No. 105, Original

In The

# Supreme Court of the United States

STATE OF KANSAS,

*Plaintiff,*

v.

STATE OF COLORADO,

*Defendant,*

*and*

UNITED STATES OF AMERICA,

*Defendant-Intervenor.*

**On Exceptions To The Third Report Of The Special Master**

## KANSAS' EXCEPTION AND BRIEF IN SUPPORT THEREOF

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## QUESTION PRESENTED

Is there an exceptional circumstance in this case justifying partial denial of the prejudgment interest necessary to afford Kansas full compensation for Colorado's breach of the Arkansas River Compact?

## EXCEPTION TO THE THIRD REPORT OF THE SPECIAL MASTER

The State of Kansas respectfully excepts to the recommendation of the Special Master that Kansas be denied prejudgment interest, on losses suffered in the years 1950-1968, as part of its damages for Colorado's violations of the Arkansas River Compact.

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# BRIEF IN SUPPORT OF KANSAS' EXCEPTION TO THE THIRD REPORT OF THE SPECIAL MASTER

## I. STATEMENT

The State of Kansas brought this original action against the State of Colorado to enforce the Arkansas River Compact, Act of May 31, 1949, Ch. 155, 63 Stat. 145 ("Compact"). The Compact is reprinted in the Appendix to this Brief. The Court granted Kansas leave to file its Complaint. *Kansas v. Colorado*, 475 U.S. 1079 (1986).

Special Master Arthur L. Littleworth, appointed in 1987, 484 U.S. 910 (1987), has filed three reports with the Court. The First Report recommended that the Court find Colorado liable for violating the Compact by allowing its water users to deplete the waters of the Arkansas River by well pumping. 513 U.S. 803 (1994). The Court overruled the Exceptions of the States to the First Report and determined in accordance with the Special Master's recommendation that Colorado had violated the Compact. *Kansas v. Colorado*, 514 U.S. 673, 693-694 (1995).

The Special Master submitted his Second Report recommending resolution of a number of remedy issues. 522 U.S. 803 (1997). The Court overruled Colorado's Exceptions to the Second Report without prejudice and returned the case to the Special Master for further proceedings. 522 U.S. 1073 (1998).

The Master has now submitted his Third Report, dated August 2000, documenting his ultimate recommendations with regard to the appropriate remedy for Colorado's past violations of the Compact. 69 U.S.L.W. 3257 (Oct. 10, 2000). The Special Master still has pending

before him proceedings principally concerning Colorado's future compliance.

### A. The Arkansas River Basin

The headwaters of the Arkansas River rise on the eastern slope of the Rocky Mountains at an altitude above 14,000 feet, not far from the towns of Leadville and Aspen, Colorado. The river flows south and east, through the Royal Gorge, leaving the mountains near Canon City, Colorado and flowing eastward through Pueblo, La Junta and Lamar, Colorado and Garden City and Dodge City, Kansas. The Arkansas River then continues through the States of Kansas, Oklahoma and Arkansas, ultimately entering the Mississippi River southeast of Little Rock, Arkansas.

There are two major instream reservoirs, John Martin Reservoir and Pueblo Reservoir, that have been constructed on the mainstem of the Arkansas River in Colorado. Twenty-three canal systems divert from the mainstem in Colorado between Pueblo and the Kansas stateline, providing water to approximately 300,000 acres of irrigated land in Colorado. Six canal systems in Kansas divert water from the Arkansas River for the irrigation of approximately 44,000 acres in Kansas. See *Kansas v. Colorado*, 514 U.S. 673, 675-677 (1995); 2 Third Report App. 86, col. b. More than a thousand new large irrigation wells were drilled along the Arkansas River in Colorado after the adoption of the Compact. 1 Third Report 103. Pumping increased from 15,000 acre-feet per year prior to the Compact, *Kansas v. Colorado*, 514 U.S., at 689-691, to more

than 200,000 acre-feet per year after the adoption of the Compact, 1 Third Report 103.[1]

### B. The Arkansas River Compact

In 1949, Kansas and Colorado approved, and Congress ratified, the Arkansas River Compact. 63 Stat. 145. See Appendix. The adoption of the Compact followed two decisions of this Court, *Kansas v. Colorado*, 206 U.S. 46 (1907), and *Colorado v. Kansas*, 320 U.S. 383 (1943), and the recommendation of the Court that the States seek to resolve their differences by negotiation pursuant to the Compact Clause of the Constitution. *Id.*, at 392; see U.S. Const., Art. I, § 10, cl. 3.

The Compact consists of nine articles. Its primary purposes, as stated in Article I, are to "[s]ettle existing disputes and remove causes of future controversy between the States of Colorado and Kansas, and between citizens of one and citizens of the other State, concerning waters of the Arkansas River" and to "[e]quitably divide and apportion" the waters of the Arkansas River and the benefits of John Martin Reservoir. A-1 to A-2.

Of principal relevance to this case is Article IV-D of the Compact, which provides:

> "This Compact is not intended to impede or prevent future beneficial development of the

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[1] The acre-foot is the common unit in the United States for quantifying larger volumes of water. It is the amount of water covering an area of one acre one foot deep. It is equal to 325,851 gallons. The Supreme Court Courtroom's volume, within the columns, is approximately 3 1/3 acre-feet.

> Arkansas River 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: Provided, that the waters of the Arkansas River . . . *shall not be materially depleted in usable quantity or availability* for use to the water users in Colorado and Kansas under this Compact *by such future development or construction.*" A-5 (emphasis added).

Article V apportions the benefits of water stored in John Martin Reservoir. A-5 to A-9. Article VII-A provides that the term "State" includes "any person . . . using, claiming or in any manner asserting any right to use" the waters of the Arkansas River under the authority of that State. A-10 to A-11.

### C. Proceedings Leading to the Special Master's Third Report

The State of Kansas commenced this proceeding in late 1985, alleging violations of Article IV-D of the Compact. Trial commenced in 1990. The Special Master filed his First Report in July 1994. 513 U.S. 803 (1994). That report recommended that the Court determine that Colorado had violated Article IV-D of the Compact in the years after its adoption by allowing development of increased groundwater pumping which materially depleted usable flows of the Arkansas River. Colorado filed several Exceptions to the First Report, including one

based on laches. The Court overruled Colorado's Exceptions, held that Colorado had violated the Compact as a result of increased post-Compact groundwater pumping in Colorado, and remanded the case to the Special Master. *Kansas v. Colorado,* 514 U.S. 673, 687-89, 694-95 (1995).

