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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 Fifth And Final Report Of The Special Master

KANSAS' EXCEPTION AND BRIEF

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KANSAS' EXCEPTION

The State of Kansas excepts to the ruling of the Special Master that, in the exercise of the Court's original jurisdiction, the Court is bound by the Congressional limit on the federal district courts in awarding costs for expert witnesses.

Respectfully submitted,

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BRIEF IN SUPPORT OF KANSAS' EXCEPTION

QUESTION PRESENTED

In the exercise of this Court's original jurisdiction, is the Court bound by the Congressional limit on the federal district courts in awarding costs for expert witnesses?

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I. STATEMENT

A. Introduction

As this interstate water compact enforcement proceeding in the Court's original jurisdiction approaches completion, the Special Master has ruled that the award of expert witness costs is controlled by the same statutory limit that applies to the federal district courts. The effect of the Special Master's ruling is to limit the award for Kansas' expert witness costs to approximately 2% of the proposed expert fees and expenses. See Additional Order Regarding an Award of Costs, reprinted as Appendix 2 to this Brief. Kansas' Exception is based on its understanding that Congress has not sought to subject interstate proceedings in the Court's original jurisdiction to the same costs limit as the federal district courts. The lack of a Congressional limit is in keeping with the constitutional nature of the Court's original jurisdiction, over which the Court must be able to exercise ultimate authority with respect to procedure, including the award of costs.

B. Proceedings Prior to This Case

This case is the latest in a long line of cases in this Court's original jurisdiction between the States of Kansas and Colorado concerning the Arkansas River. The first was *Kansas v. Colorado*, No. 10, Orig., Oct. Term 1901, 185 U.S. 125 (1902), which was authorized by the Kansas legislature and filed in this Court in 1901. That case became the first in which the

Court declared its power to resolve disputes between States over interstate rivers pursuant to what has become known as the Doctrine of Equitable Apportionment. See*, e.g.*, *New Jersey v. New York*, 283 U.S. 336, 343 (1931) ("The effort always is to secure an equitable apportionment without quibbling over formulas") (Holmes, J.).

Although the Court declared its power to apportion the Arkansas River in the 1902 decision, ultimately, the Court denied relief. *Kansas v. Colorado*, 206 U.S. 46 (1907). Suits by individual Kansas water users against individual Colorado water users in the federal district courts ensued. Colorado filed an original jurisdiction action in 1928 to enjoin the individual water user suits. Kansas counterclaimed for an equitable apportionment of the river. During the pendency of the suit, in 1936, Congress authorized John Martin Reservoir, and construction by the U.S. Army Corps of Engineers began in 1939. 1 First Report of the Special Master 45, *Kansas v. Colorado*, No. 105, Orig. (1994) [hereinafter First Rep., Second Rep., etc.]. In 1943, the Court enjoined the individual water user suits as recommended by the Special Master, but rejected the Special Master's recommendation for an equitable apportionment of the river. *Colorado v. Kansas*, 320 U.S. 383, 389-393 (1943). With John Martin Reservoir's potential to provide storage for use by both States if they could agree on how to share that storage, the States began negotiation of an interstate compact, an option that the Court had earlier recommended. *Id.,* at 392.

The Arkansas River Compact was approved by the negotiators for the States of Kansas and Colorado in 1948. The Compact received the approval of the States and the consent of Congress pursuant to Article I, Section 10, Clause 3 of the Constitution ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State"), which Congressional consent was made effective by President Truman's approval on May 31, 1949. 63 Stat. 145-152. The Arkansas River Compact allows postcompact development in Colorado provided that such development not cause material depletions of usable Stateline flows. Art. IV-D, 63 Stat. 147. The Compact is reprinted at 2 Fifth and Final Report of the Special Master, App. K (2008).

After the adoption of the Compact, new groundwater well technology became available, and Colorado allowed the drilling and use of more than two thousand high-capacity irrigation wells along the Arkansas River above the Kansas Stateline. 2 First Rep. 203-205. These new wells increased the total pumping by about five million acre-feet[1] over the period 1950-1985. See *id.,* at 219. Kansas attempted to address the postcompact well pumping issue in the forum of the Arkansas River Compact Administration,

[1] An acre-foot of water is the volume of a one-acre expanse of water one foot deep. It is 325,851 gallons. The Supreme Court courtroom, between the columns, filled to the ceiling, would hold approximately $3\frac{1}{3}$ acre-feet of water. *Cf. Kansas v. Colorado,* No. 105, Orig., Tr. of Oral Arg. 4-5 (Mar. 21, 1995).

but without success. *Kansas v. Colorado*, 514 U.S. 673, 689 (1995) ("As late as 1985, Colorado officials refused to permit an investigation by the Administration of well development in Colorado because they claimed that the evidence produced by Kansas did not 'suggest that well development in Colorado has had an impact on usable Stateline flows' "). Kansas moved to invoke the original jurisdiction of this Court shortly thereafter.

C. Proceedings in This Case

Kansas filed this case to enforce the Arkansas River Compact, 63 Stat. 145 (1949), pursuant to Article III, Section 2, Clause 2 of the Constitution and 28 U.S.C. § 1251(a). Kansas claimed that Colorado, the upstream State, had violated the Compact in three respects. Colorado filed two counterclaims against Kansas. The major claim in the lawsuit, that Colorado had violated the Compact by failing to regulate postcompact irrigation wells along the Arkansas River in Colorado, was approved by the Court, and the other claims by both States were rejected. *Kansas v. Colorado*, 514 U.S. 673 (1995). The case was remanded to the Special Master for consideration of remedies, and after further trial, the Court ruled on the Special Master's recommendations with respect to damages. *Kansas v. Colorado*, 533 U.S. 1 (2001). The Court ruled that the Eleventh Amendment was not a bar to the award of damages quantified in part by the injury to its water users and that damages should include prejudgment interest,

but only from the year in which the case was filed. *Id.,* at 9-16. The case was again remanded to the Special Master. *Id.,* at 20. After further trial on issues related to future compliance, the Court issued its most recent opinion. *Kansas v. Colorado*, 543 U.S. 86 (2004). Total violations by Colorado of the Compact due to postcompact pumping were quantified at 428,005 acre-feet for the period 1950-1996. Fourth Rep. 4 (2003). In accordance with the Court's rulings, Colorado paid Kansas approximately $34.6 million in damages. 1 Fifth Rep. 3.

The case was hotly contested from the beginning. Approximately 270 days of trial during the period 1990 to 2003 were held before Special Master Arthur L. Littleworth at the Ninth Circuit Courthouse in Pasadena, California. The evidence in the case consisted almost exclusively of expert witness testimony and exhibits. Extensive expert investigation, analysis and testimony was required. The exhibits numbered approximately 2,900, some of which were individually voluminous. The major expert investigation and analysis in the case was devoted to the creation and refinement of the Hydrologic-Institutional Model (H-I Model), which simulates all the important hydrologic and institutional conditions and operations over the 150-mile reach of the Arkansas River between Pueblo, Colorado and the Colorado-Kansas Stateline. The Court has described the H-I Model as follows:

> "This highly complex set of computer programs determines whether Colorado's post-1949 wells deplete the river of usable

> water that the Compact makes available for Kansas. It does so by trying to account for almost every Arkansas-River-connected drop of water that arrives in, stays in, or leaves Colorado, whether by way of rain, snow, high mountain streams, well pumping of underground water, evaporation, canal seepage, transmountain imports, reservoir storage, or otherwise." *Kansas v. Colorado*, 543 U.S. 86, 99 (2004).

