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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
STATE OF KANSAS, :  
Plaintiff, :  
v. : No. 105, Orig.  
STATE OF COLORADO :  
- - - - -X

Washington, D.C.  
Monday, March 19, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:03 a.m.

APPEARANCES:

JOHN B. DRAPER, ESQ., Special Assistant Attorney General,  
Santa Fe, New Mexico; on behalf of the Plaintiff.  
JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States, as Intervenor.  
DAVID W. ROBBINS, ESQ., Special Assistant Attorney  
General, Denver, Colorado; on behalf of the  
Defendant.

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CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 105 Original, the State of Kansas v. the State of Colorado.

Mr. Draper.

ORAL ARGUMENT OF JOHN B. DRAPER

ON BEHALF OF THE PLAINTIFF

MR. DRAPER: Mr. Chief Justice, thank you, and may it please the Court:

The parties are here on exceptions to the third report in this case. After the Court determined that the State of Colorado had violated the Arkansas River Compact in 1995, the case was returned to the Special Master for further proceedings.

Subsequently, the Special Master determined that Colorado had violated the Arkansas River Compact in every year from the inception of their compact to the date of filing of this case in 1985. He further determined that, since the filing of the lawsuit, that Colorado has continued to violate the compact in every year through 1996, except for 1987. Colorado does not challenge those determinations.

Each of those determinations is in the unit of acre feet. Altogether, for the period 1950 through 1994,

1 the period at issue here for the remedy, he determined  
2 that approximately 420,000 acre feet of water had been  
3 depleted from the Arkansas River by Colorado and its water  
4 users in violation of the compact. That amount of water  
5 is about 125,000 times the size of this courtroom, or a  
6 column the size of this courtroom extending upward about  
7 1,000 miles.

8 He has determined that the proper remedy for  
9 these losses, which are both past and future, because of  
10 the lingering effects of the violations by Colorado,  
11 should be compensated in money rather than in water. At  
12 the end of trial, Kansas had determined that its losses  
13 were \$62 million. Colorado's corresponding number was \$9  
14 million.

15 The Special Master recognized losses that we  
16 calculate to be approximately \$57 million. However, the  
17 Special Master was persuaded by Colorado not to accord  
18 Kansas full compensation for its losses. He reduced it  
19 further by denying part of the prejudgment interest that  
20 had been quantified by Kansas at trial.

21 QUESTION: Why should any prejudgment interest  
22 be awarded as between States? I mean, this is based on a  
23 compact, isn't it, this lawsuit?

24 MR. DRAPER: This is based on the compact, yes,  
25 Your Honor.

1 QUESTION: And is there any provision in the  
2 compact for the provision of prejudgment interest?

3 MR. DRAPER: No, there is no specific provision  
4 on prejudgment interest, nor is there any provision  
5 specifically addressing the remedy, just as there was no  
6 provision in the Pecos River Compact, which this Court --

7 QUESTION: Well, the common law rule, I assume,  
8 is that you don't award prejudgment interest for  
9 unliquidated damages.

10 MR. DRAPER: That is the traditional rule, Your  
11 Honor, but it is a largely discredited rule at this point  
12 in history, and the Court has recognized that most  
13 recently --

14 QUESTION: Oh, but as between State sovereigns,  
15 I mean, who is going to pay the bill in Colorado? It's  
16 the taxpayers, isn't it?

17 MR. DRAPER: It's the State of Colorado. They  
18 are the signatory --

19 QUESTION: The taxpayers of the State of  
20 Colorado will end up footing the bill, and it just seems  
21 odd to me that we would all of a sudden craft some rule  
22 allowing prejudgment interest against a sovereign State.  
23 I mean, the States presumably had ample opportunity to  
24 negotiate at the time of the compact for the kinds of  
25 things that should go into a damages award in the event of

1 a breach.

2 MR. DRAPER: In almost every case, the compacts  
3 that are in place now do not specify the precise remedy,  
4 or in most cases any remedy that might be afforded by this  
5 Court.

6 QUESTION: Did they just assume that, what,  
7 normal contractual remedies would be applied?

8 MR. DRAPER: I think that is the correct  
9 analysis, Your Honor. The Court has said in 1987, in the  
10 Texas v. New Mexico litigation, that the contract remedies  
11 should be looked to to determine the proper remedy for  
12 breach of a compact.

13 QUESTION: Was that the very first case in which  
14 damages, money damages were even awarded in one of these  
15 original jurisdiction cases?

16 MR. DRAPER: That is the first case, Your Honor,  
17 in which the prospect of money damages for violation of an  
18 interstate water compact were allowed. There was not a  
19 specific amount at that time. The Court returned the case  
20 to the Special Master, and it was settled before further  
21 determination was necessary.

22 QUESTION: The point wasn't even contested here,  
23 was it? Both sides wanted to resolve the case with  
24 monetary payment instead of with water, so that's hardly,  
25 you know, solid precedent for the proposition that money

1 damages are awarded.

2 MR. DRAPER: In this case, Your Honor, if I  
3 understood your point, Colorado took the position  
4 initially that compensation should be in water, without  
5 interest. The State of Kansas took the position that it  
6 should be in money with interest.

7 QUESTION: Right, and this is the first case  
8 we've had where that conflict has been presented to us.  
9 One of the parties doesn't want to pay money damages.

10 MR. DRAPER: That is correct.

11 QUESTION: And if we didn't allow money damages,  
12 I presume it would -- and if one of the parties would  
13 prefer monetary damages, I presume they could negotiate it  
14 out and pay -- I mean, Colorado could negotiate it out and  
15 pay money instead of water.

16 MR. DRAPER: That's correct, and Colorado is not  
17 challenging the determination by the Special Master here  
18 that the remedy should be in money.

19 QUESTION: I know they're not, but --

20 QUESTION: If money damages were not awarded,  
21 and some form of water relief, then you have a master  
22 who's there forever and administering the thing at great  
23 cost, often, to the parties, so money damages have that to  
24 recommend them.

25 MR. DRAPER: Money damages certainly has that to

1 recommend them, Your Honor. It's hard to tell whether  
2 we're receiving the water. You look at the river, and  
3 Colorado says, that's your water coming down in payment  
4 for our past violations. I can tell when we get a check.  
5 I'm not so sure when I'm looking at water in the river.

6 QUESTION: It's -- the interest question was  
7 never adjudicated before, but you're saying as well the  
8 damages question was never adjudicated, because last time  
9 around both parties said that's what they wanted.

10 MR. DRAPER: Last time around it was not clear  
11 that the parties were in agreement on the possibility of  
12 money damages, but this Court ruled that that was an  
13 option that should be considered by the Special Master.

14 QUESTION: If you want to get a check instead of  
15 water, you can always negotiate that out. I mean --

16 MR. DRAPER: That's true, and we're asking for a  
17 check.

18 QUESTION: So I mean, and that wouldn't put the  
19 burden on us to try to figure out how you compute money  
20 damages for failure to deliver water. I mean, that's one  
21 of the big issues in this case, I suppose, isn't it?  
22 You're going to get to that, whether we compute the losses  
23 to the farmers of Kansas from the failure to have more  
24 water delivered.