On remand, the Special Master received further briefs and evidence and then filed his Second Report with the Court in September 1997. 522 U.S. 803 (1997). The Second Report made a number of recommendations to the Court, including that the Court approve the determinations of the Special Master that: (a) Colorado had depleted an aggregate of 420,071 acre-feet in violation of the Compact during the period 1950-1994; (b) if a suitable remedy in this case should include money damages, those damages should be based on Kansas' loss rather than upon any gain to Colorado, subject to the overriding consideration that the remedy provide a fair and equitable solution; (c) if the remedy in the 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, again subject to the overall consideration of fairness; and (d) the unliquidated nature of Kansas' claim for damages does not bar the award of prejudgment interest, and the possible award of prejudgment interest would depend on the evidence presented in subsequent trial proceedings. Second Report 112-114.

Colorado filed two Exceptions to the Second Report. The Colorado Exceptions challenged the recommendations of the Special Master regarding the Eleventh Amendment and the possible award of prejudgment interest. Kansas and the United States filed briefs in opposition to Colorado's Exceptions. 1 Third Report 4.

The Court overruled the Exceptions of Colorado without prejudice to Colorado's right to renew those Exceptions at the conclusion of the Special Master's remedial proceedings. 522 U.S. 1073 (1998). Thereafter, the Special Master held trial on Colorado's violations for the two-year period 1995-1996 and on the remedy for Colorado's violations of the Compact from 1950 through 1994. The Special Master determined that violations had continued in 1995 and 1996 in an aggregate amount of 7,935 acre-feet. 2 Third Report, at App. 64.

With regard to past damages, Kansas sought compensation in money rather than water. Kansas presented evidence of losses in four categories: (1) increased pumping costs to Kansas farmers in the ditch service areas who were forced to replace depletions of surface water deliveries by pumping their wells; (2) regional increases (both past and future) in the cost of pumping due to reductions in groundwater elevations caused by depletions of usable stateline flows; (3) crop losses to farmers without wells in the ditch service areas caused by depletions of usable stateline flows that could not be replaced by well pumping; and (4) net secondary impacts on the Kansas economy resulting from the foregoing types of loss (1)-(3). The final Kansas quantification amounted to approximately $62 million. 1 Third Report 1.

Kansas also presented expert testimony on prejudgment interest and discounting. Several eminent economists, including a Nobel laureate, testified to the principle that money has a time value and to the need to apply that principle consistently to the facts of this case. They testified to the necessity of both compounding past

damages, and discounting future damages, to present value. *Id.*, at 89-92. Colorado did not dispute the validity of these principles. *Id.*, at 90, 93.

Colorado sought to repay in water over a 15-year period without interest. Colorado asserted that if repayment were to be in the form of money, it should be limited to approximately $9 million. *Id.*, at 2. The Special Master recommended repayment in money. *Id.*, at 108-119. Colorado also argued that Kansas should be denied prejudgment interest on any remedy, although it agreed that an award of damages for past losses should be adjusted for inflation. *Id.*, at 92-94.

Although, prior to the Second Report, Kansas had argued to the Special Master that the benefits derived by Colorado from its breach of the Compact would be a better measure of the appropriate remedy than Kansas' losses, the Special Master recommended that the remedy be measured by Kansas' losses. Second Report 75-84; 2 Third Report, at App. 1-10. Kansas filed no exception to the Special Master's recommendation, but did seek to submit evidence on Colorado's benefits for purposes of demonstrating that Kansas' claim based upon its losses, including prejudgment interest, was fair. When this evidence was excluded by the Special Master, Kansas made an offer of proof indicating that Colorado's benefits from violations of the Compact would be substantially greater than Kansas' losses. See 1 Third Report 2-3 ("Under the offer of proof, Kansas' damages would have amounted to $321,990,546"); 2 Third Report, at App. 6-7.

### D. The Third Report

In his Third Report, the Special Master determined that Kansas incurred damages as a result of Colorado's depletion of an aggregate of 420,071 acre-feet of usable stateline flows over the years 1950-1994. 1 Third Report 1, 8-9, 12, 120. He recommended that Kansas' damages should be determined on the basis of the analyses used by the Kansas experts, *id.* at 120 (¶ 6), with several modifications. Certain modifications do not relate to prejudgment interest, and they are not challenged in this Exception. By Kansas' calculation, these uncontested modifications reduce the Kansas claim from $62 million to approximately $57 million.

The modification that Kansas does challenge here is the Special Master's partial denial of prejudgment interest. He found that from 1950 to 1968 both Kansas and Colorado were unaware that Colorado was violating the Compact inasmuch as neither State understood that material depletions of the Arkansas River's usable flows were occurring. *Id.*, at 100, 103, 106. He found that by 1968 Colorado knew or should have known that wells developed since the adoption of the Compact were causing material depletions of usable flows. *Id.*, at 103-104.

The Special Master recommended that, as a general proposition, Kansas' monetary damages should include prejudgment interest. *Id.*, at 120 (¶ 8). Thus, he recommended that the Court confirm his earlier determination that the unliquidated nature of Kansas' claim for damages does not bar the award of prejudgment interest. *Id.*, at 119 (¶ 4). Moreover, he found that the interest rates proposed by Kansas are appropriate to account for the

loss of use of money, noting that Colorado had offered no evidence of rates appropriate to that purpose. *Id.*, at 91, 107.

In determining that Kansas' damages should include prejudgment interest, however, the Special Master distinguished between damages incurred in the years 1950-1968, when neither State was aware that Colorado was breaching the Compact, and damages incurred after 1968, when Colorado knew or should have known of its breach. *Id.*, at 102-103. He found that Kansas should be compensated for its loss of use of money due as damages in the later period, so that damages from 1969 to the date of judgment should include interest at Kansas' proposed rates. *Id.*, at 107. In contrast, he found that it would be unfair to Colorado to compensate Kansas for its loss of use of funds owed as a result of damages incurred in the earlier period; thus, he recommended that damages suffered in the years 1950-1968 be adjusted only for inflation to 1998 values using the consumer price index. *Ibid.*

By Kansas' calculation, the effect of the Special Master's recommended limitation on prejudgment interest is to reduce Kansas' remaining claim of $57 million by some $19 million to approximately $38 million.

## II. SUMMARY OF ARGUMENT

The Special Master correctly recognized the general rule that prejudgment interest should be awarded in a case such as this one, absent some exceptional circumstance. Two of this Court's leading decisions strongly support awarding Kansas prejudgment interest to compensate for its loss of use of money due as damages from Colorado's breach of the Compact to the date of judgment. *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189 (1995); *Texas v. New Mexico*, 482 U.S. 124 (1987).