The H-I Model was developed by the Kansas experts. The Colorado model, known as the Colorado Water Budget, was abandoned by Colorado in 1995. Second Rep. 8 (1997). Thereafter, Colorado relied on Kansas' H-I Model. *Kansas v. Colorado*, 543 U.S. 86, 99 (2004) ("Kansas and Colorado have agreed to use a computer model, the H-I Model, to measure Colorado's future Compact compliance"); see, *e.g.,* Second Rep. 38-45; Proposed Judgment and Decree, ¶ I.B.1, 2 Fifth Rep. 3 ("Compact compliance with respect to Groundwater Pumping shall be determined using the results of the H-I Model"). One sign of the pervasiveness of the expert work on the H-I Model in this case is shown by the fact that each of the Special Master's five reports in this case include descriptions of the H-I Model and rulings by him with respect to the Model. See, *e.g.,* 2 First Rep. 228-263; Second Rep. 7-45; Third Rep., App. Exhs. 5, 6 (2000); Fourth Rep. 21-120 (2003); 3 Fifth Rep. *passim*. The H-I Model has been accepted by the Court as the basis for determining future compliance with the Compact. See *Kansas v. Colorado*, 543 U.S. 86, 99 (2004).

D. The Fifth and Final Report

The Special Master's Fifth and Final Report consists of three volumes. Volume I contains the text of the Report and 19 Appendix Exhibits. Volumes II and III contain the Proposed Judgment and Decree. Volume II contains the text of the Decree and all appendices except Appendix C. Volume II also contains an extensive Appendix B related to the H-I Model. See 2 Fifth Rep. B.1-B.65. Volume III, which contains Appendix C, is a thick volume containing a narrative description of the H-I Model and the Usable Flow analysis, with a DVD containing the H-I Model code and other electronic files in the back pocket.

E. The Special Master's Recommendations on Costs

The Special Master entered two orders regarding costs. The first is entitled Order Regarding An Award of Costs. 1 Fifth Rep., App. Exh. 6, at App. 86. In that Order, the Special Master determined that Kansas was the "prevailing party" for purposes of determining costs. *Id.,* at App. 87-89. The Special Master ordered Kansas to file a brief in response to Colorado's assertion that witness fees are limited to an attendance fee of $40 per day. *Id.,* at App. 91. Kansas filed its brief as directed by the Special Master, together with its specific proposal on the costs that should be awarded. The Kansas proposal for expert fees and expenses *without* the $40-per-day limit was $9,214,727.81; the Kansas proposal for expert fees

and expenses *with* the $40-per-day limit was $162,927.94. *Id.,* App. Exh. 7, at App. 94. The Special Master then entered the Additional Order Regarding An Award of Costs. *Id.*, App. Exh. 7; App. 2 to this Brief. The Special Master determined that "the $40 per day limit found in Section 1821(b) governs an interstate proceeding in the original jurisdiction of the United States Supreme Court." App. 2, at App. 10. It is that ruling to which Kansas excepts. In both Orders, the Special Master gave his guidance to the States on the reasonableness of the Kansas costs proposal. In accordance with his ruling, however, the Special Master did not consider what the appropriate award of expert witness costs should be if the $40-per-day limit were *not* applicable. See 2 Fifth Rep., at App. 89-91, 98-100.

F. The States' Costs Settlement Agreement

The Special Master encouraged the States to reach an agreement on costs subject to their ability to challenge any of his rulings before the Court. App. 2, at App. 15 ("It is understood that any agreements reached on these various costs issues will not preclude either State from taking exception to the legal issues decided in my Orders, and their subsequent inclusion in a Decree").

Pursuant to the suggestion of the Special Master, the States entered into a Costs Settlement Agreement, which is attached to this Brief as Appendix 3. The elements of costs were specified separately in

paragraph (1) of the Agreement, and it was agreed that any element of costs not challenged by an exception filed with the Court would remain a binding agreement. See App. 3, at App. 19-20. After setting forth the specific agreement on costs by category in paragraph (1) of the Costs Settlement Agreement, the States provided as follows:

> "In accordance with the Additional Order, the agreements reached on the items and the amounts of the costs set forth in paragraph (1) shall not preclude either State from filing exceptions to the Special Master's rulings on the legal issues decided by the Special Master regarding costs, and both States reserve their right to file exceptions to the legal issues decided in the Special Master's Orders regarding costs." *Id*., at App. 19.

The Agreement provided $199,577.19 for total witness costs, including expert witness attendance fees. The total amount of costs agreed to was $1,109,946.73. *Id.,* at App. 18. Colorado has paid Kansas that amount. Subsequently, Kansas and the United States entered into a Stipulation on costs. See 1 Fifth Rep. 5.

II. SUMMARY OF ARGUMENT

The Special Master has held that this Court is bound in this case by Congressional enactments with respect to the award of costs for expert witnesses in the federal district courts. This appears to be a misreading of both the intent of Congress with respect to

those enactments and of the ultimate authority of the Court to make awards of costs in original cases.

A statutory scheme beginning in the early days of the Union, and finding its present form in 1853, makes clear that the Congressional legislation on costs applicable to the lower federal courts of original jurisdiction was not intended to apply to the Supreme Court's original jurisdiction. This Court confirmed as much in 1855 and 1987. Moreover, Congress has expressly acknowledged the Court's authority by providing that costs in this Court may be taxed against the litigants "as the court directs."

Even if Congress had intended to regulate taxation of costs in the original jurisdiction of this Court, such an act would be subject to the Court's ultimate authority to regulate procedure within its constitutionally created original jurisdiction. The Court has previously held that Congressional enactments are unnecessary for the exercise of its original jurisdiction. Moreover, the constitutional authorization for Congress to regulate procedure in the Court's appellate jurisdiction does not extend to regulation of the Court's original jurisdiction, which strongly suggests that Congress is not granted that power.

Because of the unique nature of litigation between States in the Court's original jurisdiction, the Court has declared that it has a duty to mold the proceedings to best attain the ends of justice. This is especially true in the present case, where the prevailing downstream State has been required to expend

extremely large amounts for expert costs in order to protect its rights under the Arkansas River Compact, and where the fruits of that expert work can and are being utilized by the non-prevailing State to allow it to continue with postcompact pumping while maintaining compliance with the Compact.

III. ARGUMENT

The Special Master determined that *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437 (1987), a case arising in the federal district courts, applies to cases of original jurisdiction and that taxation of costs for expert witness fees, pursuant to § 1920, is therefore limited to the $40-per-day attendance fee provided in 28 U.S.C. § 1821(b). In *Crawford Fitting*, this Court held that, absent explicit statutory or contractual authorization, federal courts are bound by the limitations of §§ 1821 and 1920 when a prevailing party seeks reimbursement for fees paid to its own expert witnesses. 482 U.S., at 439, 445. The Court reached this conclusion based on Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1821 and 1920.

