State and the other, and between the citizens of one State and the citizens of the other, it does not settle disputes between one State's citizens and the other State. Colorado Brief 21. But this fine parsing of Article I-A ignores the provision in Article VII-A that the term "State" shall be construed to include its water users.

Colorado's proposed water remedy, which would benefit individual water users, is inconsistent with its position on the Eleventh Amendment). Colorado emphasizes, "Water would be delivered *to Kansas*. Delivery to, and benefits to, Kansas water users are matters left to Kansas." Colorado Brief 22 (Colorado's emphasis). Of course, the same is true of money: "Any damages will go to the State of Kansas, to be spent as it decides, and not to individual water users." Second Report 88-89. Kansas merely seeks recovery of the monetary equivalent of the water that, under Colorado's proposal, would be delivered to the Stateline.

Colorado also contends that the applicability of the Eleventh Amendment depends "not on how the state ultimately spends any damages it may recover, but on the nature and origin of the claims on which damages are based." Colorado Brief 19, n. 11. Yet the "nature and origin of the claim" that Kansas asserts are surely the same whether recovery on that claim is in the form of water or money. Kansas' claim has its nature and origin in the Compact and the Eleventh Amendment is no barrier to a monetary remedy for such a claim. *Texas v. New Mexico*, 482 U.S., at 130.

In sum, Colorado wholly ignores Kansas' *sovereign* interest in rectifying Colorado's breach, characterizing Kansas' interests in this case solely as *quasi-sovereign*. Colorado Brief *passim*. Colorado's failure to recognize Kansas' sovereign rights under the Compact leads Colorado to its unfounded assertion that Kansas is overstepping the bounds of its quasi-sovereign interests.

Over and above its sovereign interest in enforcing the Compact, however, Kansas does indeed have quasi-sovereign interests that constitute an adequate and independent basis for the recovery that Kansas seeks. See *Alfred L. Snapp & Son v. Puerto Rico, ex rel., Barez*, 458 U.S., at 601-602 ("[q]uasi-sovereign interests stand apart from" other interests, such as sovereignty, that the State may assert). One of this Court's first decisions to recognize the concept of quasi-sovereignty was *Kansas v. Colorado*, 206 U.S., at 99, which held, in the absence of an interstate compact, that Kansas was entitled to invoke this Court's original jurisdiction over its claim that Colorado had diverted excessive amounts of water from the Arkansas River. The Court explained:

> "In this respect [Kansas] is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. *Georgia v. Tennessee Copper Co.*, decided this day, *post*, p. 230." *Ibid.*

Colorado concedes that here, too, Kansas is not acting *solely* for the benefit of its individual citizens but rather has quasi-sovereign interests that are properly raised. Colorado Brief 9; see Second Report 86-87 & n. 20. Colorado contends, however, that Kansas' remedy cannot be

based in any measure on losses to individual water users. Colorado Brief 9-14. The decision in *Kansas v. Colorado*, 206 U.S. 46, itself is to the contrary. This Court analyzed whether Kansas should receive more water based on population and crop yields in the areas abutting the Arkansas River in the two States. *Id.*, at 108-113. It was precisely the uses made by individual farmers – or the diminution in such uses – that this Court deemed relevant to the issue of whether Kansas was entitled to relief.

This Court reached the same result more explicitly in a series of decisions concerning the apportionment of the Laramie River. *Wyoming v. Colorado*, 259 U.S. 419, modified, 260 U.S. 1 (1922), vacated and new decree entered, 353 U.S. 953 (1957); *Wyoming v. Colorado*, 286 U.S. 494 (1932); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Wyoming v. Colorado*, 309 U.S. 572 (1940). Under those decisions, a State's interests in the apportionment of an interstate stream are "indissolubly linked" with the interests of its water users, 286 U.S., at 509; 259 U.S., at 468, and the States' rights under the equitable apportionment decree in that proceeding were based on the rights of their water users, 259 U.S., at 468; see 309 U.S., at 579-580. Here, the Special Master reasoned that if evidence of individual uses can be the basis of a decree apportioning water between two States, as in *Wyoming v. Colorado*, it can likewise be the basis of a claim for breach of the Compact apportioning water between two States. Second Report 103.

Colorado seeks to distinguish the Laramie River decisions on the ground that, "[a]lthough the states' apportionments were based on use by their respective water users, they were not the *same* as those individual claims."