The Special Master nevertheless recommended that Kansas not be compensated for its loss of use of money due as damages over an extended period of Colorado's violations of the Compact, namely, the years 1950-1968. He believed that it would be unfair to Colorado to afford Kansas full compensation for its injury. The Third Report discusses three circumstances that the Special Master seems to have deemed sufficiently exceptional to justify withholding prejudgment interest: first, that a "great length of time" has passed since Colorado began violating the Compact, producing what the Special Master considered to be startling results; second, that both States were unaware in the early years that Colorado was violating the Compact; and third, that it was the farmers of the two States, rather than the States themselves, who most directly experienced the benefits and losses resulting from the Compact violations. 1 Third Report 99-106.

None of these circumstances justifies withholding prejudgment interest. The fact that much time has passed since Colorado first violated the Compact is precisely the

reason for awarding prejudgment interest, not a reason for denying it. This is not a case in which the plaintiff inexcusably delayed bringing suit. This Court has previously ruled that Kansas was not guilty of laches during the period 1950-1968, *Kansas v. Colorado*, 514 U.S. 673, 689 (1995). Because Kansas is not at fault for the simple passage of time, its compensation should not be effectively reduced on account of that passage of time.

There is likewise no justification for withholding interest on the ground that Colorado, like Kansas, was unaware that Colorado was violating the Compact in the early years. Colorado's good-faith ignorance of its violations of the Compact would bear on the question of prejudgment interest if interest were awarded as a penalty for bad-faith conduct. But prejudgment interest is an element of just compensation, not a penalty. Colorado's good faith in the early years is therefore not a circumstance sufficient to justify withholding full compensation from Kansas for Colorado's breach of the Compact.

Finally, any reliance on the supposition that Colorado's farmers received most of the benefits of Colorado's Compact violations, and that Kansas' farmers incurred most of the harm, is misplaced. Article VII-A of the Compact rules out any distinction between the States and their respective water users. Indeed, the Court has already held, in this case and previously, that the defendant State is liable for a violation of an interstate compact arising from the actions of its water users.

## III. ARGUMENT

### A. Legal Principles Governing an Award of Prejudgment Interest

The determination whether to award prejudgment interest in this case is guided to a large extent by this Court's unanimous decision in *City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189 (1995). As the Special Master recognized, although *City of Milwaukee* was an admiralty case, the decision is so "pointed that it must strongly influence the prejudgment interest issues." 2 Third Report App. 41. As *City of Milwaukee* articulates, the prejudgment interest inquiry is governed by traditional judge-made principles inasmuch as Congress has not enacted a statute on the subject. 515 U.S., at 194. The general rule in an admiralty case is that prejudgment interest should be awarded, subject to a limited exception for "peculiar" or "exceptional" circumstances. *Id.*, at 195. The presumption in favor of prejudgment interest is not confined, however, to the admiralty context. Rather, the Court has recognized the compensatory nature of prejudgment interest in other contexts, including contract cases in particular. *Id.*, at 195, n. 7; see *West Virginia v. United States*, 479 U.S. 305 (1987) (action to enforce State's contractual obligation); *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163 (1933) (action for breach of sales contract).[2] The

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[2] Lower courts have construed decisions of this Court such as *City of Milwaukee* and *West Virginia* as establishing the principle that prejudgment interest is not unique to any particular area of federal law, *e.g.*, *Transmatic, Inc. v. Gulton Indus., Inc.*, 180 F.3d 1343, 1347 & n. 2 (Fed. Cir. 1999), but "is an ordinary part of any award under federal law," *In re Oil Spill by*

present case, too, involving Colorado's breach of the Arkansas River Compact, is in essence a contract case because " '[a] Compact is, after all, a contract.' " *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)). The general rule that prejudgment interest should be awarded serves to ensure that the injured party is fully compensated and, more specifically, that it is compensated " 'for the loss of use of money due as damages from the time the claim accrues until judgment is entered.' " *Id.*, at 195-196 (quoting *West Virginia v. United States*, 479 U.S. 305, 310-311, n. 2 (1987)).

An award of prejudgment interest is not automatic, but rests in the discretion of the tribunal passing on the subject. *City of Milwaukee*, 515 U.S., at 196.[3] As with other discretionary determinations, however, "the judge's decision must be supported by a circumstance that has relevance to the issue at hand." 515 U.S., at 196, n. 8 (citing Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982)). The "most obvious" example of a relevant circumstance justifying a departure from the general rule is a plaintiff's " 'undue delay in prosecuting the lawsuit.' " *Id.*, at 196 (quoting *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 657 (1983)).

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*the Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir. 1992) (per curiam); accord 1 Third Report 94-95 and cases cited there.

[3] The tribunal passing on the subject is, of course, this Court, not the Special Master. See *Kansas v. Colorado*, 514 U.S. 673, 691 (1995) ("[T]he ultimate responsibility for deciding what are correct findings of fact remains with the Court . . . ").

In contrast, and of particular pertinence here, a defendant's good-faith belief that it is not responsible for the plaintiff's loss is not such a circumstance. *Id.*, at 196-197. The defendant's good faith would carry significant weight if prejudgment interest were awarded to penalize bad-faith conduct. *Id.*, at 197. "But prejudgment interest is not awarded as a penalty; it is merely an element of just compensation." *Ibid.* Similarly, the defendant's good faith would have more weight if the Court were to adopt the "venerable" common-law rule that unliquidated claims do not bear interest. *Ibid.* But the common-law rule, which "has faced trenchant criticism for a number of years," does not square with the presumption in favor of prejudgment interest. *Id.*, at 197 & n. 9. A defendant's good faith thus is not sufficiently unusual to justify withholding prejudgment interest. *Id.*, at 198 (observing that legitimate difference of opinion on issue of liability "is merely a characteristic of most ordinary lawsuits").

The view that a defendant's good faith should relieve it of the obligation to pay prejudgment interest resembles an argument addressed and rejected in *Texas v. New Mexico*, 482 U.S. 124 (1987), an original action for breach of an interstate compact. The defendant State, New Mexico, contended that its long-held, good-faith belief that it was in compliance with the Pecos River Compact immunized it from any obligation to compensate Texas for adjudicated prejudgment violations. *Id.*, at 129. The Pecos River Compact, like the Arkansas River Compact, became effective with Congress' approval in 1949. 63 Stat. 159. The Court determined that New Mexico had underdelivered water in the years 1950-1983, *Texas v. New Mexico*, 482

U.S., at 127-128, as the Special Master here has found that Colorado underdelivered water in the years 1950-1996. The parties remained at odds, however, over the basic meaning of a key term in the Pecos River Compact until 1979, and New Mexico's obligation to deliver water remained unquantified and uncertain – that is to say, unliquidated – until 1984. *Id.*, at 127, 129. Two special masters recognized that New Mexico had acted in good faith. *Id.*, at 129. Nonetheless, the Court squarely rejected the proposition that New Mexico's good faith relieved it of the duty to perform its compact obligations:

> "[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." *Ibid.*

Taken together, *City of Milwaukee* and *Texas v. New Mexico* make clear that a defendant State's good faith is not a circumstance relieving it of the obligation to pay full compensation for its breach of a compact. This remains true although the defendant State may have acted in good faith over an extended period of time such as is frequently involved in interstate water litigation. Prejudgment interest is an essential element of full compensation and should be awarded whether or not the defendant knew or should have known that it was breaching the compact.

