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Kansas v. Colorado, 533 U.S. 1 (2001)

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those submerged lands.

Turning to the first question, the Supreme Court recognized that Idaho had conceded that its earlier agreements with the Tribe included submerged lands. In addition, the Supreme Court agreed with the findings of the district court, and noted that the right to control the lake bed and adjacent waters was traditionally important to the Tribe because their livelihood depended on fishing. Thus, an acreage determination of the reserved area in 1883 necessarily included the area of the lake bed. Given Idaho's concession and the district court's findings, the Supreme Court found that Congress clearly intended to include the submerged lands in the reservation to the Tribe.

Turning to the second question, the Supreme Court recognized that Idaho had conceded that an 1888 report by the Secretary of the Interior regarding the scope of the reservation included all the navigable waters of Lake Coeur d'Alene. In addition, the Supreme Court noted that: (1) the United States could avoid hostilities between white settlers and the Tribe only by agreeing to a reservation that included submerged lands, (2) Congress dealt and negotiated in a fair manner with the Tribe to fulfill that objective, (3) that Congress ratified the agreements without any language indicating the submerged lands had passed to Idaho upon its statehood, and (4) such agreements included the sale of lands within the reservation to others with the compensation going directly to the Tribe. Given Idaho's concession and the district court's findings, the Supreme Court found that Congress clearly intended to defeat the future state of Idaho's title to the submerged lands.

Matthew J. Costinett

Kansas v. Colorado, 533 U.S. 1 (2001) (holding that Colorado is liable to Kansas for monetary damages and prejudgment interest dating back to 1985 for Colorado's violation of the Arkansas River Compact).

Congress approved the Arkansas River Compact ("Compact") between Colorado and Kansas in 1949. The Compact provided, *inter alia,* that future development in the river basin could not materially deplete the usable quantity or availability of water to other users. In 1986, Kansas invoked the Supreme Court's original jurisdiction alleging that Colorado had violated the Compact. The Court granted Kansas leave to file a complaint and appointed a Special Master.. The Special Master's first report recommended the Court find that Colorado's post-Compact groundwater pumping had materially depleted the waters in violation of Compact Article IV-D. The Court remanded the case to the Special Master to determine the appropriate remedy. The Special Master's second report recommended an award of damages, to which Colorado filed exceptions. The Court overruled Colorado's exceptions without prejudice and remanded the case to the

Special Master for a more specific remedy.

The Special Master's third report recommended that damages be measured by Kansas' losses, rather than by Colorado's profits, that the damages be paid in money rather than water, and that damages include prejudgment interest from 1969 to the date of the judgment. The initial estimate of damages totaled $62,369,173. Of that amount, approximately $9.2 million represented direct and indirect losses, $12 million was attributable to inflation, and $41 million comprised interest. Colorado filed four objections and Kansas filed one objection to the report. Colorado contended: (1) the Eleventh Amendment barred an award of damages; (2) the damages award should not include prejudgment interest; (3) the amount of interest awarded was excessive; and (4) Kansas improperly calculated crop production losses. Kansas objected that prejudgment interest should be paid from 1950, the date of the first Compact violation, rather than 1969.

The Court overruled Colorado's first objection and held that the Eleventh Amendment does not preclude recovery of damages when a State acts in its own interest rather than as an agent or trustee for its citizens. Furthermore, when a state properly invokes the Court's jurisdiction, neither the measure of damages, the method for calculating damages, nor the state's post-judgment decisions regarding the use of the money can retrospectively negate the Court's jurisdiction.

The Court dismissed Colorado's second objection, that prejudgment interest could not be applied to an unliquidated claim, as an unsound common-law distinction between liquidated and unliquidated claims. The Court pointed out that since 1933, they have consistently held that an injured party is not fully compensated for damages without adding interest for the delay in obtaining the award. They agreed with the Special Master that the unliquidated nature of Kansas' damages, in and of itself, does not bar an award of pre-judgment interest.

Next, Colorado objected to both the interest rate adopted and the date from which it accrued. Colorado argued that the Special Master improperly used the higher rates available to individual farmers, rather than the lower interest rates available to the state. However, the Court felt the rates available to individual farmers provided a better remedy for the economic consequences of Colorado's breach because it reflected the farmers' cost of borrowing. The Court also agreed with the Special Master that the equities of the case did not support awarding pre-judgment interest from 1950. Furthermore, given the uncertain scope of damages between 1968 and 1985, and the fact that it was up to Kansas to initiate proceedings to quantify damages, the Court agreed with Colorado that denying pre-judgment interest for that period was reasonable. Thus, the Court overruled Kansas' exception that interest should accrue from 1950 and Colorado's exception challenging the recommended interest rates; however the Court sustained Colorado's objection to the award of interest prior to 1985.

Colorado's final objection challenged the value of crop losses attributable to the Compact violations. The parties disagreed over how much additional yield the missing water would have produced. Kansas' experts relied on a hypothesis of a linear relationship between water and crop yields, with an estimated reduction in yield due to environmental factors. Colorado's expert proposed a competing model, but had to withdraw it when confronted with flaws in his data. Thus, the Court overruled Colorado's objection because Colorado was unable to successfully challenge Kansas' experts and provide a plausible alternative cost estimate.

The Court remanded the case to the Special Master for preparation of a final judgment specifying the amount of damages that Colorado must pay.

John A. Helfrich

UNITED STATES CIRCUIT COURTS

FIRST CIRCUIT

Pepperell Assoc. v. United States Envtl. Protection Agency, 246 F.3d 15 (1st Cir. 2001) (holding the Environmental Appeals Board's decision unreviewable, based on the record's substantial evidence).

Pepperell Associates ("Pepperell") operated a small business, which accidentally released 350 gallons of oil into United States navigable waterways. After the spill, the Environmental Protection Agency ("EPA") brought a three-count administrative penalty action. Both parties appealed the Administrative Law Judges' ("ALJ") decision to the Environmental Appeals Board ("EAB"). Pepperell petitioned for judicial review of the EAB's decision in the United States Court of Appeals for the First Circuit. However, the court refused the petition because EAB based its decision on the records' substantial evidence.

Pepperell asserted four issues for review. First, Pepperell argued its facility was not subject to the Clean Water Act's ("CWA") Spill Prevention Control and Countermeasures ("SPCC") regulations because the location made it unreasonable to foresee a discharge into navigable waters. Second, Pepperell argued that between November 1, 1996 and July 14, 1997, SPCC regulations did not apply to it because its underground oil capacity was less than SPCC's jurisdictional threshold. Third, Pepperell argued that its 20,000 gallon, aboveground storage tank created a new feature, and thus was not a modification. Finally, Pepperell claimed EAB miscalculated the penalty.

The court explained that EAB was entitled to substantial deference if it followed its own procedures and met statutory requirements. The court would only set aside EAB's findings if the record, taken as a