Rule 54(d) provided in part at that time: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *Id*., at 441 (quoting F.R.C.P. Rule 54(d)). Section 1920 provides, "A judge or clerk of any court of the United States may

tax as costs the following: . . . (3) fees and disbursements for printing and witnesses. . . .” *Id.,* at 440 (quoting 28 U.S.C. § 1920). Section 1821, as quoted by the Court, provides as follows:

> “(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> . . . .
>
> “(b) A witness shall be paid an attendance fee of $30 per day for each day’s attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.” 482 U.S., at 441 (quoting 28 U.S.C. § 1821).[2]

The Court read these provisions together to reach its holding:

> “The logical conclusion from the language and interrelation of these provisions is that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the Court otherwise directs.” 482 U.S., at 441.

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[2] The $30 amount was raised to $40 in 1990. Judicial Improvements Act of 1990, Pub. L. 101-650, § 314.

The Court also disposed of contrary arguments by the petitioners. *Id.*, at 441-445.

The Special Master stated, "Rule 17.2 of the Supreme Court Rules provides that in original actions the Federal Rules of Civil Procedure may be taken as guides, and there appears to be no legal reason why *Crawford Fitting* should not be applicable here." App. 2, at App. 13. The Special Master also rejected Kansas' argument that the award of costs in this Court was addressed separately by Congress in 28 U.S.C. § 1911. *Id.*, at App. 12. The Special Master did not address Kansas' argument that the Constitution requires that ultimate authority for the award of costs in the original jurisdiction must lie with the Court.

Subsequent cases have affirmed the Court's holding in *Crawford Fitting*. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 126 S.Ct. 2455, 2458, 2460 (2006) (holding that expert witness fees could not be shifted to the losing party pursuant to a disability education statute permitting an award of attorney fees); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 85, 102 (1991) (holding that expert witness fees could not be shifted to the losing party pursuant to a civil rights statute permitting an award of attorney fees). For the following reasons, however, the State of Kansas submits that *Crawford Fitting* and its progeny do not apply to proceedings in the Court's original jurisdiction and that, therefore, an award of costs for expert fees and expenses is not limited by § 1821(b).

A. Congress Has Not Sought to Limit the Award of Costs in Original Cases

1. This Court Has Recognized That Congress Has Not Sought to Regulate Proceedings in the Court's Original Jurisdiction

In 1853, Congress enacted laws to regulate fees and costs in the circuit and district courts of the United States. Act of Feb. 26, 1853, 10 Stat. 161 ("An Act to Regulate the Fees and Costs to be allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for other Purposes") [hereinafter the 1853 Fee Act]. Two years later, in an 1855 case concerning a boundary dispute between Florida and Georgia, the Court was faced with a procedural question in an original proceeding. The Court described the scope of its original jurisdiction and then stated: "But the Constitution prescribes no particular mode of proceeding, *nor is there any Act of Congress upon the subject*." *Florida v. Georgia*, 17 How. (58 U.S.) 478, 491 (1855) (emphasis added). Thus, in 1855 the Court observed that there was no act of Congress dealing with procedure in the original jurisdiction of the Court. Since this decision was entered only two years after the adoption of the 1853 Fee Act, the Court in essence found that there was no provision in the 1853 Fee Act controlling procedure in the original jurisdiction of the Court.

In turn, *Crawford Fitting* held that the present statutes, 28 U.S.C. §§ 1821 and 1920, were brought forward intact from the 1853 Fee Act. *Crawford*

Fitting, 482 U.S., at 440 ("The sweeping reforms of the 1853 Fee Act have been carried forward to today without any apparent intent to change the controlling rules") (internal quotation omitted). Reading the 1853 Fee Act, *Florida v. Georgia* and *Crawford Fitting* together leads to the conclusion that Congress, through 1987, had not enacted any legislation seeking to control the procedure in the original jurisdiction of the Court. And since 1987, Congress has not amended either § 1920 or § 1821 to make them applicable to the original jurisdiction of the Court. *Compare* 28 U.S.C. §§ 1920 and 1821 *with Crawford Fitting*, 482 U.S., at 440-441 (quoting §§ 1920 and 1821 as they appeared at that time).[3]

Moreover, the Court in *Florida v. Georgia* held that rules of procedure applicable to proceedings between individuals "could not govern a case where a sovereign state was a party defendant." 17 How. (58 U.S.), at 492. Yet this is exactly what the Special Master has ruled should be done in this case. He has ruled that §§ 1821 and 1920 apply both to the federal district courts and to this proceeding between the States of Kansas and Colorado in the original jurisdiction of the Supreme Court. This is contrary to the

[3] A leading commentator has reached the same conclusion: "In any event, Congress has not made any effort to control the Court's procedure [in original jurisdiction cases]." 17 Charles Alan Wright et al., Federal Practice and Procedure § 4054, at 235 (2007).

Court's view that a single set of procedural rules cannot apply to both types of cases.

In fact, the Court has historically applied its own rules in awarding costs in interstate cases in the original jurisdiction, without any reliance on acts of Congress. Traditionally, the Court has declined to award costs in cases considered to be "governmental." In cases that involve "governmental questions, in which each party has a real and vital [interest]," costs have typically been divided equally. *North Dakota v. Minnesota*, 263 U.S. 583, 584 (1924). This is true because in a "governmental" case neither State is culpable and both have an equal interest in resolving the issue to promote order. Thus, costs are typically divided equally in boundary disputes between States where both States share an equal interest in identifying the proper boundary between them. In *North Dakota*, the Court stated:

> "'The matter involved is governmental in character, in which each party has a real, and yet not a litigious, interest. The object to be obtained is the settlement of a boundary line between sovereign states in the interest, not only of property rights, but also in promotion of the peace and good order of the communities, and is one which the states have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, ...' The same rule, however, does not apply to cases in which parties have a

> litigious interest." *Ibid.,* quoting *Maryland v. West Virginia*, 217 U.S. 577, 582 (1910).

See also *Nebraska v. Iowa*, 143 U.S. 359, 370 (1892). Where there is a "litigious" interest, costs are awarded to the prevailing party. *North Dakota v. Minnesota*, 263 U.S., at 586 ("costs should be taxed against North Dakota, the defeated party").

A review of the cases that the Court has deemed "litigious" is instructive. In *North Dakota v. Minnesota*, the State of North Dakota brought suit against the State of Minnesota to enjoin the use of drainage ditches and obtain damages. Similarly, in *Wyoming v. Colorado*, 259 U.S. 496 (1922), suit was brought to obtain an equitable apportionment and to enjoin the diversion of water. In *Missouri v. Illinois*, 200 U.S. 496 (1906), and *New York v. New Jersey,* 256 U.S. 296 (1921), States brought suit to restrain neighboring States from actions alleged to cause pollution to a shared body of water. See also *South Dakota v. North Carolina*, 192 U.S. 286 (1904). In each of these cases, the Court awarded costs to the prevailing party since the action was "litigious."[4]

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[4] The Special Master recognized that the Court has awarded costs to the prevailing party in cases in which the parties have a "litigious" interest. 1 Fifth Rep., at App. 88, citing *North Dakota v. Minnesota,* 263 U.S. 583, 584 (1924), *Wyoming v. Colorado,* 259 U.S. 496 (1922), *Missouri v. Illinois*, 200 U.S. 496 (1906).

A case is "litigious" where one State brings suit against another State to restrain the other from taking actions that are alleged to cause injury to the plaintiff State's rights or property. This is precisely the present case. Unlike the cases that are "governmental" in character, Kansas and Colorado did not share "a common interest to bring [the issues] to a satisfactory and final conclusion." *Maryland v. West Virginia*, 217 U.S., at 582. In fact, Colorado had no incentive to bring suit at all. Rather, Kansas was forced to file suit in order to protect its rights under the Arkansas River Compact. Colorado opposed the motion for leave to file. Moreover, Colorado had neglected and refused to comply with the Compact despite having been on notice since 1968 that it was violating the Compact by allowing postcompact pumping. See Third Rep. 103 ("I find that by 1968 Colorado knew, or should have known, that postcompact wells were causing material depletions of usable Stateline flows").