This Court's decisions are consonant with well-recognized economic principles bearing on prejudgment interest. Kansas' economists testified, without contradiction by Colorado, that prejudgment interest is necessary to restore the parties to the *status quo ante*. Without it, the plaintiff is penalized by the loss of opportunity to invest the asset taken from it, and the defendant receives a windfall in the form of earnings from the invested asset. In other words, interest does no more than render an award of damages at its present value by replicating the value that the plaintiff would have received had the plaintiff had use of the lost asset at the time of the injury. Just as future damages must be discounted to present value in order not to *overcompensate* the plaintiff, so past damages must be compounded to present value in order not to *undercompensate* the plaintiff. Kansas' economists attested to the equivalency of discounting future damages and compounding past damages. Both operations are a function of the fact that money has a time value – a dollar today is worth less than a dollar yesterday and more than a dollar tomorrow. See 1 Third Report 89-92.

This Court, for its part, long ago observed, "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future." *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 489 (1916). On this basis, the Court has "consistently recognized that 'damage awards in suits governed by federal law should be based on present value.' " *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 339 (1988) (quoting *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 412 (1985) (per curiam)). This Court has also recognized the economic truism that compounding past damages is as

essential to render a damages award at present value as is discounting of future damages. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 538, n. 22 (1983); accord *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir. 1992) (per curiam) (compounding past losses "is just the flip side of discounting" future losses); *In re Air Crash Disaster Near Chicago, Ill., on May 25, 1979*, 644 F.2d 633, 644 (7th Cir. 1981); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 594 (2d Cir. 1961); Charles T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 56, at 225 (1935).

### B. The Court's Precedents Support a Complete Award of Prejudgment Interest in This Case.

The Special Master agreed, "in general, that prejudgment interest should be included in any damage award for violation of an interstate water compact." 1 Third Report 102. He cited *City of Milwaukee* and *Texas v. New Mexico*, among other authorities, in reaching this determination. Nevertheless, he stopped short of applying those decisions fully to this case. Positing that "without some limitation" an award of prejudgment interest produces "startling results," he settled on the view that "one fundamental standard still appears to remain – that prejudgment interest is given 'in response to considerations of fairness.' " *Id.*, at 99-100 (quoting *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 352 (1939)). In this case, he concluded, fairness "should relieve Colorado of the obligation to pay interest on damages from depletions during [the] 1950-68 period." *Id.*, at 106.

The Special Master did not suggest, however, that there is anything intrinsically unfair about prejudgment interest. On the contrary, he acknowledged that "a *denial* of prejudgment interest may be unfair, and should be justified." *Id.*, at 97; accord *City of Milwaukee*, 515 U.S., at 199 (rejecting contention that award of prejudgment interest is inequitable in a mutual fault situation, and observing that "a *denial* of prejudgment interest would be unfair") (emphasis in original). Thus, the Special Master's denial of prejudgment interest for the period 1950-1968 must find a justification in some exceptional circumstance rendering an award of interest unfair in this case. See *id.*, at 195.

The Special Master did not find that Kansas was guilty of undue delay in prosecuting this lawsuit, a circumstance that could justify a denial of prejudgment interest. See *City of Milwaukee*, 515 U.S., at 196. Indeed, this Court has previously concluded that Kansas showed no lack of diligence or inexcusable delay in bringing suit. *Kansas v. Colorado*, 514 U.S. 673, 689 (1995). Consistent with that conclusion, the Special Master found that "[n]either state in the early years saw any wrongdoing, or thought that Kansas was not receiving its compact share of usable flows of the Arkansas River." 1 Third Report 106; see also *id.*, at 100, 103.

The Special Master did, however, identify three circumstances that, in his view, make this case exceptional: (1) a "great length of time," now 50 years, has passed since Colorado began breaching the Compact, *id.*, at 99; (2) Colorado, like Kansas, was unaware in the early years that depletions were occurring in breach of the Compact,

*id.*, at 103, 106,[4]; and (3) according to the Special Master, Colorado farmers experienced most of the benefits, while Kansas farmers experienced most of the losses, from Colorado's breach of the Compact. None of these circumstances supports the Special Master's decision to deny prejudgment interest for the years 1950-1968.

### 1. The Simple Passage of Time Since Colorado's Breach of the Compact Is Not a Reason to Deny Prejudgment Interest.

That a great length of time has passed is precisely the reason that prejudgment interest is needed – the greater the time, the greater the need. *In re Oil Spill by the Amoco Cadiz*, 954 F.2d, at 1334 (noting that passage of time "is a reason to award interest, not to deny it").[5] The Special Master acknowledged that an award of prejudgment interest cannot be called punitive, no matter how large it may be, because such an award is merely an element of

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[4] The Special Master appeared to view this case as *sui generis*, asserting that "there is no case in which prejudgment interest has been awarded that is at all similar to the facts in this dispute." 1 Third Report 98. It is true, of course, that prejudgment interest was not expressly awarded in *Texas v. New Mexico*, inasmuch as the case was settled. It is instructive, nevertheless, that this Court held New Mexico answerable for its breach of the Pecos River Compact over the 34 years from 1950 to 1983, despite New Mexico's protest that it had believed in good faith that it was in compliance. *Texas v. New Mexico*, 482 U.S., at 127-129.

[5] Accord *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1268 (D.C. Cir. 1999), modified on other grounds, 200 F.3d 867 (D.C. Cir.) (per curiam), cert. denied, 120 S.Ct. 2215 (2000); *In re Milwaukee Cheese Wis., Inc.*, 112 F.3d 845, 849 (7th Cir. 1997).

full compensation. 1 Third Report 100 (citing *In re Milwaukee Cheese Wis., Inc.*, 112 F.3d 845, 849 (7th Cir. 1997)). Nevertheless, he felt that calculating prejudgment interest over the period at issue in this case produces "startling results" and has a "dramatic impact" on Kansas' damages. *Id.*, at 100, 103. Significantly, the Special Master did not express any misgivings about Kansas' proposed *rates* of interest; on the contrary, he adopted those rates for purposes of the interest award that he did recommend, for the period 1969 to the date of judgment. *Id.*, at 91, 107. Thus, it was purely the cumulative effect of compounding interest over time, not any particular rate of compounding, that the Special Master found startling. See *id.*, at 100, 102-103.[6]