25 MR. DRAPER: Yes. There's no dispute at this



1 point in the case, Your Honor, that the compensation  
2 should be paid in money. That, as Your Honor alludes to,  
3 was quantified by Kansas in large part by assessing the  
4 injuries suffered by the water users in Kansas, mostly  
5 irrigating farmers.

6 The approach was taken to assess the losses in  
7 value suffered by the water users in Kansas because we had  
8 no ready market for water to which we could turn for the  
9 value of an acre foot of water in 1950, 1951 and so on.  
10 If we had that, that would have been the most direct way  
11 to do it.

12 QUESTION: I take it your argument for interest  
13 here is that there were -- that the money -- I'm sorry,  
14 that the water you didn't get in the 45 years in which the  
15 violations went on is translatable into crop loss, crop  
16 loss is translatable into money and, in order to be made  
17 whole on the money, you should be made whole on the loss  
18 of use of the money. I mean, that's your interest  
19 argument, isn't it?

20 MR. DRAPER: That's exactly right, Your Honor.

21 QUESTION: Okay.

22 MR. DRAPER: Yes.

23 QUESTION: Did you -- was there an inflationary  
24 factor added so that the damages, say for the early  
25 sixties were computed in 1995 or year 2000 dollars?

1 MR. DRAPER: For the years that were denied  
2 prejudgment interest treatment, 1950 through 1968, the  
3 Special Master did adjust those, at the suggestion of  
4 Colorado, not on the basis of principal, but simply  
5 because Colorado was not objecting to that. Those are  
6 adjusted, which is only a fraction of the time value of  
7 money that occurred from that period to the present.

8 QUESTION: But the people who are paying are  
9 really the present taxpayers, and they're paying for  
10 something that older generations of taxpayers maybe didn't  
11 do, and it could be horrendous amounts, if you have a  
12 violation that's 200 years old, as you could in a  
13 different case.

14 Rather than getting into all that, why wouldn't  
15 we assume that the States didn't want to unless they said  
16 it specifically in the compact?

17 MR. DRAPER: Your Honor, there are limits to  
18 keep such amounts from --

19 QUESTION: Why?

20 MR. DRAPER: -- becoming too large. The  
21 principle that was largely addressed in the last time that  
22 the case was before the Court, that is, laches, the  
23 question was, was there unreasonable delay in prosecuting  
24 Kansas' claim by Kansas? That was contested --

25 QUESTION: No, no, I suppose it's nobody's

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1 fault, you know. It just -- what I vision, and I want the  
2 answer to this, and I'll exaggerate it, but hoards of  
3 lawyers in State Attorneys Generals offices combing  
4 through the files of ancient documents looking for  
5 violations, primarily to receive for the State Treasury  
6 vast amounts of money coming out of compound interest. I  
7 mean, you see, that's the horror.

8 Now, what prevents that from happening, once we  
9 get into the habit of awarding prejudgment interest?

10 MR. DRAPER: The Court has stated that the  
11 determination of prejudgment interest is subject to the  
12 Court's discretion. It is also subject to consideration,  
13 again, of the time that has passed, and we are looking  
14 here at not simply any claim that could be found in the  
15 cellar of a courthouse.

16 This is the claim of the State of Colorado  
17 against the State of Kansas, or, I'm sorry, the State of  
18 Kansas against the State of Colorado, and it is Colorado,  
19 along with Kansas, who are the signatory parties to this  
20 compact, and the compact itself, in article 7(a), equates  
21 the State with its water users.

22 If I could turn your attention to that  
23 particular provision. It is in the topside brief, the  
24 blue brief, in the appendix at page A-11. Beginning at  
25 the bottom of A-10, article 7(a) of the Arkansas River

1 Compact says, each State shall be subject to the terms of  
2 this compact. Where the name of the State or the term,  
3 State, is used in this compact, these shall be construed  
4 to include any person or entity of any nature whatsoever  
5 using, claiming, or in any manner asserting any right to  
6 the use of the waters of the Arkansas River under the  
7 authority of that State.

8 We believe that this equates the water users in  
9 both States with the States themselves both in terms of  
10 the actions in Colorado by Colorado water users  
11 constituting the actual violation by the State of Colorado  
12 and, on the other side of the State line, the losses  
13 suffered by the individual farmers in Kansas, being the  
14 losses that the State of Kansas, as State, is entitled to  
15 claim for breach of the obligation that Colorado had to  
16 the State of Kansas.

17 In further support of that point, I would point  
18 to a second provision of the compact. It's in the same  
19 appendix at page A-5, and this is in the famous  
20 provision -- at least famous to those of us who have been  
21 working on this case -- 4(d). This is the provision that  
22 makes explicit the obligation of Colorado, and it's the  
23 proviso in the last five lines of Article 4(d) that is  
24 important.

25 It reads, provided that the waters of the

1 Arkansas River, as defined in Article 3, shall not be  
2 materially depleted in usable quantity or availability for  
3 use to the water users in Colorado and Kansas under this  
4 compact by future development or construction.

5 We believe that it is not the proper  
6 characterization of this case that it is going to be --  
7 that is a problem for the individuals, either as taxpayers  
8 in Colorado or the water users in Kansas, but that these  
9 are State obligations, and they need to be settled between  
10 States on fair, compensatory rules that are normally  
11 applied in contract situations, because, as we know,  
12 compacts are contracts between the compacting States.

13 QUESTION: Is it the case that there is no  
14 market for an acre foot of water in Kansas? Is there such  
15 a price today that could be paid if a farmer were to go  
16 out and buy water from another farmer who had some? Would  
17 there be a price paid per acre foot?

18 MR. DRAPER: Your Honor, there is no specific  
19 evidence in the record on that, but from my knowledge the  
20 water tends to be transferred with the land, and it is  
21 used primarily for irrigation purposes.

22 QUESTION: Well, in today's world I think we all  
23 are aware that water can be severed from the land and  
24 sold, so much an acre foot, for application on a different  
25 piece of land.

1 MR. DRAPER: That's correct, Your Honor.  
2 However, that information was not available to a  
3 sufficient extent for the years 1950 and later to --

4 QUESTION: Well, presumably you'd take the  
5 current value and then adjust for values in earlier times.

6 MR. DRAPER: Our experts sought to determine  
7 from specific data applicable to each year what the losses  
8 were, what the crop prices were, what the appropriate  
9 interest rates were for that year and each following year,  
10 to get a --

11 QUESTION: It just seems like such a  
12 complicated, not obvious measure of damages. I was just  
13 struck by how strange it was, really, to try to measure  
14 damages here in dollars based on some estimated crop loss  
15 to individual farmers.

16 MR. DRAPER: It is a daunting task at times,  
17 Your Honor, but we wanted to present to the Special Master  
18 the most specific data that we could possibly find.

19 QUESTION: Does Kansas have the riparian system  
20 of water rights, or the appropriated system?

21 MR. DRAPER: Appropriated system, Your Honor.

22 QUESTION: There's one thing on the question of  
23 how far the compound interest could compound that I don't  
24 understand, and I was -- I want to ask the other side the  
25 same question, but maybe you can explain it.