Kansas' only recourse to obtain the water to which it was entitled was through an action in this Supreme Court's original jurisdiction. Had Colorado complied with the Compact, Kansas would not have been required to put forth the considerable expenditure and effort needed to enforce its rights. Like the previous "litigious" cases where the Court has awarded costs, the present suit was initiated to enjoin Colorado from continuing practices that damaged Kansas' rights under the Compact. Through its violation of the Compact, Colorado is the ultimate

cause of Kansas' expenditures, and reasonable expert witness costs should be taxed against Colorado.

2. Normal Statutory Interpretation Confirms that Congress Has Not Sought to Regulate Proceedings in the Court's Original Jurisdiction

Early acts of Congress addressing witness fees and taxation of costs indicate that Congress intended §§ 1821 and 1920 to apply to the circuit courts and district courts established by Congress,[5] but not to cases of original jurisdiction in the Supreme Court. In 1853, Congress passed "An Act to Regulate the Fees and Costs to be allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for other Purposes," Act of Feb. 26, 1853, 10 Stat. 161. Therein, Congress provided for the payment of witness fees and taxation of costs, in a form similar to that existing in §§ 1821 and 1920 today. The current provisions of §§ 1821 and 1920 represent the intent of Congress as reflected in the

[5] Congressional authority to regulate the circuit courts and district courts arises out of the constitutional grant of express authority to "establish and ordain" inferior courts. See U.S. Const., art. III, § 1. The Judiciary Act of 1789 established both district courts and circuit courts pursuant to this constitutional grant. The district courts and circuit courts were both accorded original jurisdiction, and the circuit courts were also accorded appellate jurisdiction from the district courts, Act of Sept. 24, 1789, §§ 9-11, 1 Stat. 76-79.

"sweeping reforms of the 1853 Fee Act." *Crawford Fitting*, 482 U.S. at 440; see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 241, 255-256 & nn.26-29 (1975) (holding that Congressional limitations on taxation of attorney fees, as provided in 28 U.S.C. § 1923 and taxed pursuant to § 1920, could not be exceeded on the basis of the private attorney general doctrine).

The provisions of the 1853 Fee Act are effectively identical to the core provisions of §§ 1821 and 1920. Like § 1821, the 1853 Fee Act provided that a witness shall be compensated for appearing in court or before any officer pursuant to law and shall be reimbursed for necessary travel based on mileage. 10 Stat. 167; see 28 U.S.C. § 1821(b)-(c) (providing for an attendance fee and for reimbursement of travel expenses). Like § 1920, the 1853 Fee Act also provided that the fees paid the clerk and marshal, the amount paid witnesses and printers, and the fees for exemplification and copies of papers may be taxed against the losing party when the prevailing party is so entitled by law. 10 Stat. 168; see 28 U.S.C. § 1920 (providing for taxation of the same costs, among others). Significantly, the Act provided that such costs "shall be taxed by a judge or clerk of the court." 10 Stat. 168. The language of § 1920 is effectively identical, stating that costs may be taxed by "[a] judge or clerk of any court of the United States."

Legislative history also indicates that Congress intended to regulate the circuit courts and the district courts and not the original jurisdiction of the

Supreme Court when it enacted the 1853 Fee Act. Congress enacted the 1853 Fee Act because of Congressional concerns about the district courts' lack of uniformity in compensating officers of the courts and regulating taxation of costs between private parties. See *Alyeska Pipeline*, 421 U.S., at 251-252 & n.24. Notably, the issue that motivated Congress to pass the 1853 Fee Act does not apply to original proceedings. This is true because the issue of a lack of uniformity among courts is not a concern with respect to cases of original jurisdiction in the Supreme Court. Such concerns arise only when there is more than one sister court. The Supreme Court, in the exercise of its original jurisdiction, is unique.

Throughout the 1853 Fee Act, the text refers to district and circuit courts. See, *e.g.,* 10 Stat. 161 ("clerks of the district and circuit courts"); 10 Stat. 165 (providing fees for marshals' travel and attendance at the circuit and district courts"); 10 Stat. 167 (stating that no per diem or allowance shall be made "for attendance at rule days of the circuit or district courts"). Although the Act in some instances uses more general terms not strictly limited to the district or circuit courts, see, *e.g.,* 10 Stat. 161 ("attorneys, solicitors, and proctors in the United States courts"); 10 Stat. 162 ("attorney, proctor, or other person admitted to manage or conduct causes in any court of the United States"), the title of the Act clarifies Congress' intent: "An Act to Regulate the Fees and Costs to be allowed Clerks, Marshals, and Attorneys of the *circuit and district Courts of the United States,*

and for other Purposes" (emphasis added). *Immigration & Naturalization Serv. v. National Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 189 (1991) (ambiguity in the text of a statute may be resolved by reference to the statute's title).

Similarly, the express language of the Process Act of 1789, the first precursor of the 1853 Fee Act and of the present §§ 1821 and 1920, indicates that Congress intended to regulate fees in the circuit and district courts and not in the Supreme Court. The Process Act provides that the "modes of process and rates of fees, except fees to judges, *in the circuit and district courts*, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." Act of September 29, 1789, ch. XXI, § 2, 1 Stat. 93 (emphasis added); see also *Alyeska Pipeline*, 421 U.S., at 248 n.19 (discussing the Process Act of 1789 and subsequent acts in regard to attorney fees).

Legislative history regarding the revision of the Judicial Code in 1948 also supports the position that Congress did not intend to regulate witness fees and taxation of costs in cases of original jurisdiction in the Supreme Court. There, Congress retained the essential provisions established by the 1853 Fee Act. H.R. Rep. No. 80-308, at 1 (1947); *compare* 62 Stat. 950, § 1821, *with* 10 Stat. 167; 62 Stat. 955, § 1920, *with* 10 Stat. 168. In keeping with the 1853 Fee Act, Congress identified the persons who may order taxation of costs: "[a] judge or clerk of any court of the United States." 62 Stat. 955; see also 1853 Fee Act, 10 Stat.

168 (stating that costs "shall be taxed by a judge or clerk").

The Special Master relied on the definition of the prepositional phrase "court of the United States" in § 451 to support his conclusion that this prepositional phrase overrides the noun "judge" in § 1920. See App. 2, at App. 11. The Special Master's conclusion ignores a fundamental canon of statutory construction, as well as basic rules of grammar. This Court has held, "It is our duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche,* 348 U.S. 528, 538-539 (1955). The Court has recently applied this principle to interpretation of a compact, which is a federal statute, criticizing a contrary interpretation because it "would deny operative effect to each word in the Compact, contrary to basic principles of construction." *New Jersey v. Delaware*, 552 U.S. ___, No. 134, Orig., slip op., at 11 (March 31, 2008) (citing *Menasche*). The Special Master, however, reads the term "judge" right out of the statute. His reading denies *any* effect to the word "judge," contrary to the Court's precedents. See *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language").