The impression that much interest has accrued, however, is no more a reason to deny interest than the fact that much time has passed. See *In re Oil Spill by the Amoco Cadiz*, 954 F.2d, at 1333 (rejecting argument that prejudgment interest should be denied on the ground that "this

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[6] If the Special Master were justified in being startled by the effect of compounding past damages, he should also have been startled by the effect of discounting future damages. Due to the effect of discounting, Kansas did not even present a claim for the permanent loss of the beneficial use of 324,866 acre-feet of groundwater from the Ogallala aquifer due to Colorado's Compact violations. See 1 Third Report 3, 12. Since Kansas would have used that specific water only at the time in the future when no other groundwater is left to be pumped, the effect of discounting makes the present value of those future damages de minimis. Damages awards under federal law are properly based on present value regardless of whether, to some, the results are startling. See *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 339 (1988).

has been a lengthy case, so that interest has mounted dramatically"). To say that prejudgment interest has grown dramatically is the same as to say that Kansas' loss of the use of its money has grown dramatically. That Kansas' loss has grown large is no reason to deny Kansas a remedy. To be sure, the decision to award interest is discretionary and fairness may inform the Court's exercise of its discretion. But the Special Master's startled reaction to the accrual of interest is not a proper basis on which to exercise discretion. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) ("[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles' ") (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (C.C.D. Va. 1807) (Marshall, C.J.)); *Brown v. Allen*, 344 U.S. 443, 496 (1953) ("We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' . . . Discretion without a criterion for its exercise is authorization of arbitrariness" ) (Frankfurter, J.) (quoting Cardozo, THE NATURE OF THE JUDICIAL PROCESS 139, 141 (1921)). Whatever discretion a court may have on the issue, such discretion is not "authorization to decide who deserves the money more." *In re Milwaukee Cheese Wis., Inc.*, 112 F.3d 845, 849 (7th Cir. 1997).

### 2. Colorado's Lack of Knowledge of Its Breach of the Compact Is Not a Reason to Deny Prejudgment Interest.

As for the circumstance that both States were acting in good faith, unaware of depletions in the early years, *City of Milwaukee* and *Texas v. New Mexico* point to the

proper outcome. The objective of a contract remedy is to afford the injured party full compensation. Prejudgment interest is simply one element of that compensation. A defendant's ignorance of its breach does not justify a denial of prejudgment interest any more than it justifies a denial of other elements of compensation. The fact and extent of a plaintiff's injury do not depend on the defendant's state of mind, and neither should the plaintiff's remedy.

In focusing on Colorado's state of mind as well as the amount of interest that has accrued, the Special Master looked to considerations related not to making Kansas whole, but rather to mitigating the impact of the remedy on Colorado. Had the Special Master been charged with recommending a punitive remedy, such considerations might have been proper. But he disclaimed any intent to impose a punitive remedy. 1 Third Report 100. He acknowledged that " '[p]rejudgment interest is not awarded as a penalty; it is merely an element of just compensation.' " *Id.*, at 97 (quoting *City of Milwaukee*, 515 U.S., at 197).

Nonetheless, under the rubric of a "fundamental standard" of fairness, the Special Master applied concepts relevant to punitive damages to relieve Colorado of part of its obligation to compensate Kansas. See *id.*, at 99. For example, the Special Master's belief that it would be unfair to assess interest for an unknowing breach of a compact, 1 Third Report 100, 103, 106, is similar to the principle that an unintentional wrong is less reprehensible, and thus less punishable, than an intentional one. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-580

(1996). Likewise, his startled reaction to the ratio of compounded to nominal damages,[7] 1 Third Report 100, is reminiscent of the rule that punitive damages should not be awarded at a ratio disproportionate to compensatory damages. See *BMW*, 517 U.S. at 580-583. This Court has inferred such limitations on a State's imposition of punitive damages from the Due Process Clause of the Fourteenth Amendment. *Id.*, at 568, 574 & n. 22. As far as Kansas is aware, however, this Court has not identified any comparable limitation on an aggrieved party's right to compensation. In short, limitations on punitive damages are not circumstances that have relevance to the issue at hand. See *City of Milwaukee*, 515 U.S., at 196, n. 8.

The problem inherent in the Special Master's reliance on vague "considerations of fairness" is that it ultimately is indistinguishable from a balancing of equities, an approach that this Court has firmly rejected. *West Virginia v. United States*, 479 U.S. 305, 311, n. 3 (1987). To be sure, this Court has been careful to point out that its rejection of an open-ended fairness standard does not preclude courts from applying an equitable consideration such as laches to bar a claim for prejudgment interest. *Ibid.* (citing *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 352-353 (1939)). But the laches doctrine, as a limitation on prejudgment interest, is long-established and well-defined. See, *e.g.*, *Board of Comm'rs*, 308 U.S., at 352-353; *Redfield v. Bartels*, 139 U.S. 694, 701 (1891); *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884). It

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[7] The Special Master defined "nominal" damages as "the actual dollar value when the damage occurred." 1 Third Report 2.

presents a circumstance that *is* relevant to whether the plaintiff is entitled to compensation. *City of Milwaukee*, 515 U.S., at 196. A plaintiff's undue delay in bringing suit properly limits the plaintiff's right to compensation because it "injures the [defendant] by forcing it to act as an uncompensated trustee or investment manager." *In re Milwaukee Cheese Wis., Inc.*, 112 F.3d, at 849; accord *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1298 (7th Cir. 1987). A relevant and well-defined limitation such as laches stands on a different footing than a judge's subjective notion of whether it is fair to award interest in a given case.

The Special Master recognized, consistent with this Court's prior ruling, that Kansas was not guilty of laches because there was a "general lack of knowledge in the early years" that Colorado was breaching the Compact. 1 Third Report 106. He felt that the "same degree of fairness" that protected Kansas from a finding of laches should now protect Colorado from the obligation to compensate Kansas for its lost use of money during the period 1950-1968. *Ibid.* That conclusion, however, conflates two very different principles. As a matter of logic as well as fairness, a general lack of knowledge that the plaintiff has a claim is relevant to, and indeed dispositive of, the defense of laches because an essential element of the defense is a plaintiff's "lack of diligence" or "neglect to assert a right or claim." *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). In contrast, the same general lack of knowledge is irrelevant to the issue of whether the plaintiff should be compensated for its loss. Whether or not the parties had any inkling of Colorado's breach of the Compact in the early years, the fact remains that Colorado had

use of both water, an asset belonging to Kansas, and the income that it generated. The Special Master himself recognized that Colorado derived and retained this benefit. 1 Third Report 101 ("[W]e should not be oblivious to Colorado's use of the water over this long period of years"). It does not follow as a matter of logic or fairness that Colorado should be relieved of the obligation to restore the value of what it took because at one time the parties were unaware that Colorado was doing the taking.[8]