Colorado Brief 20 (Colorado's emphasis). But this assertion actually supports the Special Master's recommendation. For although Kansas' claim for damages is *based* (in part) on evidence of the value of water to individuals as a function of the uses that they would make of it, its claim is not the *same* as any individuals' claims. Kansas' rights in the waters of the Arkansas River transcend an aggregation of its citizens' simple property rights. *Kansas v. Colorado*, 206 U.S., at 99; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

The Colorado Brief gives greatest prominence to the decision in *North Dakota v. Minnesota*, 263 U.S. 365 (1923). Colorado Brief 6, 8, 10-12. As the Special Master observed, however, this Court's basis for dismissing North Dakota's claims for damages on behalf of individual farmers was that "recovery was sought for the claimants themselves." Second Report 95. The individual claimants were financing the State's prosecution of the case, each claimant expected to share in any award of damages "in proportion to the amount of his loss," and it was "inconceivable that North Dakota [was] prosecuting this damage feature of its suit without intending to pay over what it thus recover[ed] to those entitled." 263 U.S., at 375. Simply stated, North Dakota was acting as a collecting agent for specific individuals. See Second Report 95.

The other cases on which Colorado principally relies likewise involved a State's prosecution of claims as a collecting agent for identified individuals. In *New Hampshire v. Louisiana*, 108 U.S. 76, 89 (1883), each of two plaintiff States was

> "nothing more nor less than a collecting agent 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."

In *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395-396 (1938), the plaintiff State took legal title to claims against the stockholders of a private, insolvent bank as a "mere expedient for the purpose of collection," and the State sought recovery "solely for the benefit of the depositors and creditors of the bank." It was thus determined that each of these suits was improper and should be dismissed.

As the Special Master observed, more recent decisions applying the concept of quasi-sovereignty only strengthen the determination that Kansas may properly seek recovery measured by the harm to its water users. Second Report 97-98 (noting that in recent years "there has been some development of the Court's attitude toward the coupling of private claims with those of a state suing as quasi-sovereign"). In particular, *Maryland v. Louisiana*, 451 U.S., at 739, holds that a State may pursue its claim in an original action when (1) it alleges substantial and serious injury to its proprietary interests, and (2) it seeks to represent a great many citizens who are not "likely" to have the incentive or recourse to assert their claims individually. Here, Colorado does not dispute that Kansas properly seeks relief for injury to its own proprietary rights. Second Report 86-87 & n. 20. Kansas also seeks relief measured in part by the value of water to a great many water users affected by Colorado's admitted

breach of the Compact. Even insofar as such water users can be identified, they "cannot be expected to litigate" individual claims, *Maryland v. Louisiana*, 451 U.S., at 739, for two reasons in this case: (1) Colorado itself contends that they are foreclosed from any judicial recourse in their own right, Second Report 100; Colorado Brief 23; see *Maryland v. Louisiana*, 451 U.S., at 739; and (2) at the request of Colorado, this Court enjoined their predecessors in 1943 from pursuing private actions against Colorado interests for water from the Arkansas River, *Colorado v. Kansas*, 320 U.S., at 388, 391.

Colorado asserts that most quasi-sovereignty decisions have involved claims for injunctive relief rather than damages and that, although an injunction may properly benefit private individuals, damages awardable to a State must neither benefit individuals nor account for harm to them. Colorado Brief 17. After *Maryland v. Louisiana*, however, it is clear that a State may recover damages for harm to its quasi-sovereign interests and that such a recovery may account for economic harm to a State's citizens. This Court upheld several States' damages claims on behalf of citizens who were natural gas consumers, where the States' claims were based on the consumers' payment of an allegedly unconstitutional state tax. *Maryland v. Louisiana*, 451 U.S., at 739. Similarly, as stated above, *Texas v. New Mexico* implicitly approves a State's recovery of damages measured by harm to the water users who have suffered shortages. 482 U.S., at 131-132 & n. 7.