1           As I understand, the Master decided that the  
2 interest ought to run from 1969, which was the date upon  
3 which each side either knew or should have known that a  
4 violation of the compact was taking place.

5           MR. DRAPER: Yes.

6           QUESTION: The Master also decided that there  
7 had been no undue delay on the part of Kansas in not  
8 instituting suit for another, what was it, 17 years,  
9 something like that?

10          MR. DRAPER: That's correct. It was -- suit was  
11 filed at the end of 1985.

12          QUESTION: Indeed. The two dates, or the  
13 findings with respect to the two dates struck me as being  
14 at least possibly in tension. I'm not suggesting that  
15 Kansas would have been obligated to file suit, of course,  
16 in 1969, the year that it first knew or should have known,  
17 but it also seems the case that there was rather a long  
18 gap between that time and the time that Kansas actually  
19 did institute suit, and yet the Master found no undue  
20 delay.

21          Now, all of this may be relevant if we determine  
22 that interest should run and try to come up with some  
23 determination about how to take the point at which it  
24 begins to run. Is there some tension between the knew or  
25 should have known in '69, and the no undue delay for a

1 lawsuit that wasn't filed for 17 years?

2 MR. DRAPER: I believe there is some tension,  
3 Your Honor. We believe that the way that the Special  
4 Master has applied the lack of knowledge in the two areas,  
5 one area being where there was unreasonable delay, and the  
6 other area being whether prejudgment interest should be  
7 awarded, is inconsistent.

8 We suggest that it is impossible to find  
9 unreasonable delay if the plaintiff was unaware of the  
10 claim. That was essentially --

11 QUESTION: You mean, unaware in fact, even if  
12 the plaintiff should have been aware?

13 MR. DRAPER: That would go into the  
14 reasonableness of the delay. Should -- knew or should  
15 have known would be the complete statement of that test.

16 QUESTION: Okay.

17 QUESTION: In response to my question, my  
18 concern that they would dig up old claims and then have  
19 horrendous interest, you said, well, there's a lot of  
20 discretion in the Master to prevent that from happening.  
21 That's what he did here. He said, we're not going to give  
22 you the money between 1950 and 1968. Now you're  
23 complaining about that, so if he doesn't have discretion,  
24 then why isn't my horrendous imaginary hypothetical a real  
25 problem?



1 MR. DRAPER: Well, the cardinal rule, Your  
2 Honor, is complete compensation.

3 QUESTION: Well, fine. If it's complete  
4 compensation, then we're back to my problem, which is  
5 digging up very old claims from 1780 or something, and we  
6 discover that all of the taxpayers of Massachusetts are  
7 going to pay \$5 billion to New Hampshire because they  
8 found a claim from 1782 and there's compound interest.

9 MR. DRAPER: I would suggest only, Your Honor,  
10 that there are methods by which the Court has dealt with  
11 significant or unreasonable delay in its interstate  
12 cases --

13 QUESTION: Yes, that's what I'm interested in,  
14 the cases where you can't say laches. They dig up some  
15 good claim, and now you previously said they have a lot of  
16 discretion on the prejudgment interest part. Now you're  
17 saying they don't have discretion on the prejudgment  
18 interest part.

19 MR. DRAPER: Well, I should clarify my position.  
20 I would say that there -- while there is discretion, it is  
21 a very limited scope, given the authorities of this Court,  
22 and that it is to be exercised according to a system of  
23 principles that have been set out by this Court.

24 QUESTION: Mr. Draper, why --

25 QUESTION: Certainly somebody bringing a 200-

1 year-old claim would find a formidable barrier in the  
2 doctrine of laches, would they not?

3 MR. DRAPER: Yes, Your Honor. This Court in  
4 1995 did not go so far as to decide that laches is  
5 applicable, but found that in this case there was  
6 unreasonable delay and that, either through the doctrine  
7 of laches or acquiescence, there was the ability of the  
8 Court to deal with stale claims.

9 QUESTION: Mr. Draper, could I come back to  
10 Justice Souter's question? I don't understand how it is  
11 that Kansas should not have known enough to bring the suit  
12 until 1987, but Colorado should have known that it was  
13 wrongfully taking too much water 17 years before that? It  
14 seems to me the two should go hand in hand.

15 MR. DRAPER: We believe that the existence or  
16 nonexistence of knowledge on the part of Colorado is  
17 absolutely irrelevant as a matter of law, and we have  
18 taken no position on what the right date might be if --

19 QUESTION: Well, how can that be? The whole  
20 purpose of the common law rule against prejudgment  
21 interest for unliquidated claims was because of lack of  
22 knowledge to the -- by the defendant. That was the whole  
23 reason for the common law rule, and if that's the reason,  
24 then you're asking us to adopt a new rule here. How could  
25 Colorado have known about prejudgment interest in an

1 interstate compact dispute?

2 MR. DRAPER: Your Honor, that whole line of  
3 reasoning, we assert, has been discredited. It is not  
4 logical. It has faced trenchant criticism, to use the  
5 words of this Court, in the 1995 case, City of Milwaukee,  
6 and we believe that this is, as the Court has pointed out,  
7 essentially a contract dispute. One must keep in mind  
8 that it is sovereign States who are the contracting  
9 parties, but the guiding principles --

10 QUESTION: So shouldn't that, Mr. Draper, mean  
11 that there should be some modification? You say the  
12 common law rule has been abandoned in many States because  
13 it's illogical, the distinction between liquidated and  
14 unliquidated damages.

15 On the other hand, as Justice O'Connor's  
16 starting questions indicated, we are dealing here with a  
17 peculiar animal, a suit between two States, so why do you  
18 insist that you take the, what would be the rule for an  
19 ordinary contract in the State that's abandoned the  
20 liquidated-nonliquidated and take that over, jot and  
21 tittle, to the interstate suit?

22 MR. DRAPER: Because, Your Honor, it would  
23 violate the principle that this Court set out in 1987 that  
24 a remedy would be provided by this Court for violation of  
25 an interstate compact. If you do that, the Court is not

1 providing a complete remedy.

2 QUESTION: Well, but that -- doesn't that sort  
3 of beg the question? If we start with the assumption that  
4 there is some discretion over the matter of interest, why  
5 couldn't we resolve the tension between the findings with  
6 respect to those two dates with a rule like this, that  
7 interest will be awardable from the time at which the  
8 violation either was or should have been known, and from  
9 the time after that at which suit was instituted, to avoid  
10 the problem of allowing a State, as apparently Kansas did  
11 here, to sit on its rights from 1969 to whatever it was,  
12 1977?

13 MR. DRAPER: There are two answers to that, Your  
14 Honor --

15 QUESTION: '87. '87, yes.

16 MR. DRAPER: There are two answers. One is  
17 that this Court has already determined that there was not  
18 unreasonable delay in bringing this suit, and the Special  
19 Master did not base in any way his decision to limit  
20 prejudgment interest on any delay other than that  
21 considered in the laches analysis.

22 QUESTION: Well, I know that, but why shouldn't  
23 he have? I mean, it just seems odd whether the delay --  
24 call the delay undue or not, the fact is there was a 17 or  
25 18-year delay from the time at which Kansas could have

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1 brought this lawsuit. Why should Kansas be rewarded with  
2 interest for that delay, even if it was not undue?