### 3. The Effect of Colorado's Breach on the Farmers of Each State Is Not a Reason to Deny Prejudgment Interest.

Finally, an additional circumstance noted in the Special Master's report is his belief that Colorado farmers – as opposed to the State or its subdivisions – received most of the benefits of Colorado's breach of the Compact, while Kansas farmers incurred most of the losses. *Id.*, at

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[8] In this regard, the Special Master was not consistent in his application of his own precepts. Without explanation, he determined that no compensation should be paid for Kansas' loss of use of money *incurred after 1968* on account of nominal damages suffered in the years 1950-1968, notwithstanding his own finding that Colorado knew or should have known of its breach by 1968. 1 Third Report 106-107; see *id.*, at 103. For the 32 years from 1969 to the present, Colorado has delayed payment of all pre-1969 damages. Even if a defendant's good-faith ignorance of its breach were a valid reason to deny prejudgment interest, it would not justify the Special Master's recommendation to deny Kansas compensation for its loss of use of money after 1968, when Colorado could no longer claim ignorance.

101. It is unclear what significance the Special Master attributed to this issue. He evidently did not consider it determinative, inasmuch as it did not prevent him from recommending an award of prejudgment interest for the later years. He may have been concerned that Colorado's state government itself did not have most of the benefits of its Compact breach in hand and so could not invest the money to pay for an eventual interest award. See 1 Third Report 101. But in view of the Special Master's finding that Colorado was unaware of its breach in the years 1950-1968 – and his conclusion that Colorado should therefore be relieved of the obligation to pay interest for those years – Colorado's ability or inability to set aside money to meet an interest obligation would seem to be beside the point.

At any rate, the Compact's express language does not admit of a distinction between a State and its water users. Rather, Article VII-A defines "State" to include "any person . . . using, claiming or in any manner asserting any right to use" the waters of the Arkansas River under the authority of that State. A-10 to A-11. Moreover, consistent with this definition is the Compact's purpose to resolve disputes and controversies, not only between the States as such, but also "between citizens of one and citizens of the other State." Art. I, at A-1. Kansas, as comprised of both its state government and its water users, indisputedly was denied the opportunity to invest the asset taken from it. As noted above, the Special Master himself recognized that Colorado has long had use of money that rightfully belonged to Kansas. 1 Third Report 101. The manner in which the people of Colorado chose to distribute the proceeds of the wrongfully appropriated water

has no bearing on whether Kansas should be compensated for what was taken.

This Court has previously determined in this case that Colorado bears liability for the actions of its water users. *Kansas v. Colorado*, 514 U.S. 673, 693-694 (1995). Implicit in that ruling is the premise that sovereign States stand in their citizens' stead in an original action such as this one. In *Texas v. New Mexico*, this Court noted that a plaintiff State represents its citizens in seeking enforcement of an interstate compact:

> "[T]he 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. See *Maryland v. Louisiana*, 451 U.S. 725, 735-739 (1981). It is wholly consistent with that view that the State 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." 482 U.S. 124, 132, n. 7 (1987).

If a plaintiff State in an original action properly recovers damages on behalf of "those who were hurt," *ibid.*, it follows that a defendant State must answer for the actions of its citizens who inflicted the harm. Indeed, as just noted, the Compact expressly holds Colorado answerable for the actions of any person "using, claiming or in any manner asserting any right to use" the waters of the Arkansas River under Colorado's authority. A-10 to A-11. Furthermore, the Court has not qualified its commitment to provide a complete remedy for breach of a compact on the basis of whether the defendant State itself or its citizens inflicted the harm. See *Texas v. New Mexico*,

482 U.S. at 129. Prejudgment interest should be awarded as one element of such a remedy.

## IV. CONCLUSION

The Exception of the State of Kansas to the Third Report of the Special Master should be sustained.

Respectfully submitted,

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# APPENDIX

## ARKANSAS RIVER COMPACT, 1948

The State of Colorado and the State of Kansas, parties signatory to this Compact (hereinafter referred to as "Colorado" and "Kansas", respectively, or individually as a "State", or collectively as the "States") having resolved to conclude a compact with respect to the waters of the Arkansas River, and being moved by considerations of interstate comity, having appointed commissioners as follows: "Henry C. Vidal, Gail L. Ireland, and Harry B. Mendenhall, for Colorado; and George S. Knapp, Edward F. Arn, William E. Leavitt, and Roland H. Tate, for Kansas"; and the consent of the Congress of the United States to negotiate and enter into an interstate compact not later than January 1, 1950, having been granted by Public Law 34, 79th Congress, 1st Session, and pursuant thereto the President having designated Hans Kramer as the representative of the United States, the said commissioners for Colorado and Kansas, after negotiations participated in by the representatives of the United States, have agreed as follows:

### ARTICLE I

The major purposes of this Compact are to:

A. Settle existing disputes and remove causes of future controversy between the States of Colorado and Kansas, and between citizens of one and citizens of the other State, concerning the waters of the Arkansas River and their control, conservation and utilization for irrigation and other beneficial purposes.

B. Equitably 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.

## ARTICLE II

The provisions of this Compact are based on (1) the physical and other conditions peculiar to the Arkansas River and its natural drainage basin, and the nature and location of irrigation and other developments and facilities in connection therewith; (2) the opinion of the United States Supreme Court entered December 6, 1943, in the case of *Colorado v. Kansas* (320 U.S. 383) concerning the relative rights of the respective States in and to the use of waters of the Arkansas River; and (3) the experience derived under various interim executive agreements between the two States apportioning the waters released from the John Martin Reservoir as operated by the Corps of Engineers.

## ARTICLE III

As used in this Compact:

A. The word "Stateline" means the geographical boundary line between Colorado and Kansas.

B. The term "waters of the Arkansas River" means the waters originating in the natural drainage basin of the Arkansas River, including its tributaries, upstream from

the Stateline, and excluding waters brought into the Arkansas River Basin from other river basins.

C. The term "Stateline flow" means the flow of waters of the Arkansas River as determined by gaging stations located at or near the Stateline. The flow as determined by such stations, whether located in Colorado or Kansas, shall be deemed to be the actual Stateline flow.

D. "John Martin Reservoir Project" is the official name of the facility formerly known as Caddoa Reservoir Project, authorized by the Flood Control Act of 1936, as amended, for construction, operation and maintenance by the War Department, Corps of Engineers, later designated as the Corps of Engineers, Department of the Army, and herein referred to as the "Corps of Engineers". "John Martin Reservoir" is the water storage space created by "John Martin Dam".

E. The "flood control storage" is that portion of the total storage space in John Martin Reservoir allocated to flood control purposes.