The decision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), on which Colorado relies, explicitly disclaims any determination that the Eleventh Amendment bars a

State from seeking damages for harm to its citizens. In holding that Hawaii could not recover damages under the antitrust laws for harm to its citizens, this Court emphasized,

> "The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act." *Id.*, at 259.[4]

These decisions go further than is necessary in this case in order to recognize Kansas' claim under the Compact. Kansas does not seek damages owed to its citizens. It does not seek recovery of its citizens' personal claims. Kansas simply seeks to recover as a contracting party "the loss in value to [Kansas] of [Colorado's] performance caused by its failure or deficiency," Restatement (Second) of Contracts § 347(a) (1979), as measured in part

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[4] One law review article on which Colorado relies (authored by counsel for the defendants in several *parens patriae* antitrust suits) declares that States' damages claims on behalf of their citizens "represent a perversion, rather than a consistent development[,] of the concept" of quasi-sovereignty. Malina & Blechman, *Parens Patriae* Suits for Treble Damages under the Antitrust Laws, 65 Nw. U. L. Rev. 193, 223 (1970). But *Maryland v. Louisiana* effectively rejects this view. Another law review article that Colorado cites actually conflicts with Colorado's position because, consistent with *Maryland v. Louisiana*, the article argues that a State may recover damages for harm to its quasi-sovereign interests "when the damage is done to the citizens of a state, but no individual is able to sue because his injuries are not legally recognizable." Comment, State Protection of its Economy & Environment: *Parens Patriae* Suits for Damages, 6 Colum. J. L. & Soc. Prob. 411, 417 (1970); cf. *Maryland v. Louisiana*, 451 U.S., at 739.

by the value that the water would have yielded to water users in Kansas if it had been delivered as promised. The Eleventh Amendment does not impair Kansas' right to a suitable remedy, whether in water or money, for Colorado's breach of the Compact. *Texas v. New Mexico*, 482 U.S., at 130.

II. THE UNLIQUIDATED NATURE OF KANSAS' CLAIM FOR DAMAGES DOES NOT BAR THE AWARD OF PREJUDGMENT INTEREST AS PART OF A COMPLETE REMEDY FOR COLORADO'S BREACH OF THE COMPACT

The timing of performance by Colorado of its duties to deliver water under the Compact is essential: "The critical matter is the amount of divertible flow at times when water is most needed for irrigation." *Kansas v. Colorado*, 514 U.S., at 685. It is therefore appropriate that the Special Master allowed for the possibility of prejudgment interest, recommending:

> "That the unliquidated nature of Kansas' claim for damages does not bar the award of prejudgment interest, whether the remedy includes money damages or water repayment; that the possible award of prejudgment interest will depend upon the evidence presented in future trial proceedings." Second Report 113-114, ¶ 9.

The Special Master supports this recommendation persuasively, Second Report 105-111, noting this Court's observation that "the venerable common-law rule that prejudgment interest is not awarded on unliquidated claims . . . has faced trenchant criticism for a number of years" as stated by this Court in *City of Milwaukee v.*

Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 197 (1995) (footnote omitted); Second Report 106. The Court explained: "The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." 515 U.S., at 195.

City of Milwaukee itself serves to refute most of Colorado's arguments. As the Special Master noted, this Court accorded "little weight" to the argument that there was a good faith dispute over liability. 515 U.S., at 196-197; Second Report 109. Likewise, Colorado's arguments that there was a good faith dispute over Compact compliance in this case should also be given little weight. This is consistent with the Court's position that the purpose of prejudgment interest is to compensate the plaintiff for losses suffered rather than to punish the defendant for deliberate wrongdoing or bad faith conduct:

> "If interest were awarded as a penalty for bad faith conduct of the litigation, the City's argument would be well taken. But prejudgment interest is not awarded as a penalty; it is merely an element of just compensation." 515 U.S., at 197.

The Court concluded:

> "In sum, the existence of a legitimate difference of opinion on the issue of liability is merely a characteristic of most ordinary lawsuits. It is not an extraordinary circumstance that can justify denying prejudgment interest." 515 U.S., at 198.

The Special Master also noted the statement by the Court in *City of Milwaukee* that a "*denial* of prejudgment interest would be unfair." Second Report 109 (citing *City*

of Milwaukee, supra, at 199 (emphasis in the Court's opinion)). Thus, while Colorado asserts that imposition of prejudgment interest would be unfair when there is a good faith dispute over liability, *City of Milwaukee* holds that, absent exceptional circumstances, denial of prejudgment interest would itself be unfair.

Although *City of Milwaukee* arose in the admiralty context, its rationale is far broader. As the Court stated, "We have recognized the compensatory nature of prejudgment interest in a number of cases decided outside the admiralty context." 515 U.S., at 195, n. 7 (citations omitted). The Court's first cited example was *West Virginia v. United States,* 479 U.S. 305 (1987), which, like this case, was an action to enforce a contractual obligation against a State. The Court awarded prejudgment interest against West Virginia notwithstanding the absence of a statute authorizing such an award, on the ground that "[p]rejudgment interest is an element of complete compensation." *Id.,* at 310 (citation and footnote omitted). The Court went on to say:

> "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *Id.,* at 310, n. 2.