Congress specifically used the nouns "judge" and "clerk" as the subjects of the primary sentence in § 1920. The noun "judge" and the noun "clerk" are described as being "of any court of the United States." This prepositional phrase is used as an adjective to describe which types of judges and clerks are

intended. See Wm. A. Sabin, Gregg Reference Manual 522 (8th ed. 1996) (a prepositional phrase used as an adjective to modify a noun indicates "which type"). Thus, "of any court of the United States" identifies "which type" of "judge" or "clerk" is subject to § 1920. It cannot change "judge" into "justice" if "judge" does not otherwise include "justice." Section 451 makes clear that "judge" does not include "justice." The term "justice" is separately defined to include only the Chief Justice and associate justices of the Supreme Court. *Id.* If Congress had intended for § 1920 to apply to original proceedings in the Supreme Court, it would have included the word "justice" in § 1920, as it expressly provided in many other provisions of Title 28. See, *e.g.,* 28 U.S.C. §§ 371, 453-456, 458, 459. Section 1920 clearly provides that "[a] *judge* or clerk of any court of the United States" may tax costs; it does not refer to a justice of the Supreme Court (emphasis added).[6]

In the recent Opinion of the Court in *New Jersey v. Delaware*, No. 134, Orig., the Court was also faced with the effect of a prepositional phrase modifying the central noun. There, the question was whether "riparian jurisdiction of every kind and nature" amounted to "exclusive jurisdiction." The Court

[6] In addition, two subparts of § 1920, subparagraphs (2) and (6), were added by statutes that are expressly limited to courts other than the Supreme Court, which could not have been done if § 1920 applied to the Supreme Court. See Court Reporters Act of January 20, 1944, 58 Stat. 5; Court Interpreters Act, 92 Stat. 2040 (1978).

resisted allowing the prepositional phrase "of every kind and nature" to convert "riparian jurisdiction" into "exclusive jurisdiction." *Id.*, slip op., at 11. In other words, the expansive prepositional phrase was not allowed to subvert the meaning of the noun modified.

Moreover, in discussing the Court's approach to statutory interpretation in *Lopez v. Gonzales*, 549 U.S. ___, 127 S.Ct. 625, 631 (2006), the Court made clear that "the last thing this approach would do is divorce a noun from the modifier next to it without some extraordinary reason." In that case the issue was whether the modifier would be disregarded. *A fortiori* the noun being modified should not be discarded. Yet that is exactly what the Special Master did in this case.

As the Special Master notes, § 1821 by its terms, would appear to apply to the Supreme Court. Fifth Rep., at App. 96. The only reason that § 1821(b) is relevant, however, is because it is invoked by § 1920. *Crawford Fitting*, 482 U.S., at 440 ("The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821"). Because § 1821(b) only comes into play if invoked by § 1920(3), the real question is whether § 1920 applies to cases in the Court's original jurisdiction.

Moreover, the applicability of § 1821(b) to original proceedings is open to question despite its particular language. The Court has said, "The sweeping reforms of the 1853 Fee Act have been carried forward to today, 'without any apparent intent to change

the controlling rules.'" *Crawford Fitting*, 482 U.S., at 440, quoting *Alyeska Pipeline*. In *Crawford Fitting*, *ibid*., despite the change in wording from the 1853 Fee Act ("The following *and no other* compensation shall be taxed and allowed") (emphasis added) to the present § 1920 ("A judge or clerk of any court of the United States *may* tax as costs the following") (emphasis added), the Court in essence held that the change in wording was not found to indicate a change in intended effect. Likewise, it would appear that even though the Supreme Court is literally included within the definition of the terms used in § 1821, no change in effect was intended by the change in wording from the 1853 Fee Act, which clearly applied only to circuit and district courts. The same may be said of § 1920 to the extent that the words "clerk of any court of the United States" might be taken to refer to the clerk of this Court.

In 28 U.S.C. § 1911, Congress recognized the Supreme Court's inherent authority to tax costs as it deems appropriate. Whereas § 1920 provides for taxation of costs in the lower federal courts, § 1911 addresses costs in the Supreme Court. It provides "The Supreme Court may fix the fees to be charged by its clerk. The fees of the clerk, cost of serving process, and other necessary disbursements incidental to any case before the court, may be taxed against the litigants as the court directs." Thus, § 1911 confirms that Congress did not intend for § 1920 to apply to cases of original jurisdiction in the Supreme Court. The distinction recognized by Congress between the

Court's original and appellate jurisdiction is shown by 28 U.S.C. § 1912, wherein Congress limits the Supreme Court's discretion in cases of appellate jurisdiction. That section provides that the Supreme Court or a court of appeals, "may adjudge to the prevailing party just damages for his delay, and single or double costs."

Moreover, statutory provisions for the determination of fees in the courts of appeals and the district courts support the position that Congress recognized the Supreme Court's inherent authority in § 1911. *Compare* § 1911 *with* 28 U.S.C. § 1913 (providing that the fees and costs in the courts of appeals shall be "reasonable and uniform in all the circuits" and that such fees and costs "shall be prescribed . . . by the Judicial Conference of the United States"), *and* 28 U.S.C. § 1914 (providing that the filing fee in the district courts shall be $350 and that additional fees may be collected "only as are prescribed by the Judicial Conference"). This express distinction between the fees that may be fixed and taxed by the Supreme Court and the fees that must be prescribed by the Judicial Conference for courts of appeals and district courts reflects both Congressional intent to regulate fees and costs in the lower courts and Congressional recognition of the inherent authority that the Supreme Court has in cases of original jurisdiction.

The Special Master states that an award of costs, as provided in the second sentence of § 1911, applies only to fees charged by the Supreme Court clerk. App. 2, at App. 12-13. However, the plain language of

§ 1911 includes "[t]he fees of the clerk" as one cost among others that may be taxed as directed by the court: "The fees of the clerk, costs of serving process, and other necessary disbursements incidental to any case before the court, may be taxed against the litigants as the court directs." Clearly, § 1911 does not limit taxation of costs in the Supreme Court to "the fees to be charged by its clerk."

Second, and more importantly, the Special Master misinterprets Kansas' reliance on § 1911. The Special Master's ruling that expert witness fees are not covered by § 1911 assumes that Congress must authorize recovery of expert witness fees in interstate water proceedings of original jurisdiction by a specific statute. See *ibid*. Kansas does not rely on the authority allegedly "granted" to the Supreme Court by Congress in § 1911 to support Kansas' position. Rather, as discussed *supra*, Kansas believes that § 1911 supports the conclusion that Congress did not intend for §§ 1821 and 1920 to limit the Supreme Court's inherent authority to award costs as it deems appropriate in cases of original jurisdiction. Section 1911 merely recognizes the Court's constitutional authority to award costs, which authority the Court has historically exercised. See H.R. Rep. 80-308, at A159 (stating that the second paragraph of § 1911, regarding taxation of costs, was "inserted to give statutory sanction to existing practice"). Thus, § 1911 does not manifest Congressional intent to limit the Court's authority to award costs; rather, § 1911

indicates that Congress did not intend to limit the Supreme Court's inherent authority by §§ 1920 and 1821 in cases of original jurisdiction. Section 1911 recognizes the Court's inherent authority and historical practice of exercising this authority.