3 MR. DRAPER: It's not a reward. It's simply  
4 compensation. There is no windfall.

5 QUESTION: Thank you, Mr Draper.

6 Mr. Minear, we'll hear from you.

7 ORAL ARGUMENT OF JEFFREY P. MINEAR

8 ON BEHALF OF THE UNITED STATES, AS INTERVENOR

9 MR. MINEAR: Mr. Chief Justice, and may it  
10 please the Court:

11 The United States would like to address two  
12 issues with respect to the Master's proposed remedy.  
13 First, the Master's calculation of damages here does not  
14 violate the Eleventh Amendment and, second, this Court  
15 should allow prejudgment interest on a discretionary basis  
16 in interstate compact suits.

17 QUESTION: When you get to the second point, and  
18 I don't mean to spoil your order, but will you sort of  
19 take up where we left off on the problem that we -- some  
20 of us seem to be having in finding that there was  
21 knowledge, or should have been knowledge in '69. We don't  
22 have a suit for a couple of decades, and interest is  
23 piling up. That's our problem, and I -- so will you  
24 address that when you get to point 2?

25 MR. MINEAR: I'd be happy to address that now,

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1 in fact, to preserve the continuity of the argument.

2 Your Honor, first of all, the Master's finding  
3 with respect to knowledge here related to Colorado's  
4 knowledge, and not Kansas' knowledge, and Colorado had  
5 knowledge that there was the prospect of some violation  
6 because it had complaints within its own State borders  
7 with respect to groundwater pumping depletion, depleting  
8 stream flow and, as you may recall, that is the basis for  
9 liability here, that Colorado had allowed its citizens to  
10 pump groundwater which reduced the State line flow.

11 QUESTION: No, I realize that. Did he, did the  
12 Master specifically find that Kansas was not under an  
13 obligation to have known in '69?

14 MR. MINEAR: He found that Kansas did not know  
15 at that time.

16 QUESTION: Did not know in fact?

17 MR. MINEAR: Did not know in fact.

18 QUESTION: And I suppose Colorado did not know  
19 in fact, but he found that Colorado should have known in  
20 '69. Did he make a finding that it was not the case that  
21 Kansas should have known in '69?

22 MR. MINEAR: I do not believe that he did. I  
23 don't believe that he specifically addressed that issue.

24 QUESTION: It would seem the same would apply.  
25 I mean, people from Kansas never go to Colorado? I mean,

1 what's --

2 MR. MINEAR: Well, it's hard to say what the  
3 state of knowledge was in 1968, and to the extent there  
4 was some lack of proof here, I think the burden would fall  
5 on Kansas to have --

6 QUESTION: I mean, why can't we just make the  
7 assumption that if one side knew or should have known, the  
8 other side knew or should have known?

9 MR. MINEAR: I do think that we simply can't  
10 assume that --

11 QUESTION: Farmers know who's drilling wells,  
12 and so forth.

13 MR. MINEAR: On the other hand, though, the  
14 Colorado, for instance, had commissioned a study. It had  
15 done its own internal studies. I believe in 1965 it had  
16 begun to license groundwater pumping, so it's not clear  
17 that everything that was known to one sovereign would  
18 necessarily be known to another sovereign.

19 QUESTION: Let's assume, just -- and I think  
20 we've got your point, but assume for the sake of argument  
21 that Kansas would have been under the same duty to know  
22 that Colorado was, and that '69 is the date.

23 The case as it comes to us, I take it, is a case  
24 in which there is no question about Kansas being thrown  
25 out of court for suing too late, but it may well be that,

1 by waiting so long to sue, Kansas should not be entitled  
2 to the same running and compounding of interest that it  
3 would have been entitled to if it had sued more promptly  
4 after the 1969 date. Why shouldn't we take that  
5 possibility into consideration in fashioning the rule as  
6 to when the interest starts to run?

7 MR. MINEAR: I think it's entirely fair to take  
8 that consideration into account. The United States' view  
9 with regard to prejudgment interest is that it should be  
10 allowed in interstate compact suits, but on a  
11 discretionary basis, based on the facts of the individual  
12 case.

13 QUESTION: Mr. Minear, one thing seems to have  
14 gotten lost in this discussion. I thought that it was --  
15 when Colorado, or perhaps Kansas, knew that Kansas water  
16 was being depleted, and when you were able to prove in  
17 court how much, wasn't there something in the record that  
18 until there was computer modeling you couldn't estimate  
19 with any degree of accuracy --

20 MR. MINEAR: That's --

21 QUESTION: -- how much was involved, and that  
22 wasn't until the eighties.

23 MR. MINEAR: That's correct, Your Honor, that  
24 also there was difficulty in determining exactly how much  
25 water had been depleted. It wasn't clear when that



1 knowledge was available, but it certainly was after, we  
2 believe, 1968.

3 QUESTION: No, but couldn't they have brought a  
4 suit in equity to stop depletion, and if they had done  
5 that, the damages wouldn't be running, we wouldn't have  
6 the interest question.

7 MR. MINEAR: Well, I agree with that as well,  
8 and again I think this focuses --

9 QUESTION: So the fact that they may not have  
10 been able to prove the precise predicate, which is the  
11 modeling predicate for the computation of money damages  
12 now, doesn't prove that they shouldn't have sued earlier.

13 MR. MINEAR: Your Honor, I agree with all of the  
14 points that are being made here, and the United States  
15 wishes to emphasize the principle that a rigid rule one  
16 way or another with regard to prejudgment interest is what  
17 ought to be avoided here. We do think these factors are  
18 relevant in considering what is the appropriate level of  
19 prejudgment interest.

20 QUESTION: Well, why not do the simplest thing?  
21 They're States. They can say what they want in the  
22 compact. Just say, the traditional common law, no  
23 interest on, no prejudgment interest on unliquidated  
24 damages, or whatever, applies, we assume it in the  
25 contract, compact, unless they work it out and say to the

25

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1 contrary.

2 MR. MINEAR: Your Honor, because I think that  
3 doesn't adequately address the common law rule, which I  
4 think we should look to the Restatement of Contracts in  
5 stating the rule in a compact case.

6 That's the closest analogy to the contract  
7 situation, and in the Restatement of Contracts, since 1932  
8 the rule has been that, where damages are a fixed sum of  
9 money, or a performance that has a fixed value,  
10 prejudgment interest does apply, but in those cases, in  
11 all other cases prejudgment interest is applied under a  
12 rule of reasonableness, based on the aspects, the  
13 circumstances of the particular case.

14 So our position really simply suggests that the  
15 Restatement rule is what ought to be applied here. Both  
16 States would have been on knowledge of that principle as a  
17 background principle in this case.

18 I would like to address the Eleventh Amendment  
19 issue, because I think that also merits this Court's  
20 concern. The Master properly determined, in accordance  
21 with this Court's decision in Texas v. New Mexico, that  
22 Kansas is entitled to money damages as a basis for  
23 Colorado's compact violations, as a remedy for the compact  
24 violations, and he calculated those damages by determining  
25 the value of the water that Kansas was entitled to but did

1 not receive and, in making that determination, he  
2 evaluated the cost to Kansas farmers, which was reflected  
3 in two matters, increased groundwater pumping costs, and  
4 also lost crop production.