As the Special Master points out, the trend away from the rule barring interest on unliquidated damages is clear: "[T]he compensatory rationale for prejudgment interest has emerged as the dominant principle." Second Report 109-110. Following *West Virginia v. United States,* Judge Posner stated:

> "The areas in which interest is allowed . . . are diverse. The time has come, we think, to generalize, and to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay." *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989).

As the Special Master noted, courts have recognized that, if prejudgment interest is not awarded, the defendant may have an incentive to delay payment. Second Report at 107 (citing D. Dobbs, Law of Remedies § 3.6(3) (2d ed. 1993); accord *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir. 1992) (per curiam) ("An injurer allowed to keep the return on this money has profited by the wrong.").

Colorado makes several additional arguments against an award of prejudgment interest. First it suggests that there must be a clear obligation to pay prejudgment interest before this Court should award it. Colorado Brief 24. Colorado's position seems to be that, if the Compact does not expressly state that interest will be due for violations of the Compact, then no such interest should be allowed. Such an approach to the interpretation and enforcement of interstate compacts would be contrary, however, to the jurisprudence of this Court. In *Texas v. New Mexico*, 482 U.S. 124 (1987), the Court stated, with regard to enforcement of the Pecos River Compact:

> "A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact

> occurred and the nature of the remedy called for. Restatement (Second) of Contracts § 33(2), and Comment *b* (1981)." 482 U.S., at 129.

Significantly, the Court then went on to hold that the absence from the Pecos River Compact of any explicit remedy provision, let alone a specific provision authorizing money damages, did not preclude the Court from providing not only a remedy but a remedy in money damages (if "fair and equitable") for past violations of the Pecos River Compact. Likewise, awarding prejudgment interest as part of those money damages is well within the Court's "complete judicial power . . . to provide one State a remedy for the breach of another." *Id.*, at 128.

Colorado also criticizes the Special Master's reliance on cases involving statutory awards of prejudgment interest. Colorado Brief 25. But as the Court said in *City of Milwaukee*:

> "Far from indicating a legislative determination that prejudgment interest should not be awarded, however, the absence of a statute merely indicates that the question is governed by traditional judge-made principles." 515 U.S., at 194.

Moreover, this Court has already approved an award of prejudgment interest on a contractual obligation in an action against a State in the absence of a statute authorizing such interest. In *West Virginia v. United States, supra,* this Court approved the award of prejudgment interest against the State of West Virginia, saying,

> "In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due." 479 U.S., at 308-309 (citations omitted).

In *West Virginia*, the Court noted that the state law of the defendant State allowed prejudgment interest. 479 U.S., at 312, n. 5. Similarly here, although it is not controlling, Colorado law itself recognizes that interest is necessary to provide a complete remedy and that prejudgment interest may be awarded even on unliquidated claims. See, *e.g.*, *Davis Cattle Co. v. Great Western Sugar Co.*, 393 F. Supp. 1165, 1181-1195 (D. Colo. 1975) (applying Colorado law), aff'd, 544 F.2d 436, 441-442 (10th Cir. 1976), cert. denied, 429 U.S. 1094 (1977). More recently, the Colorado Supreme Court has stated: "When a Court appropriately applies the doctrine of unjust enrichment, the unjustly enriched party is generally liable for interest on the benefits received." *Martinez v. Continental Enters.*, 730 P.2d 308, 317 (Colo. 1986) (citing D. Dobbs, Law of Remedies § 3.5 (1973)); see also Rothschild, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192, 204-206 & nn. 74-76, 80 (1982). Colorado statutes now *require* prejudgment interest to be paid for property wrongfully withheld whether the amount is liquidated or not. Colo. Rev. Stat. § 5-12-102 (1973). The State itself is subject to this rule when it is a defendant in its own courts. *Wilkerson v. State*, 830 P.2d 1121, 1127 (Colo. App. 1992). Thus, although Colorado urges this Court not to "cast aside" the rule against awarding prejudgment interest on unliquidated claims, Colorado Brief 26, Colorado itself has already done so for cases brought under Colorado law.