In sum, previous enactments, legislative history, and other statutory provisions regarding fees and taxation of costs illustrate that Congress did not intend for §§ 1821 and 1920 to apply to cases arising under the Supreme Court's original jurisdiction. As a result, it is clear that the holding in *Crawford Fitting* does not apply to cases arising under the Supreme Court's original jurisdiction. *Crawford Fitting* relies heavily on the 1853 Fee Act to reach the conclusion that taxation of costs for expert witnesses is limited by §§ 1821 and 1920. *Crawford Fitting*, 482 U.S., at 440. As discussed above, the 1853 Fee Act specifically applied to circuit courts and district courts. In addition, reading the acts and statutes *in pari materia*, *Crawford Fitting*, 482 U.S., at 445; *United States v. Stewart*, 311 U.S. 60, 64 (1940), it is apparent that Congress did not intend to encroach on the inherent authority of the Supreme Court in cases of original jurisdiction, but rather intended to regulate the proceedings of the lower federal courts, which regulation corresponds to the Congressional authority to "ordain and establish" inferior courts and to regulate appellate jurisdiction. See U.S. Const., art. III, §§ 1, 2.

B. This Court Has Final Authority Over the Award of Costs in Original Cases

Even if Congress, *arguendo*, intended to regulate the proceedings of the Supreme Court in cases of original jurisdiction, Article III, § 2, Clause 2 of the Constitution suggests that the Court must have final authority with regard to such matters. The first sentence of § 2, Clause 2 establishes the cases in which the Supreme Court has original jurisdiction: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." U.S. Const., art. III, § 2. Article III provides no other limitation on its grant of original jurisdiction to the Supreme Court. By its terms, Article III does not grant Congress authority to regulate the original jurisdiction. In contrast, the second sentence of § 2, Clause 2 establishes the cases in which the Supreme Court has appellate jurisdiction: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*." U.S. Const., art. III, § 2 (emphasis added). The grant of appellate jurisdiction is expressly qualified, whereas the grant of original jurisdiction is not. This difference in language would suggest that the founders did not grant Congress the authority to regulate the Court's original jurisdiction.

Chief Justice Marshall utilized similar reasoning in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803),

when he addressed Congressional power to expand the scope of the Court's original jurisdiction:

> "It has been insisted, at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.
>
> If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.
>
> Affirmative words are often, in their operation, negative of other objects than those

> affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.
>
> It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." 1 Cranch (5 U.S.), at 174.

The same reasoning found to prohibit Congress from expanding the *scope* of the original jurisdiction in *Marbury* would appear to prohibit Congress from adopting regulations for *procedure* in the original jurisdiction. As in *Marbury*, a negative or exclusive sense is inherent in the affirmative words describing the power of Congress to regulate the appellate jurisdiction, with the result that the power of Congress to regulate is excluded as to the original jurisdiction. Otherwise, the words "under such Regulations as the Congress shall make" would "have no operation at all." *Ibid.*[7]

The Court has often declared its power to proceed in its original jurisdiction without any authorizing Congressional legislation. In *Florida v. Georgia*, 17

[7] This, in fact, is the opinion of a leading commentator: "Of course, the fact the drafters of Article III included a provision that gives Congress the authority to regulate the Court's appellate jurisdiction, coupled with their failure to include a comparable provision directed at its original jurisdiction, strongly suggests Congress cannot regulate or modify the latter." 22 James Wm. Moore, Moore's Federal Practice § 402.02[2][b], at 402-24.3 (3d ed. 2007).

How. (58 U.S.) 478 (1855), the Court, faced with a question of procedure in the original jurisdiction, stated:

> "But the court, upon much consideration, held, that although Congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court; and in the absence of any legislation by Congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given." *Id.,* at 492.

To the extent that this is still reliable precedent, which is subject to question,[8] the Court appears to be indicating a cooperative approach with Congress if Congress should choose to provide guidance with respect to procedures in the original jurisdiction. Yet, in the case of a conflict, the authority of the Court logically must be supreme.[9]

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[8] The Court was apparently relying on *Grayson v. Virginia*, 3 Dall. (3 U.S.) 320 (1799), a pre-*Marbury* case. See *Florida v. Georgia*, 17 How. (58 U.S.), at 492.

[9] One commentary has addressed this issue:

> "Procedural authority, however, cannot be divorced from the power to control jurisdiction. The Court has ruled that it can exercise the original jurisdiction established by the Constitution without any need for

(Continued on following page)

In *Texas v. New Mexico*, 482 U.S. 124 (1987), another water compact case, the Supreme Court recognized its inherent authority in cases of original jurisdiction. There, New Mexico argued that the Supreme Court was "without power" to award post-judgment interest absent statutory authority. New Mexico relied on *Pierce v. United States*, 255 U.S. 398 (1921), which had held that a federal district court could not award postjudgment interest absent statutory authority. Without hesitation, the Court in *Texas v. New Mexico* rejected this argument. The Court stated, "But we are not bound by this rule in exercising our original jurisdiction." *Texas v. New Mexico*, 482 U.S., at 132 n.8. In this instance, the Court affirmed that, when exercising its original jurisdiction, the Court is not bound by statutory rules applicable to the lower federal courts.

In sum, the absence of express constitutional language granting Congress authority to regulate the Court's *original* jurisdiction, viewed in light of the

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congressional guidance in matters of procedure. The opinions announcing this result, moreover, suggest that Congress lacks power to retract any portion of the original jurisdiction. If indeed the Constitution establishes original jurisdiction beyond congressional control, the Court must have final authority over the procedure to be used. Any other conclusion would subject the constitutional jurisdiction to drastic impairment or even defeat by unworkable procedures mandated by Congress." 17 Charles Alan Wright et al., Federal Practice and Procedure § 4054, at 235 (2007) (footnote omitted).

express language specifying the power of Congress to regulate the *appellate* jurisdiction, leads to the conclusion that the power to regulate the original jurisdiction of the Supreme Court was not conferred upon Congress. The reasoning in *Marbury* is consistent with this conclusion. And *Texas v. New Mexico* recognized the Court's inherent authority to act without Congressional authorization in the context of a water compact case, like the instant case. Any interpretation of §§ 1821 and 1920 that assumes such Congressional power should therefore be rejected. For this reason, also, the Court's power to award costs in the original jurisdiction, cannot be limited by §§ 1821 and 1920.

C. Reasonable Expert Costs Should Be Awarded in this Case

Based on the Special Master Orders, which preserved the States' right to file exceptions, and which nevertheless encouraged the States to pursue agreement, the States agreed that the appropriate value of witness costs, including expert witness attendance fees was $199,577.19. The States confirmed that they were reserving their rights to file exceptions as authorized by the Special Master. See App. 3, at 19.

Kansas proposed total expert costs of $9,214,727.81. 1 Fifth Rep., at App. 94. Therefore, there is a very sizeable amount of the expert costs incurred by Kansas that is not allowable under the Special Master's

ruling that the $40-per-day limit applies. In fact, his ruling allows only some 2% of the total expert witness costs incurred. Most of Kansas' proposed expert costs were related to the development of the H-I Model, including, *inter alia*, expert analysis of (1) the Arkansas River Compact, (2) the physical attributes of the Arkansas River Basin in Colorado and Kansas, (3) the water supply facilities constructed by private and governmental entities in the Basin, (4) the complicated hydrology of the Basin, and (5) the hydrologic and institutional data needed for model input. The development of the H-I Model computer program code was, itself, a Herculean effort. As the Special Master has recognized, the contributions of the experts, with respect to the H-I Model and otherwise, were essential to the resolution of the interstate issues before the Court. See, *e.g., id.,* at App. 89-91.