5 Colorado has challenged that aspect of the award  
6 on the basis that it violates the Eleventh Amendment, and  
7 we disagree. Our view is, the Master's determination of  
8 damages here was simply by reference to what the water was  
9 worth to the Kansas users, not to provide any sort of  
10 compensation for the Kansas users themselves.

11 QUESTION: Well, you mean Colorado can't turn  
12 around and give it to the Kansas users who had been  
13 deprived of it, if they're still around?

14 MR. MINEAR: You mean, could Kansas turn around  
15 and give the money --

16 QUESTION: Right. Right.

17 MR. MINEAR: Yes. Yes, I believe that Kansas  
18 could do that if they wished.

19 QUESTION: So what's the difference between that  
20 and these users just suing Colorado themselves?

21 MR. MINEAR: Well, it's not clear that the users  
22 individually have a claim against Colorado. Kansas does  
23 have its own claim predicated on the compact.

24 QUESTION: Let's assume they don't. Let's  
25 assume they don't. Let's assume it would violate the

1 Eleventh Amendment for these farmers who are deprived of  
2 the water to sue Colorado. Why does it make any sense to  
3 allow Kansas to sue on their behalf, and then turn around  
4 and give them the money?

5 MR. MINEAR: Because Kansas is not suing on  
6 their behalf. Kansas is suing for the performance that  
7 was due to it under the compact. Kansas is asserting, in  
8 essence, its own claim, which was for delivery of a usable  
9 quantity of water, usable water at the State line, and --

10 QUESTION: Why shouldn't the measure of damages,  
11 then, relate to what Kansas as a State lost? It did, in  
12 part, lost income taxes and that kind of thing. I mean,  
13 why would the measure be specifically what each farmer  
14 would have lost in terms of dollars?

15 MR. MINEAR: The Master did include State income  
16 taxes and secondary taxes.

17 QUESTION: I can understand that, but it's hard  
18 to know why the measure of money damages should be based  
19 strictly on, or in part on what the individual farmer  
20 would have lost if the State doesn't plan to turn around  
21 and give it to the farmer.

22 MR. MINEAR: Well, Your Honor, the reason why  
23 is, we have to determine what was the value of the water  
24 at the State line, and as you pointed out before, there is  
25 no market for the water like there would be a market for

1 so many bushels of wheat.

2 QUESTION: Why does the United States have any  
3 position or interest as to what kind of damages Colorado  
4 pays Kansas, or the Eleventh Amendment, for that matter?

5 MR. MINEAR: Well, Your Honor, we have a general  
6 interest in these original actions to make sure that  
7 there's a fair allocation of damages and rights and  
8 responsibilities.

9 QUESTION: Why is that? Where does that  
10 interest stem from?

11 MR. MINEAR: We are parties to these suits  
12 frequently, most likely in issues revolving, involving  
13 liability. We are a party to this suit because of our  
14 operation of the upstream reservoirs.

15 QUESTION: But does the award of damages from  
16 Colorado to Kansas in any way affect the Government's  
17 operation of those upstream reservoirs?

18 MR. MINEAR: It would affect them if it were  
19 repayment in water. Here, money is being used as a  
20 substitute for water, and we thought it appropriate to  
21 weigh in on that question with respect to the position  
22 that the Master has taken, and our position is very  
23 simply, simply that we have to look to what the value of  
24 the water was at the State line.

25 QUESTION: Well, my problem is, if you do it in

1 this kind of suit, which is under a compact, I presume you  
2 would have to do the same thing in a parens patriae suit  
3 by a State against another State, wouldn't you? Wouldn't  
4 you apply the same rule?

5 MR. MINEAR: Not necessarily Your Honor, because  
6 the compact situation involves a situation where there is  
7 a clear claim by the State under the -- an agreement that  
8 is entered into by the States.

9 QUESTION: Thank you, Mr. Minear.  
10 Mr. Robbins, we'll hear from you.

11 ORAL ARGUMENT OF DAVID W. ROBBINS  
12 ON BEHALF OF THE DEFENDANT

13 MR. ROBBINS: Mr. Chief Justice, and may it  
14 please the Court:

15 I would like to turn initially to the  
16 prejudgment interest issue, since that seemed to draw the  
17 Court's attention early on. I would ask you to look at  
18 Article 4(d) that Mr. Draper drew your attention to,  
19 because he only asked you to read the second half of  
20 Article 4(d).

21 QUESTION: What page is that on?

22 MR. ROBBINS: That's on page A-5 of the Kansas  
23 opening brief.

24 Article 4(d) describes for the parties and for  
25 the Court what the parties actually intended, and that was

1 not to impede or limit development of water within the  
2 Arkansas Basin, subject only to the proviso, both States  
3 understood that there would be additional development  
4 within the basin, and both States understood that there  
5 would be a risk that that development might cause material  
6 depletion to usable flow.

7 QUESTION: Are you now summarizing article,  
8 section (d), Mr. Robbins?

9 MR. ROBBINS: Yes. Yes, Your Honor. I did not  
10 take the time to read the entire article, Your Honor.

11 The -- later in the compact, in the enforcement  
12 provision, the two States address the manner in which they  
13 are going to determine when usable flows might be depleted  
14 by setting up an interstate agency called the Arkansas  
15 River Compact Administration, and the Arkansas River  
16 Compact Administration is charged with investigating  
17 concerns about material depletions to usable flow.

18 There was no contemplation in this compact that  
19 Colorado -- I want to draw a distinction between other  
20 compacts that States have entered into, the Colorado River  
21 Compact, where the obligation to deliver water is set out  
22 at 75 million acre feet over 10 years by the Upper Basin,  
23 the Rio Grande Compact, where there is a table of  
24 relationship located right in the compact, where each  
25 signatory understands what it must do each year to comply

1 with the compact.

2 In the case of the Arkansas River Compact, there  
3 was no obligation on the part of Colorado to deliver a  
4 particular quantum of water in any year. Rather, both  
5 States sought to have the opportunity to continue to  
6 develop unused waters, and both States agreed that they  
7 would be vigilant, working through the interstate agency,  
8 to investigate when and if a violation or an under  
9 delivery was occurring.

10 Now, no investigation was requested. Under the  
11 compact, under Article 7(h) -- 8(h), I'm sorry, until  
12 1985. Prior to that time, both States cooperated together  
13 and worked together on the operation of the river.  
14 Neither State expressed an understanding that there was  
15 any way in which the river was being depleted by  
16 activities in Colorado or in Kansas.

17 Remember, if you look again at Article 4(d), it  
18 applies to both States, not just Colorado, so what we need  
19 to do here is understand what the deal was, and the deal  
20 wasn't that Colorado was automatically guaranteeing that  
21 it was going to deliver a certain amount of water every  
22 year, which would be what would be assumed by the argument  
23 which Kansas has made, and therefore failing to deliver  
24 some amount over a 40-year period, we automatically should  
25 owe them significant damages, when, in fact, the concept



1 here was that both States would work to allow full  
2 development of the system, and both States would be  
3 responsible to ensure that if overdevelopment occurred in  
4 one or the other State that affected usable flows, an  
5 investigation would be undertaken and appropriate  
6 enforcement undertaken.