F. The "conservation pool" is that portion of the total storage space in John Martin Reservoir lying below the flood control storage.

G. The "ditches of Colorado Water District 67" are those ditches and canals which divert water from the Arkansas River or its tributaries downstream from John Martin Dam for irrigation use in Colorado.

H. The term "river flow" means the sum of the flows of the Arkansas and the Purgatoire Rivers into John Martin Reservoir as determined by gaging stations appropriately located above said Reservoir.

I. The term "the Administration" means the Arkansas River Compact Administration established under Article VIII.

## ARTICLE IV

Both States recognize that:

A. This Compact deals only with the waters of the Arkansas River as defined in Article III.

B. This Compact is not concerned with the rights, if any, of the State of New Mexico or its citizens in and to the use in New Mexico of waters of Trinchera Creek or other tributaries of the Purgatoire River, a tributary of the Arkansas River.

C. (1) John Martin Dam will be operated by the Corps of Engineers to store and release the waters of the Arkansas River in and from John Martin Reservoir for its authorized purposes.

(2) The bottom of the flood control storage is presently fixed by the Chief of Engineers, U.S. Army, at elevation 3,851 feet above mean sea level. The flood control storage will be operated for flood control purposes and to those ends will impound or regulate the streamflow volumes that are in excess of the then available storage capacity of the conservation pool. Releases from the flood control storage may be made at times and rates determined by the Corps of Engineers to be necessary or advisable without regard to ditch diversion capacities or requirements in either or both States.

(3) The conservation pool will be operated for the benefit of water users in Colorado and Kansas, both

upstream and downstream from John Martin Dam, as provided in this Compact. The maintenance of John Martin Dam and appurtenant works may at times require the Corps of Engineers to release water then impounded in the conservation pool or to prohibit the storage of water therein until such maintenance work is completed. Flood control operation may also involve temporary utilization of conservation storage.

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 purpose of water utilization and control, as well as the improved or prolonged functioning of existing works: 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.

## ARTICLE V

Colorado and Kansas hereby agree upon the following basis of apportionment of the waters of the Arkansas River:

A. Winter storage in John Martin Reservoir shall commence on November 1st of each year and continue to and include the next succeeding March 31st. During said period all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water

equivalent to the river flow, but such releases shall not exceed 100 c.f.s. (cubic feet per second) and water so released shall be used without avoidable waste.

B. Summer storage in John Martin Reservoir shall commence on April 1st of each year and continue to and include the next succeeding October 31st. During said period, except when Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water equivalent to the river flow up to 500 c.f.s., and Kansas may demand releases of water equivalent to that portion of the river flow between 500 c.f.s, and 750 c.f.s., irrespective of releases demanded by Colorado.

C. Releases of water stored pursuant to the provisions of paragraphs A and B of this Article shall be made upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period. Unless increases to meet extraordinary conditions are authorized by the Administration, separate releases of stored water to Colorado shall not exceed 750 c.f.s., separate releases of stored water to Kansas shall not exceed 500 c.f.s., and concurrent releases of stored water shall not exceed a total of 1,250 c.f.s.: Provided, that when water stored in the conservation pool is reduced to a quantity less than 20,000 acre-feet, separate releases of stored water to Colorado shall not exceed 600 c.f.s., separate releases of stored water to Kansas shall not exceed 400 c.f.s., and concurrent releases of stored water shall not exceed 1,000 c.f.s.

D. Releases authorized by paragraphs A, B and C of this Article, except when all Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, shall not impose any call on Colorado water users that divert waters of the Arkansas River upstream from John Martin Dam.

E. (1) Releases of stored water and releases of river flow may be made simultaneously upon the demands of either or both States.

(2) Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream is authorized by the Administration.

(3) Releases of river flow and of stored water to Colorado shall be measured by gaging stations located at or near John Martin Dam and the releases to which Kansas is entitled shall be satisfied by an equivalent in Stateline flow.

(4) When water is released from John Martin Reservoir appropriate allowances as determined by the Administration shall be made for the intervals of time required for such water to arrive at the points of diversion in Colorado and at the Stateline.

(5) There shall be no allowance or accumulation of credits or debits for or against either State.

(6) Storage, releases from storage and releases of river flow authorized in this Article shall be accomplished pursuant to procedures prescribed by the Administration under the provisions of Article VIII.

F. In the event the Administration finds that within a period of fourteen (14) days the water in the conservation pool will be or is liable to be exhausted, the Administration shall forthwith notify the State Engineer of Colorado, or his duly authorized representative, that commencing upon a day certain within said fourteen (14) day period, unless a change of conditions justifies cancellation or modification of such notice, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which their respective priority rights were administered by Colorado before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed. Such priority administration by Colorado shall be continued until the Administration finds that water is again available in the conservation pool for release as provided in this Compact, and timely notice of such finding shall be given by the Administration to the State Engineer of Colorado or his duly authorized representative: Provided, that except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this Compact, when there is water in the conservation pool the water users upstream from John Martin Reservoir shall not be affected by the decrees to the ditches in Colorado Water District 67. Except when administration in Colorado is on a priority basis the water diversions in Colorado Water District 67 shall be administered by Colorado in accordance with distribution agreements made

from time to time between the water users in such District and filed with the Administration and with the State Engineer of Colorado or, in the absence of such agreement, upon the basis of the respective priority decrees, as against each other, in said District.

G. During periods when Colorado reverts to administration of decreed priorities, Kansas shall not be entitled to any portion of the river flow entering John Martin Reservoir. Waters of the Arkansas River originating in Colorado which may flow across the Stateline during such periods are hereby apportioned to Kansas.

H. If the usable quantity and available for use of the waters of the Arkansas River to water users in Colorado Water District 67 and Kansas will be thereby materially depleted or adversely affected, (1) priority rights now decreed to the ditches of Colorado Water District 67 shall not hereafter be transferred to other water districts in Colorado or to points of diversion or places of use upstream from John Martin Dam; and (2) the ditch diversion rights from the Arkansas River in Colorado Water District 67, and of Kansas ditches between the Stateline and Garden City shall not hereafter be increased beyond the total present rights of said ditches, without the Administration, in either case (1) or (2), making findings of fact that no such depletion or adverse effect will result from such proposed transfer or increase. Notice of legal proceedings for any such proposed transfer or increase shall be given to the Administration in the manner and within the time provided by the laws of Colorado or Kansas in such cases.

## ARTICLE VI

A. (1) Nothing in this Compact shall be construed as impairing the jurisdiction of Kansas over the waters of the Arkansas River that originate in Kansas and over the waters that flow from Colorado across the Stateline into Kansas.

(2) Except as otherwise provided, nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas River in said State as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River.