The Court has emphasized the unique nature of the rules of procedure that must be applied in interstate cases:

> "There was no difficulty in exercising this power where individuals were parties;. . . . But these precedents could not govern a case where a sovereign State was a party defendant. . . . And it became, therefore, the duty of the court to mold its proceedings for itself, in a manner that would best attain *the ends of justice*, and enable it to exercise conveniently the power conferred. And in doing this, it was without doubt one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct

> the proceedings in the simplest form in which the ends of justice could be attained." *Florida v. Georgia*, 17 How. (58 U.S.) 478, 492 (1855) (emphasis added).

The unique relationship between two sovereign States in an interstate water proceeding supports an award of actual expert witness fees in cases involving breach of a Compact. A downstream State, such as Kansas, lies at a distinct disadvantage in relation to an upstream State. The upstream State controls the water to which the downstream State is entitled, and an upstream State's misappropriation and overuse of water is difficult and costly to ascertain and quantify. It is also difficult for the downstream State to enforce its rights against the upstream State and ensure that the upstream State meets its obligations.

As evidenced by the costs incurred by Kansas in this case, developing the modeling necessary to evidence the upstream State's misappropriation and overuse of water is a formidable task requiring extensive and expensive expert analysis and research. A downstream State, such as Kansas, should not be unfairly burdened by the formidable expert expenses necessary to protect its rights against an upstream State, provided that it ultimately prevails, as Kansas has in this case.

Fairness and the need to preserve a balance between the interests of upstream and downstream States supports an award of actual expert witness fees where the expert witness evidence and modeling is adopted by the breaching party and relied on by the

Court. Both the Special Master and Colorado relied, and Colorado continues to rely, on the fruits of the work of Kansas' experts for which costs have been requested. Indisputably, Kansas' expert witnesses have provided testimony, research, and analysis that were crucial to resolution of this case. The Court's disposition of this case rests on the results obtained from Kansas' experts. Indeed, the Court and Colorado ultimately adopted the H-I Model, the product of Kansas' expert research and analysis, as the method for determining Compact compliance. See, *e.g.*, Fourth Rep. 121. The H-I Model has also made it possible for Colorado to continue to allow postcompact pumping, by quantifying replacement water requirements, rather than shutting off all postcompact pumping, as requested by Kansas. See Order Denying Kansas Motion for Injunction. App. to Second Rep. 12. In fact, the H-I Model is explicitly relied upon by Colorado in its Use Rules, which control almost all pumping in the Arkansas River Basin affected by this case. See 2 Fifth Rep., App. J.1, at J.7 ("The state and division engineers shall use the Kansas Hydrologic-Institutional Model (HIM) and the Durbin usable flow method with the Larson coefficients, or such other method approved by the Special Master, the United States Supreme Court, or the Arkansas River Compact Administration to determine depletions to usable Stateline flow caused by post-compact ground water diversions for irrigation use").

For the foregoing reasons, Kansas should be allowed to recover reasonable expert witness costs. Since the Special Master assumed that the $40-per-day

limit applies in this case, he did not fully consider the reasonableness of Kansas' proposed expert witness costs if the $40-per-day limit does not apply. Kansas therefore requests that the Court remand the case to the Special Master for consideration of Kansas' proposed award of expert witness costs in light of the Court's ruling, in order that the "ends of justice" may be attained.

IV. CONCLUSION

Kansas' Exception should be sustained, and the case should be remanded to the Special Master for consideration in light of the Court's ruling.

Respectfully submitted,

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APPENDIX 1

Constitutional and Statutory Provisions Involved

U.S. Constitution

Art. III, § 2, cl. 2

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulation as the Congress shall make.

Title 28, U.S. Code

§ 451. Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

The term "judge of the United States" includes judges of the court of appeals, district courts, Court of International Trade and any court created by Act of

Congress, the judges of which are entitled to hold office during good behavior.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court.

The term "district" and "judicial district" mean the districts enumerated in Chapter 5 of this title.

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

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§ 1821. Per diem and mileage generally; subsistence

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a

uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 240 of such Act (8 U.S.C. 1252(b)[1]) to be deportable shall be ineligible to receive the fees or allowances provided by this section.

(f) Any witness who is incarcerated at the time that his or her testimony is given (except for a witness to whom the provisions of section 3144 of title 18 apply) may not receive fees or allowances under this section, regardless of whether such a witness is incarcerated at the time he or she makes a claim for fees or allowances under this section.

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[1] So in original. Reference in parenthesis should probably be "(8 U.S.C. 1229a)".

§ 1911. Supreme Court

The Supreme Court may fix the fees to be charged by its clerk.

The fees of the clerk, cost of serving process, and other necessary disbursements incidental to any case before the court, may be taxed against the litigants as the court directs.

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§ 1912. Damages and costs on affirmance

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

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§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

APPENDIX 2

IN THE SUPREME COURT
OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant, UNITED STATES OF AMERICA, Intervenor.	)	No. 105 Original

ADDITIONAL ORDER
REGARDING AN AWARD OF COSTS

This is the second Order concerning an award of costs. In my first Order dated December 19, 2005, I determined that Kansas was the prevailing party under Rule 54(d)(1) of the Federal Rules of Civil Procedure and is entitled to costs, although the amount of those costs is a "more complicated issue." During the liability phase of the trial, it became necessary for Kansas to interrupt its case for almost a year, resulting in a "replacement case." I indicated in my earlier Order that Kansas' costs should not include these failed efforts in originally attempting to establish the amount of depletions, and the final cost allocation should recognize the additional burdens

placed on Colorado in having to meet a second Kansas case on the liability issue.

Having decided the "prevailing party" issue, I directed the States to confer to see if an agreement on costs could be reached, and if not, to submit specific cost proposals, and to brief the issue of whether expert witness fees are limited to $40 per day pursuant to 28 U.S.C. § 1821(b). In separate briefs filed February 1, 2006, the States reported that they had come to agreement on certain cost items, but were unable to reach a full agreement. Both States provided specific proposals on items to be included in a cost award, and the amounts of such items.

Kansas submitted alternate proposals, one based on the assumption that expert witness fees were not limited to $40 per day. The other calculation assumed that expert witness costs were, in fact, limited to those allowed for lay witnesses. In both of these calculations, Kansas made a 25% reduction in the witness fees associated with the two experts during the liability phase who were replaced. Without the $40 per day limit, the Kansas proposal for expert fees and expenses totaled $9,214,727.81. Assuming the limit in § 1821(b) to be applicable, such costs were $162,927.94.

After reviewing the Kansas proposal, Colorado responded that it did not have sufficient information to evaluate all of the costs submitted, but Colorado's proposed witness costs were $103,308.94. This total was based on applying the § 1821(b) limit, and

reflected a reduction in the number of attendance days allowed for certain witnesses.

The principal legal issue is whether the $40 per day limit found in § 1821(b) governs an interstate proceeding in the original jurisdiction of the United States Supreme Court. I have determined that it does. There is no question about the facts that such limit applies to expert witness costs in cases arising in the federal district courts. That issue was settled in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). In that decision the Supreme Court held that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary." (*Id*. at 439) In this opinion, the majority of the Court rejected the view that the language in Rule 54(d) of the Federal Rules of Civil Procedure was intended as a grant of discretion to district courts in the allowance of expert witness fees.