7 So in our view, at a minimum, on prejudgment  
8 interest, until 1985 Colorado knew no more than Kansas.  
9 There is nothing in the record to suggest that Colorado  
10 did. The Master --

11 QUESTION: But they had a report done, which  
12 Kansas didn't. Didn't they have a report done?

13 MR. ROBBINS: Absolutely. We -- Justice Scalia,  
14 we certainly did. That report did not deal with the issue  
15 of material depletion to usable flow. It was looking,  
16 rather, at the general hydrology in the basin. It did not  
17 look at other impacts that were affecting the flows of  
18 the --

19 QUESTION: Well, I mean, it was clear from that  
20 study that flow would be affected, wasn't it? I mean, you  
21 didn't have to be a water expert to understand that the  
22 inevitable consequence of that study was that you were  
23 taking water from the river.

24 MR. ROBBINS: There is no question about that.  
25 Your point is exactly well-taken, but remember, we were

1 entitled to take additional water from the river under  
2 Article 4(d), subject only to the constraint that we not  
3 deplete usable flows materially.

4 QUESTION: Okay, but you've also got a finding  
5 which you seem to -- I think you want to ignore here, that  
6 you should have known in '69. What do we do with that?

7 MR. ROBBINS: Justice Souter, the finding that  
8 the Master made, in our opinion, is contrary to this  
9 Court's 1995 ruling. We argued in 1995, the two States,  
10 about the very Wheeler report upon which the Master  
11 relied. We argued that that report should have given the  
12 States notice of the existence of a potential problem  
13 under the compact, and this Court found, different than  
14 the master's first report to you, that the evidence was  
15 vague and conflicting.

16 It is our view that in fairness, if it was too  
17 vague and conflicting to find that Kansas should have  
18 known in 1969 and brought suit at that time if it was  
19 concerned, or, better, referred it to the compact  
20 administration, that in fairness Colorado should be held  
21 to no higher standard of knowing that it was in fact  
22 depleting usable flows.

23 QUESTION: Well --

24 MR. ROBBINS: You're asking us to actually know  
25 there were depletions occurring when you did not find that

1 Kansas was even charged --

2 QUESTION: Okay, but is that properly before us  
3 here?

4 MR. ROBBINS: I believe it is, yes.

5 QUESTION: I hadn't realized your claim went  
6 that far, but I will assume it does.

7 MR. ROBBINS: So it is our view that prejudgment  
8 interest ought not be -- if you are to consider it as a  
9 remedy in this case, it ought not be held against Colorado  
10 at a minimum until 1985, the time at which there was  
11 official notice that, in fact, Kansas was asserting that  
12 there were depletions material depletions --

13 QUESTION: And what's your position after 1985?

14 MR. ROBBINS: Well, I --

15 QUESTION: Suppose the shoe were on the other  
16 foot, and Colorado was suing some other State?

17 MR. ROBBINS: I do not believe, Justice  
18 O'Connor, that prejudgment interest is appropriate in this  
19 context until damages are liquidated. There was no  
20 contemplation between the States that there would even be  
21 a monetary consequence in these compacts. There might be  
22 injunctive relief. You have to think that in 1949, that  
23 the law was such that the common law was generally  
24 accepted to be damages only suffered, prejudgment interest  
25 on liquidated damages.

1           The parties never discussed anything to do with  
2 damages in this case. The parties contemplated only that  
3 they would work together through this interstate agency,  
4 the compact administration, and would seek to ensure that  
5 depletions to usable flow didn't occur.

6           QUESTION: When I suggested that, the Government  
7 said -- it sounded sensible. They said, well, the  
8 prejudgment interest rule has always been the common law,  
9 just part of the common law, and why should we -- and you  
10 ought to just stick to that.

11           MR. ROBBINS: I agree completely with that, and  
12 I think the cases cited by my loyal opposition are not --  
13 do not stand for the proposition. I do not believe the  
14 City of Milwaukee v. National Gypsum stands for the  
15 proposition that prejudgment interest is applicable in  
16 every dispute that involves some form of a contract.

17           In fact, I believe that stands for the  
18 proposition that if you are in an admiralty circumstance,  
19 and if you know or should have known that, in fact, damage  
20 had occurred, and in that case there was a Great Lakes  
21 carrier sitting at the bottom of the harbor, and the good  
22 faith was about who put it there, not the good faith that  
23 Colorado's talking about here today, which was, we didn't  
24 have a clue, I don't think it's appropriate.

25           QUESTION: So your basic -- one part of your

1 basic rule is, if the plaintiff isn't barred by laches,  
2 then the defendant shouldn't be hit with prejudgment  
3 interest.

4 MR. ROBBINS: That's correct.

5 QUESTION: All right.

6 MR. ROBBINS: If we don't have a tolling --

7 QUESTION: But that can't be the whole rule.  
8 What's the principle that you think we should adopt in  
9 respect to prejudgment interest in a suit between two  
10 States?

11 MR. ROBBINS: In my view, until a damage, the  
12 damages are liquidated, there should not be prejudgment  
13 interest in this case, and I think that's --

14 QUESTION: Well, in other words --

15 QUESTION: Unless it's specifically mentioned in  
16 the compact.

17 MR. ROBBINS: Unless it's described in the  
18 compact, that's correct.

19 QUESTION: You say until damages are liquidated.  
20 Until there's a judgment, then.

21 MR. ROBBINS: That's correct.

22 QUESTION: There would be no prejudgment  
23 interest.

24 MR. ROBBINS: That's correct.

25 QUESTION: I just want to get clear on the point

1 that you and I discussed a minute ago on your exception to  
2 the Master's finding that you should have known in '69.  
3 Which one of the four Colorado exceptions raises that in  
4 your judgment? Three seems to be the closest to it.

5 MR. ROBBINS: Well, I --

6 QUESTION: Your number 3.

7 MR. ROBBINS: I believe that's the closest one,  
8 that's correct.

9 QUESTION: Okay.

10 QUESTION: What number?

11 QUESTION: Three.

12 MR. ROBBINS: Number 3.

13 QUESTION: You don't contest post judgment  
14 interest?

15 MR. ROBBINS: No, ma'am. You determined that  
16 very clearly in Texas v. New Mexico.

17 QUESTION: But that's -- and that's something  
18 that this Court determined. It didn't come from the  
19 statute that governs post judgment interest for district  
20 courts.

21 MR. ROBBINS: That's correct, Justice Ginsburg.

22 QUESTION: So --

23 MR. ROBBINS: We're not here to argue to you  
24 that you do not have discretion in these interstate  
25 original proceeding actions. You do. You have discretion

1 to formulate what you believe to be is the appropriate  
2 remedy. I think you made that very clear in Texas v. New  
3 Mexico in response to the Texas claim that you were barred  
4 from awarding post judgment interest unless there was a  
5 statute or other authority to grant it, so I -- we don't  
6 dispute that, no, Your Honor.