B. Inasmuch as the Frontier Canal diverts waters of the Arkansas River in Colorado west of the Stateline for irrigation uses in Kansas only, Colorado concedes to Kansas and Kansas hereby assumes exclusive administrative control over the operation of the Frontier Canal and its headworks for such purposes, to the same extent as though said works were located entirely within the State of Kansas. Water carried across the Stateline in the Frontier Canal or another similarly situated canal shall be considered to be part of the Stateline flow.

## ARTICLE VII

A. Each State shall be subject to the terms of this Compact. Where the name of the State or the term "State" is used in this Compact these shall be construed to

include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas River under the authority of that State.

B. This Compact establishes no general principle or precedent with respect to any other interstate stream.

C. Wherever any State or Federal official or agency is referred to in this Compact such reference shall apply to the comparable official or agency succeeding to their duties and functions.

## ARTICLE VIII

A. To administer the provisions of this Compact there is hereby created an interstate agency to be known as the Arkansas River Compact Administration herein designated as "The Administration."

B. The Administration shall have power to:

(1) Adopt, amend and revoke by-laws, rules and regulations consistent with the provisions of this Compact;

(2) Prescribe procedures for the administration of this Compact: Provided, that where such procedures involve the operation of John Martin Reservoir Project they shall be subject to the approval of the District Engineer in charge of said Project;

(3) Perform all functions required to implement this Compact and to do all things necessary, proper or convenient in the performance of its duties.

C. The membership of the Administration shall consist of three representatives from each State who shall be appointed by the respective Governors for a term not to exceed four years. One Colorado representative shall be a resident of and water right owner in Water Districts 14 or 17, one Colorado representative shall be a resident of and water right owner in Water District 67, and one Colorado representative shall be the Director of the Colorado Water Conservation Board. Two Kansas representatives shall be residents of and water right owners in the counties of Finney, Kearny or Hamilton, and one Kansas representative shall be the chief State official charged with the administration of water rights in Kansas. The President of the United States is hereby requested to designate a representative of the United States, and if a representative is so designated he shall be an ex-officio member and act as chairman of the Administration without vote.

D. The State representatives shall be appointed by the respective Governors within thirty days after the effective date of this Compact. The Administration shall meet and organize within sixty days after such effective date. A quorum for any meeting shall consist of four members of the Administration: Provided, that at least two members are present from each State. Each State shall have but one vote in the Administration and every decision, authorization or other action shall require unanimous vote. In case of a divided vote on any matter within the purview of the Administration, the Administration may, by subsequent unanimous vote, refer the matter for arbitration to the Representative of the United States or other arbitrator or arbitrators, in which event

the decision made by such arbitrator or arbitrators shall be binding upon the Administration.

E. (1) The salaries, if any, and the personal expenses of each member shall be paid by the government which he represents. All other expenses incident to the administration of this Compact which are not paid by the United States shall be borne by the States on the basis of 60 per cent by Colorado and 40 per cent by Kansas.

(2) In each even numbered year the Administration shall adopt and transmit to the Governor of each State its budget covering anticipated expenses for the forthcoming biennium and the amount thereof payable by each State. Each State shall appropriate and pay the amount due by it to the Administration.

(3) The Administration shall keep accurate accounts of all receipts and disbursements and shall include a statement thereof, together with a certificate of audit by a certified public accountant, in its annual report. Each State shall have the right to make an examination and audit of the accounts of the Administration at any time.

F. Each State shall provide such available facilities, equipment and other assistance as the Administration may need to carry out its duties. To supplement such available assistance the Administration may employ engineering, legal, clerical, and other aid as in its judgment may be necessary for the performance of its functions. Such employees shall be paid by and be responsible to the Administration, and shall not be considered to be employees of either State.

G. (1) The Administration shall cooperate with the chief official of each State charged with the administration of water rights and with Federal agencies in the systematic determination and correlation of the facts as to the flow and diversion of the waters of the Arkansas River and as to the operation and siltation of John Martin Reservoir and other related structures. The Administration shall cooperate in the procurement, interchange, compilation and publication of all factual data bearing upon the administration of this Compact without, in general, duplicating measurements, observations or publications made by State or Federal agencies. State officials shall furnish pertinent factual data to the Administration upon its request. The Administration shall, with the collaboration of the appropriate Federal and State agencies, determine as may be necessary from time to time, the location of gaging stations required for the proper administration of this Compact and shall designate the official records of such stations for its official use.

(2) The Director, U.S. Geological Survey, the Commissioner of Reclamation and the Chief of Engineers, U.S. Army, are hereby requested to collaborate with the Administration and with appropriate State officials in the systematic determination and correlation of data referred to in paragraph G(1) of this Article and in the execution of other duties of such officials which may be necessary for the proper administration of this Compact.

(3) If deemed necessary for the administration of this Compact, the Administration may require the installation and maintenance, at the expense of water users, of measuring devices of approved type in any ditch or group of ditches diverting water from the Arkansas

River in Colorado or Kansas. The chief official of each State charged with the administration of water rights shall supervise the execution of the Administration's requirements for such installations.

H. Violation of any of the provisions of this Compact or other actions prejudicial thereto which come to the attention of the Administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the Administration may report its findings and recommendations to the State official who is charged with the administration of water rights for appropriate action, it being 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.

I. Findings of fact made by the Administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of the facts found.

J. The Administration shall report annually to the Governors of the States and to the President of the United States as to matters within its purview.

## ARTICLE IX

A. This Compact shall become effective when ratified by the Legislature of each State and when consented to by the Congress of the United States by legislation providing substantially, among other things, as follows:

"Nothing contained in this Act or in the Compact herein consented to shall be construed as impairing or

affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such Compact: Provided, that the Chief of Engineers is hereby authorized to operate the conservation features of the John Martin Reservoir Project in a manner conforming to such Compact with such exceptions as he and the Administration created pursuant to the Compact may jointly approve."

B. This Compact shall remain in effect until modified or terminated by unanimous action of the States and in the event of modification or termination all rights then established or recognized by this Compact shall continue unimpaired.

IN WITNESS WHEREOF, The commissioners have signed this Compact in triplicate original, one of which shall be forwarded to the Secretary of State of the United States of America and one of which shall be forwarded to the Governor of each signatory State.

Done in the City and County of Denver, in the state of Colorado, on the fourteenth day of December, in the Year of our Lord One Thousand Nine Hundred and Forty-eight.

Henry C. Vial
Gail L. Ireland
Harry B. Mendenhall
Commissioners for Colorado

George S. Knapp
Edward F. Arn
William E. Leavitt
Roland H. Tate
Commissioners for Kansas

Attest:

Warden L. Noe
Secretary

Approved:

Hans Kramer
Representative of the United States