In sum, this Court has stated a broad rationale for awarding prejudgment interest whether or not the underlying claim is liquidated. Consistent with this rationale, the Special Master noted that "a majority of jurisdictions reject the strict, traditional approach to awarding prejudgment interest." Second Report 107 (citing Rothschild, *supra*, at 204). The Court should apply the same rationale in this case.

III. COLORADO'S PREDICTIONS OF "FAR-REACHING AND UNINTENDED CONSEQUENCES" ARE UNFOUNDED

Colorado concludes its Brief by predicting a string of "far-reaching and unintended consequences," including the following: (1) an unprecedented expansion of the concept of quasi-sovereignty; (2) increased interstate litigation; (3) decreased resolution of interstate disputes through mutual accommodation and agreement; (4) increased risk of double recoveries; and (5) increased delay in enforcing interstate compacts. Colorado Brief 27-30. Each of these predictions is unfounded.

The prediction of an "unprecedented expansion of the concept of quasi-sovereignty" is simply a restatement of Colorado's erroneous position on quasi-sovereignty. Like the rest of the Colorado Brief, it misses the point that Kansas is seeking to enforce its sovereign rights under the Compact, not merely its quasi-sovereign interests. Colorado argues that, if the Court overrules its exceptions, litigation between States in this Court would be encouraged by "opening the door to recovery for losses to individuals." Colorado Brief 29. But Kansas is not

pressing its quasi-sovereign rights to recover "losses to individuals." Rather, Kansas seeks the appropriate remedy, that is, a complete remedy, for the losses to the State of Kansas caused by Colorado's breach of its obligations to the State of Kansas under the Compact. Indeed, this Court has emphasized the need to afford a State a remedy for past breaches of an interstate water allocation compact. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Moreover, as explained above, allowing recovery for the actual losses of citizens would be within the accepted doctrine of quasi-sovereignty as set out in *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981).

Colorado further asserts that formation of compacts will be discouraged by a result that would expand the effect of the Arkansas River Compact beyond its terms for a violation which was not deliberate or willful, and for which no statute of limitations has been recognized. Colorado Brief 28-29. But under essentially similar circumstances the Court answered a similar argument from New Mexico in the Pecos River litigation as follows:

> "[G]ood-faith differences about the scope of contractual undertakings do not relieve either party from performance. . . . There is often a retroactive impact when courts resolve contract disputes about the scope of a promisor's undertaking; parties must perform today or pay damages for what a court decides they promised to do yesterday and did not. In our view, New Mexico cannot escape liability for what has been adjudicated to be past failures to perform its duties under the Compact." *Texas v. New Mexico*, 482 U.S. 124, 129 (1987).

What Colorado is trying to do is exactly what this Court would not allow New Mexico to do, that is, to escape the lion's share of liability for past failures to deliver water as required under an interstate compact. In *Texas v. New Mexico*, the Court rejected a notion similar to that proposed here by Colorado:

> "We find no merit in [New Mexico]'s submission that we may order only prospective relief, that is, requiring future performance of compact obligations without a remedy for past breaches. If that were the case, New Mexico's defaults could never be remedied. . . . [A] Compact when approved by Congress becomes a law of the United States, but '[a] Compact is, after all, a contract.' It remains a legal document that must be construed and applied in accordance with its terms." 482 U.S., at 128 (citations omitted).

When Colorado entered into the Arkansas River Compact, it fully realized the solemn nature of the obligations it was undertaking. Ten years before the Arkansas River Compact negotiations were completed, this Court said:

> "Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, *the apportionment is binding upon the citizens of each State and all water claimants*, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).

The *Hinderlider* case was decided some five years before the decision in *Colorado v. Kansas*, 320 U.S. 383 (1943), which contained the suggestion to the States of Colorado

and Kansas that they resolve the equitable apportionment of the Arkansas River through compact negotiations. *Id.*, at 392 (citing, *inter alia, Hinderlider v. La Plata River & Cherry Creek Ditch Co.).* Shortly thereafter, compact negotiations were undertaken by Colorado and Kansas, and the Arkansas River Compact was agreed to by the negotiators in 1948 and approved by the legislatures and Congress in 1949. 1949 Colo. Sess. Laws 485, § 1, codified at Colo. Rev. Stat. § 37-69-101 (1973); 1949 Kan. Sess. Laws 829, codified at Kan. Stat. Ann. § 82a-520 (1989); Act of Congress of May 31, 1949, 63 Stat. 145. Thus, Colorado had unmistakable notice that this Court would enforce interstate compacts. That notice came from a case involving Colorado itself – Mr. Hinderlider was the Colorado State Engineer. *Hinderlider*, 304 U.S., at 95. Further, if interstate compacts were essentially unenforceable, as Colorado, an upstream State, would seem to prefer, there would be no incentive to undertake the substantial effort on behalf of the States and Congress in negotiating such compacts.