7 QUESTION: You want us to say that we should  
8 apply the common law rule?

9 MR. ROBBINS: That's correct.

10 QUESTION: Why is -- should that be different  
11 from what we held in the Milwaukee case for admiralty?

12 MR. ROBBINS: Well, the circumstances are very  
13 different. In the Milwaukee case the factual circumstance  
14 is different. There was knowledge on behalf of Milwaukee.  
15 Their good faith that they didn't know something was --

16 QUESTION: Well, but why should admiralty as a  
17 general classification be treated differently than the  
18 common law? Of course, the cases will always differ.

19 MR. ROBBINS: Well --

20 QUESTION: Have varying facts.

21 MR. ROBBINS: -- I would argue to the Court,  
22 Justice Kennedy, that the situation in the Milwaukee case  
23 was a commercial transaction. In this -- where whatever  
24 was occurring was understood to involve money damages.

25 In this case --

1                   QUESTION:  So as you read Milwaukee, if two  
2                   ships collide there's no -- well, of course, I don't know  
3                   how you'd get prejudgment --

4                   MR. ROBBINS:  They didn't tie the ship up right,  
5                   and the argument was whether the wharfinger had failed to  
6                   provide an adequate berth, or whether the owner of the  
7                   ship had allowed it to --

8                   QUESTION:  Well, but if you say the facts of  
9                   Milwaukee are different than this, I -- that doesn't  
10                  answer why admiralty and common law should go on two  
11                  different paths.

12                 MR. ROBBINS:  Well, they always have.  Admiralty  
13                 has --

14                 QUESTION:  I'm asking, why, in this context of  
15                 prejudgment interest?  What is it about an admiralty case  
16                 that makes prejudgment interest proper, and not in a  
17                 common law case.

18                 MR. ROBBINS:  For over --

19                 QUESTION:  Is it sophistication of the parties  
20                 or something?

21                 MR. ROBBINS:  For over 150 years, prejudgment  
22                 interest has been a part of admiralty judgments.

23                 QUESTION:  Well, but we now have Milwaukee, that  
24                 confirms that.

25                 MR. ROBBINS:  That's correct.



1 QUESTION: Why should there be a difference?

2 MR. ROBBINS: Because the common law  
3 traditionally viewed the necessity of the defendant  
4 understanding that, in fact, an injury was occurring, so  
5 that the defendant could either --

6 QUESTION: You mean, common law defendants are  
7 not as smart as admiralty defendants?

8 (Laughter.)

9 MR. ROBBINS: Well, I'm afraid I can't fully  
10 illuminate you on the history of --

11 QUESTION: Mr. Robbins, I think that your point  
12 is that the States thought that they were incorporating  
13 common law rather than admiralty law.

14 MR. ROBBINS: I -- there is absolutely no way  
15 for them --

16 QUESTION: Isn't that your --

17 MR. ROBBINS: -- Justice Scalia to have done  
18 anything else.

19 Thank you.

20 QUESTION: Well, yeah, but I mean --

21 QUESTION: When do you --

22 QUESTION: No, but I'm asking whether there  
23 should be a difference.

24 MR. ROBBINS: You're asking me a very hard  
25 philosophical question. I can only respond, Justice

1 Kennedy, that historically --

2 QUESTION: We have a hard philosophical question  
3 before us in distinguishing Milwaukee. That's the point.

4 MR. ROBBINS: I can say that in my judgment the  
5 states did not contemplate that prejudgment interest was  
6 to be considered. In fact, they didn't even discuss  
7 damages.

8 QUESTION: What about the provision of the  
9 Restatement, which came out, I guess, in 1932? I mean,  
10 that is supposed to be a summary of common law, is it not?

11 MR. ROBBINS: There were certainly -- there have  
12 certainly been cases that have described the fact that  
13 there was no rational basis in a commercial transaction  
14 between awarding prejudgment interest on liquidated  
15 damages, but not doing so on unliquidated damages if the  
16 intention of the litigation was to restore the plaintiff  
17 fully to the position it would have been in.

18 QUESTION: I mean --

19 MR. ROBBINS: In this circumstance, however,  
20 that doesn't really work very well, because, as was  
21 described by counsel for Kansas, the damages which Kansas  
22 seeks run to individuals, and Kansas seeks the money from  
23 the general Treasury of the State of Colorado.

24 Our view is that that, in and of itself, works a  
25 problem because, as we understand it, the Eleventh

1 Amendment was intended to protect State Treasuries from  
2 enormous damage --

3 QUESTION: Oh, I don't know about the Eleventh  
4 Amendment. I mean, the -- but the -- my thought was, and  
5 this might be totally wrong, that it isn't that the -- you  
6 know, the fact that something was done in the Middle Ages  
7 is not, whoever Holmes said, a reason for following it, so  
8 let's start with the Restatement rule. Why shouldn't that  
9 be the rule? I think it should be the rule in normal civil  
10 cases.

11 If there's something different about this one,  
12 it must stem from the fact that in a very old case what  
13 we're talking about are two groups of taxpayers, neither  
14 of whom was around at the time, shifting money between  
15 each other and stirring up a lot of trouble between their  
16 States.

17 Now, is there a basis for distinguishing that  
18 and if so, what, and why?

19 MR. ROBBINS: In my view, the distinction is  
20 that the agreement that was reached between the two States  
21 was, 1) that contemplated the States would work together  
22 to ensure that additional usable flows did not --  
23 depletions to usable flow did not occur, and that there  
24 was no contemplation that there would be exchanges of  
25 money between the two States as a result of the compact.

1           There's nothing to suggest that either State  
2 contemplated or discussed the fact that there would be a  
3 monetary consequence. Colorado acknowledges this Court's  
4 decision in Texas v. New Mexico that damages can be, under  
5 certain circumstances, awarded in order to --

6           QUESTION: Are you going to discuss that, the  
7 proper measure of damages?

8           MR. ROBBINS: I would --

9           QUESTION: Your time's flying away here, and you  
10 haven't said a word about it. What do you think the  
11 proper measure of damages should be?

12           MR. ROBBINS: Thank you, Justice Scalia. I do  
13 not believe that Texas v. New Mexico addressed the  
14 standard of damages. You merely made the statement in  
15 that case, this Court, that damages would be appropriate,  
16 and would be appropriate in certain circumstances in  
17 interstate litigation.

18           The proper measure of damages in our view are  
19 those damages which represent damages to the sovereign and  
20 quasi sovereign damages which would be damages to the  
21 general economy. We do not agree, and strongly disagree,  
22 that summing the individual damages -- and I want to make  
23 a point here. We disagree with the United States. What  
24 the Master did was not use damages to farmers as a measure  
25 of the value of water. You will see in his report that

1 he specifically found that he was relying upon the  
2 specific damages to those farmers.

3 QUESTION: But you say the general economy. You  
4 just have all sorts of causation problems there, if you  
5 try to prove damage to the general economy, don't you?

6 MR. ROBBINS: The reason that Colorado engaged  
7 in the evidentiary proceeding to determine what the  
8 damages were to farmers and to the farm community was to  
9 permit the assessment of general damages, and the Master  
10 made a finding about general damage to the Kansas economy  
11 which is called secondary damages, and it was, in fact --  
12 that number was derived and is contained in his report.  
13 We do not disagree that damages to the general economy are  
14 part of the sovereign and quasi sovereign damages that the  
15 State of Kansas suffered.

