

Opinion of STEVENS, J.

**SUPREME COURT OF THE UNITED STATES**

No. 105 Orig.

STATE OF KANSAS, PLAINTIFF *v.* STATE OF  
COLORADO

ON BILL OF COMPLAINT

[December 7, 2004]

JUSTICE STEVENS, concurring in part and dissenting in part.

With the exception of Part II, I join the Court’s opinion. In dissenting from Part II, I adhere to the views that we expressed in *Kansas v. Colorado*, 533 U. S. 1, 13–16 (2001) (*Kansas III*).<sup>1</sup> In *Kansas III*, in a compromise that was required in order to issue a judgment of the Court, we accepted the views of the CHIEF JUSTICE and JUSTICE KENNEDY that prejudgment interest should run from 1985, the date the complaint was filed. *Ibid.* Like today’s majority, I adhere to the judgment reflecting that compromise. Unlike the majority, however, I believe that prejudgment interest should run, starting in 1985, on all damages that accrued after Colorado “knew or should have known that it was violating” its compact with Kansas—*i.e.* from 1969. *Id.*, at 15, n. 5. Such a result best respects the reasoning behind our conclusion in *Kansas III* that prejudgment interest is an appropriate component of the award of damages.

In *Kansas III*, recognizing that a monetary award does not fully compensate for an injury unless it includes an interest component, we affirmed the Special Master’s determination that the unliquidated nature of Kansas’

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<sup>1</sup>*Kansas III* was predated by *Kansas v. Colorado*, 514 U. S. 673 (1995), and *Colorado v. Kansas*, 522 U. S. 1073 (1998).

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claim did not by itself bar an award of prejudgment interest. *Id.*, at 14. Nevertheless, equitable concerns persuaded a majority of the Court to overrule the Special Master’s determination that prejudgment interest should begin to run in 1969, the date on which Colorado first knew, or should have known, that it was violating the Compact. Although we did not explicitly discuss the point in our opinion, we also agreed with the Special Master’s decision to exclude from the principal amount on which interest would run any damages that had accrued prior to 1969.<sup>2</sup>

The methodology that led to that conclusion was the Master’s appraisal of the equities—in his judgment, interest should not be imposed on the portion of the damages award that was attributable to relatively innocent conduct that occurred before 1969. See Third Report of the Special Master 106–107 (hereinafter Report) (“The general lack of knowledge in the early years about pumping in Colorado and its impacts along the Arkansas River served to protect Kansas during the liability phase of the case against a claim of laches. The same degree of fairness, I believe, should now relieve Colorado of the obligation to pay full

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<sup>2</sup>Kansas had objected to the Master’s refusal to award interest on all damages accruing after 1950. See Brief for Plaintiff in *Kansas v. Colorado*, O. T. 2000, No. 105, Orig., p. 25, n. 8. Although we did not discuss Kansas’ exception to the Special Master’s determination regarding the total amount of damages on which interest would run, we overruled the objection and thereby approved the Master’s selection of the period after 1968 as the appropriate measure of damages on which interest should be paid. See *Kansas v. Colorado*, 533 U. S. 1, at 14 (2001); see also Third Report 106–107 (explaining that Colorado’s awareness of its breach was central to the determination that interest should run on post-1968 damages). Today, the Court explains why it would be inequitable to give Kansas the relief that would be the equivalent of sustaining an objection that we overruled three years ago, but does not explain why we should not accept the Special Master’s original determination that all post-1968 damages should bear interest.

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interest rates on damages from depletions during 1950–68 period . . .”). But the Master did find that Colorado was required to pay interest on damages that occurred between 1969 and 1985. See *ibid.*; see also Brief for United States in Opposition to the Exceptions of Kansas and Colorado in *Kansas v. Colorado*, O. T. 2000, No. 105 Orig., p. 27 (“For the period from 1969 to the date of judgment, the Master recommended that Kansas be awarded prejudgment interest”). Our opinion did not reject that portion of his judgment, and did not contain any suggestion that he had erred in that respect. See 533 U. S., at 12, 14. The happenstance that we selected, as a compromise, the date the complaint was filed as the date on which interest should begin to accrue should have no bearing on the principal amount of damages that gave rise to the interest obligation. Thus, I believe that the Special Master’s Fourth Report erred in its conclusion that we meant to limit the principal amount of damages to those that occurred after 1985.

Surely if this were an ordinary tort case involving a single harm-causing event, an award of prejudgment interest would apply to the entire damages recovery, not just to the portion that resulted from events occurring after interest began to accrue. See *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163, 168 (1933). Indeed, were this an ordinary case, we would no doubt have awarded prejudgment interest in the entire amount that Kansas requested in *Kansas III*. This, however, is a unique case in which unusual equities necessitated a compromise designed to resolve a dispute between two States. Thus, I agree with the Majority that the Special Master was correct in rejecting Kansas’ argument that the principal on which interest should run should be “the nominal damages occurring from 1950 through 1984.” App. to Fourth Report 15.

However, the fact that Kansas’ request represents too

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large a measure of damages does not convince me that Kansas is entitled to *no* interest for damages prior to 1985. Nothing in our *Kansas III* opinion compels such a result. In my view, the proper measure of damages on which Colorado owes Kansas interest is the entire amount attributable to the time that Colorado knew, or should have known, that it was violating the compact. That date is 1969—the date that the Special Master initially chose and that we implicitly accepted as appropriate in *Kansas III*. Choosing 1969 as the initial date for the damages period not only has the benefit of respecting our affirmation of the methodology in the Special Master’s Third Report, it also results in a total damages sum that is less than the \$38 million the Special Master originally awarded.

Accordingly, I would sustain Kansas’ second objection to the Special Master’s Report, but only insofar as it applies to post-1968 damages.