When the auditor of the State of West Virginia refused to issue a warrant for payment of that State's contribution required to be paid under the Ohio River Valley Water Sanitation Compact, 54 Stat. 752 (1940), the controversy was brought to this Court, where it was resolved against West Virginia. The Court stated:

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where

> there is no compact, it must have final power to pass upon the meaning and validity of compacts. *It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified,* or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies, is the function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 28 (1951) (emphasis added).

The Court thus required West Virginia to remedy past failure to comply with the Ohio River Valley Water Sanitation Compact, including payment of money, just as Colorado should be required to comply with the Arkansas River Compact.

Colorado received substantial benefits from entering into the Arkansas River Compact, including the benefits to Colorado "arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes." Arkansas River Compact, Article I-B; see, *e.g.*, First Report 87 ("Absent an agreement between the states, the Corps of Engineers intended to release [conservation storage water from John Martin Reservoir]."). Colorado enjoys many benefits on the Arkansas River which are protected by the Arkansas River Compact, but it must also recognize and

comply with its rightful obligations under that same Compact.

Colorado asserts that States are seeking to vindicate quasi-sovereign interests "with increasing frequency" in suits against defendants other than States, and that an increased risk thus exists that such defendants will be exposed to double liability. Colorado Brief 27. While the five lower-court cases over two decades cited by Colorado hardly represent an opening of the floodgates of litigation, Colorado's asserted concerns about the risk of double recoveries are irrelevant in any event to the questions presented here. As the Special Master recognized, Colorado itself contends that Kansas water users are foreclosed from asserting individual claims against Colorado, thus eliminating any such risk in this case. Second Report 100; Colorado Brief 23. Colorado fails to address the Special Master's observation that this Court enjoined, at Colorado's request, the assertion of claims by Kansas farmers against Colorado interests on the Arkansas River. Second Report 100; *Colorado v. Kansas*, 320 U.S. 383, 400 (1943).

Colorado fears that States will be deterred from entering into compacts by the prospect of "potentially enormous damages." Colorado Brief 29. It also suggests that States will be encouraged both to litigate (*i.e.*, to seek too much enforcement) and, contradictorily, to delay litigation (*i.e.*, to seek too little enforcement). *Ibid.*

These fears are belied by the very purpose of contract law. Contract law provides a remedy for breach, ranging from the enormous to the merely nominal, precisely in

order to facilitate commercial relations. "Market efficiency requires effective means to enforce private agreements." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 230 (1995). Thus, it is Colorado's urging to withhold critical components of a complete remedy, not the Special Master's recognition of the need for such a remedy, that would upset the stability of a contractual relationship and would ultimately deter its formation.

> "[Contract law's] basic function is to provide a sanction for reneging, which, in the absence of sanctions, is sometimes tempting where the parties' performance is not simultaneous. . . . The problem arises because the nonsimultaneous character of the exchange offers one of the parties a strategic advantage which he can use to obtain a transfer payment that utterly vitiates the advantages of the contract to the other party. *Clearly, if such conduct were permitted, people would be reluctant to enter into contracts and the process of economic exchange would be retarded.*" A. Kronman & R. Posner, The Economics of Contract Law 4 (1979) (emphasis added).

As for the notion that a complete remedy would encourage too much or too little enforcement, a basic principle of contract law is that the optimal level of enforcement is precisely that which results in a complete remedy for a breach. An interstate compact, as a species of contract, should be enforced in accordance with its terms, *Texas v. New Mexico*, 482 U.S., at 128, because "[a] remedy confined to a contract's terms simply holds parties to their agreements." *American Airlines, Inc. v. Wolens*, 513 U.S., at 229.

CONCLUSION

The State of Kansas respectfully requests that the Court accept the Second Report of the Special Master, overrule Colorado's Exceptions, and remand the case to the Special Master for proceedings not inconsistent with the Second Report and the Opinion of the Court.

Respectfully submitted this 22nd day of December, 1997,

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