16 In addition, he identified and found the amount  
17 of lost tax revenues that the State suffered, which in our  
18 view is also an appropriate damage.

19 QUESTION: Why aren't the farmers' losses part  
20 of the loss to the general economy? I gather what you're  
21 considering loss to the general economy is the farmers had  
22 less money, and therefore didn't buy as many luxury goods  
23 at the grocery stores. I don't know why you should take  
24 into account the latter, the secondary effect of this  
25 taking of water, and not take into account the former, the

1 more immediate effect of it.

2 MR. ROBBINS: The problem that we have is this.  
3 In North Dakota v. Minnesota, you set out a fairly bright  
4 line between what a State could, in fact, recover in the  
5 way of damages and what it could not.

6 In this case, as the record, as the briefs made  
7 clear, if you calculate the specific amount of damage that  
8 each individual suffered, and if you award prejudgment  
9 interest on the rate at that, that that individual would  
10 have enjoyed or paid if he had had the money, or obtained  
11 if he'd had the money, and you add all that up, and simply  
12 say, that is the amount of money that the State of Kansas  
13 is entitled to, and then, reading Texas v. New Mexico, you  
14 say a State can decide in the public interest, which is  
15 the term used in Texas v. New Mexico, they can return that  
16 money to the individuals, you have simply permitted, in  
17 the context of trying to determine damages, a back door to  
18 avoid North Dakota v. Minnesota.

19 QUESTION: But you leave one thing out in your  
20 argument, at least I think you do, and that is in this  
21 case the compacts -- the compact was entered into  
22 specifically for the purpose of protecting the individual  
23 water users as well as for protecting whatever the  
24 sovereign interest of the State as such was, so that  
25 the -- I think the reading that you're trying to give it

1 ignores the object of the compact in, frankly in  
2 protecting the farmers.

3 MR. ROBBINS: Justice Souter, I have a different  
4 take on Article 7(a) of the compact.

5 QUESTION: That's -- and that's what I want  
6 to --

7 MR. ROBBINS: And the reason I do is this. All  
8 compacts, after your decision in Hinderlider, the Court's  
9 decision in Hinderlider v. La Plata and Cherry Creek  
10 Ditch. All compacts tie the interest of the State and the  
11 interest of the water users together. There was no more  
12 an argument within this country whether or not water users  
13 could say, my interest is independent of the State's  
14 interest, because that was the whole issue in the  
15 Hinderlider case.

16 What -- 10 years later, when this compact was  
17 entered into, the history was that the States had been  
18 before you several times. The last time it involved water  
19 users in Kansas suing water users in Colorado, Colorado  
20 petitioning for this Court's protection to stop the  
21 inter -- the fight between the individual ditch companies  
22 and individuals in the two States.

23 I believe Article 7(a) was placed in the compact  
24 for the purpose of making certain that all of the people  
25 in the Arkansas basin who were going to be bound by it

1 understood on the face of the compact that they would be  
2 bound thereby, if for no other reason --

3 QUESTION: Well, but if they are bound by it, I  
4 don't see why, by a parity of reasoning, their interest  
5 may not be considered in valuing the violation. In other  
6 words, if they're bound by it I suppose either they get a  
7 benefit or the State may legitimately measure a benefit by  
8 reference to their interests.

9 You want to have it one -- you don't want to  
10 have it -- you want to have the benefits but not the  
11 burden.

12 MR. ROBBINS: We understand that we have the  
13 burden. We understand, the State of Colorado understands  
14 that it has to deliver water to the State of Kansas, and  
15 has endeavored to do so.

16 What we do not want to do is see damages paid to  
17 the State of Kansas that represent individual damages  
18 impermissible under the Eleventh Amendment from being  
19 brought against the State, summed up, and paid to the  
20 State of Kansas.

21 In my view, the way in which this case has  
22 unfolded, there is a significant risk, if one assumes that  
23 allowing a State to distribute any damages it receives in  
24 the public interest, that a State can simply, by clever  
25 pleading, fail to announce that it is seeking the damages



1 of the individuals. That was not --

2 QUESTION: Mr. Robbins, I was thinking when you  
3 were making the argument in your brief, of what you would  
4 say the Eleventh Amendment means in the kind of claim you  
5 say that the Secretary of Labor would bring against a  
6 State for violation of the Fair Labor Standards Act where  
7 the recovery would go directly into the pocket of the  
8 affected worker. Are those suits impermissible under the  
9 Eleventh Amendment?

10 MR. ROBBINS: That is pursuant to Federal  
11 statute, and that's a topic that I know this Court has had  
12 a significant amount of debate about.

13 QUESTION: Well, why isn't the compact on the  
14 same level as a Federal statute? Congress had to approve  
15 it.

16 MR. ROBBINS: Well --

17 QUESTION: I assume it has the status of a  
18 Federal statute --

19 MR. ROBBINS: It has been described --

20 QUESTION: -- so I assume the analogy is exact.

21 QUESTION: Well, the United States can sue for  
22 damages without an Eleventh Amendment problem.

23 MR. ROBBINS: That's correct, and it has been  
24 described as a Federal statute, but it is a --

25 QUESTION: Well, of course, the United States

1 can, but what you're saying here is, it's not the State.  
2 You're not questioning that one State can sue another  
3 without an Eleventh Amendment barrier, but you say what  
4 makes it no good is that it's for the benefit of the  
5 farmers, so similarly, in the Fair Labor Standards Act,  
6 the United States is suing, but if you apply your  
7 reasoning, the workers are the same as the farmers.

8 MR. ROBBINS: Justice Ginsburg, I am arguing  
9 North Dakota v. Minnesota to you, which -- in which case a  
10 lawsuit was filed by the State of North Dakota against  
11 Minnesota. They claimed -- they asked for three things.  
12 They asked specifically for an injunction, which the Court  
13 found was appropriate.

14 They asked for proprietary damages, or damages  
15 to the State itself, which the Court found was  
16 appropriate, and they asked specifically for specific  
17 damages to individual farmers who were injured by the  
18 actions of Minnesota, and the Court found that was  
19 inappropriate, because North Dakota was trying to stand in  
20 the shoes --

21 QUESTION: Yes but in this case there is not a  
22 claim comparable to your third example. In this case --

23 MR. ROBBINS: That is absolutely correct, and  
24 that's why I say it becomes a matter of pleading. If you  
25 are entitled to plead generally, and not speak about the

1 farmers when you file your complaint, but simply seek  
2 their damages, and those damages are then permissible to  
3 be collected, and then you say, under Texas v. New Mexico,  
4 I can distribute them as I wish, if I determine it's in  
5 the public interest, I can turn around and give them back.

6 QUESTION: Was there a compact in Minnesota v.  
7 North Dakota?

8 MR. ROBBINS: There was not, Mr. Chief Justice.  
9 I thank you very much for your time.

10 CHIEF JUSTICE REHNQUIST: Thank you,  
11 Mr. Robbins.

12 The case is submitted.

13 (Whereupon, at 11:03 a.m., the case in the  
14 above-entitled matter was submitted.)

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