Kansas, however, does not challenge the application of § 1821(b) to federal district court cases. Rather, it argues that *Crawford Fitting* does not apply here because that ruling was expressly dependent on 28 U.S.C. § 1920, and § 1920 does not govern an award of costs in original proceedings in the Supreme Court. Kansas maintains that the Supreme Court's authority to award expert witness fees as costs is found in 28 U.S.C. § 1911, and Congress in enacting § 1911 carefully avoided "any attempt to

interfere with the Court's inherent discretion to award costs." (Feb. 1, 2006 Brief at 6)

Section 1920 provides that a "judge or clerk of any court of the United States" may tax as costs certain enumerated fees, including the fees of "witnesses." It is Kansas' position, however, that this section does not apply to the Supreme Court because the term "judge" does not include a "justice" of the Supreme Court. Had Congress intended § 1920 to apply to original proceedings, Kansas argues that it would have included the word "justice" as it has in other provisions of Title 28. See, e.g., §§ 453-56, 458, 459. However, Kansas ignores the remaining language in the sentence referring to "any court of the United States." And that language is specifically defined to include the Supreme Court for all purposes of Title 28. 28 U.S.C. § 451. Thus the term "judge," I conclude, must be read in its broad sense. Otherwise, the Kansas interpretation would be in direct conflict with a specific statutory definition. Indeed, the term "judge" does sometimes refer to a justice of the Supreme Court, as in Art. III, Sec. 1 of the Constitution itself.

Moreover, § 1821 which amplifies the fees and allowances that may be paid to witnesses, also specifically applies to the Supreme Court. That section also provides that a witness in attendance at "any court of the United States" shall be paid $40 per day for each day's attendance, as well as travel expenses and a subsistence allowance when an overnight stay

is required. § 1821(b). This is an absolute requirement, not dependent on the term judge or justice. This section again specifically incorporates § 451 defining the term "any court of the Untied States" to include the Supreme Court. § 1821(a)(2).

In the face of these explicit applications of the expert witness fee limits to the Supreme Court, it is hard to accept Kansas' claim that Congress "made a calculated decision to exclude the Supreme Court" from such limits by using the term "judge," without adding the term "justice."

Nor do I find that Kansas' argument on Congressional intent is aided by 28 U.S.C. § 1911. That section provides:

> The Supreme Court may fix the fees to be charged by its clerk.
>
> The fees of the clerk, cost of serving process, and other necessary disbursements incidental to any case before the court, may be taxed against the litigants as the court directs.

Kansas cites a number of state cases to the effect that the term "disbursements" is consistently interpreted to refer to expenditures which may be recovered as a cost. But these are cases under various state cost statutes. No case is cited interpreting § 1911. Moreover, Kansas puts its emphasis only on the word "disbursements" without the caveat that the statute covers only "incidental" disbursements. This section applies only to "fees to be charged by its [the Supreme

Court] clerk." I do not believe that expert witness fees were intended to be covered. Certainly in a case of this kind, expert fees are not "incidental," and would not be set by the Clerk.

When Congress has intended to allow the recovery of expert witness fees and attorney fees, it has done so clearly under specific statutes. Many of these statutes are discussed in *West Virginia University Hospital v. Casey*, 499 U.S. 83 at 88-90 (1991). Absent such statutory intervention, "costs" as allowed under Federal Rules are not the same as expenses of litigation. Rule 17.2 of the Supreme Court Rules provides that in original actions the Federal Rules of Civil Procedure may be taken as guides, and there appears to be no legal reason why *Crawford Fitting* should not be applicable here. The Court held that "federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Crawford Fitting* at 445.

While the expert fee limit accounts for the largest difference in the Kansas and Colorado cost proposals, the States still differ over other issues. Kansas, however, suggests that "further discussion" between the States on these issues might allow resolution of the dollar figures. The following observations might assist in those discussions.

Section 1821(a)(i) provides that a "witness in attendance at any court of the United States" shall be paid the fees as prescribed. Section 1821(b) limits the witness fee to $40 per day "for each day's attendance." The States are in agreement as to the number of days

that the various expert witnesses actually testified. But they disagree over the allowance that should be made for the days during which experts were present in court, but did not testify. Kansas multiplied the testimony days by two for certain witnesses and by three for others, while Colorado reduced the total number of attendance days for certain witnesses. I am not sure whether any simple multiplier provides an appropriate result, but I believe that a "day's attendance" should be liberally construed. This was a case of expert testimony. It was necessary for experts not only to testify, but also to hear the testimony of opposing witnesses, and to assist counsel in cross-examination. Both States used experts in the same way, and properly so.

For the disruption in the liability phase of their case, Kansas has proposed a 25% reduction in the costs associated with two experts, and has already incorporated that reduction into its cost submittal. That reduction, however, appears to be on the low side. Moreover, an appropriate reduction should also apply to the reporter's and Master's costs associated with the necessity for the replacement case.

Kansas has proposed that all of the Master's fees and expenses should be reallocated and assessed against Colorado as costs. Such fees and expenses were allocated 40% to each State and 20% to the United States during the liability phase of the trial. Thereafter, they have been allocated and paid by the States equally. Colorado acknowledges that these fees and expenses can be reallocated by the Court, but

maintains that it would be unfair to reallocate all of Kansas' share, including time spent on issues wherein Kansas claims were denied, or arguments on which Kansas was not successful. I agree. Colorado proposes, if the Special Master fees and expenses are to be reallocated, that it be on the basis of two-thirds to Colorado and one-third to Kansas, which may not be unreasonable.

It is understood that any agreements reached on these various costs issues will not preclude either State from taking exception to the legal issues decided in my Orders, and their subsequent inclusion in a Decree.

Based on this Order, if the States cannot agree upon the costs to be included in the Decree within a month from the date hereof, they are to report on the items and amounts on which there is agreement, and on the items still in controversy. I will then issue a final Order on the amount of costs to be included in the Decree.

Dated: April 17, 2006.

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

APPENDIX 3

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.

Costs Settlement Agreement

This Agreement is entered into this 2nd day of June, 2006, by the State of Colorado and the State of Kansas with respect to the costs to be included in the Judgment and Decree in this case.

Recitals

WHEREAS, Special Master Arthur L. Littleworth entered an Order Regarding An Award of Costs (Order) dated December 19, 2005, in this case in which he found that Kansas was the prevailing party

within the meaning of F.R.C.P. 54(d)(1) and is entitled to an award of costs, but should not receive costs for its failed efforts at establishing the amount of depletions and that the cost allocation should recognize the additional burdens that were placed on Colorado in having to meet a second Kansas case; and

WHEREAS, Special Master Littleworth entered an Additional Order Regarding An Award of Costs (Additional Order) dated April 17, 2006, in which he ruled that costs, including expert witness fees, were subject to the limitations set out in 28 U.S.C. §§ 1920 and 1821, but added that the term "day's attendance" in section 1821(b) should be construed liberally because it was necessary for experts not only to testify, but also to hear the testimony of opposing witnesses, and to assist counsel in cross-examination, which both States properly did; and

WHEREAS, Special Master Littleworth further determined in the Additional Order that the fees and expenses of the Special Master paid by Kansas could be reallocated and assessed against Colorado as costs, but that it would be unfair to reallocate all of Kansas' share to Colorado; and

WHEREAS, based on the Additional Order, the Special Master gave the States additional time for further discussion, to see if they could reach agreement on the amount of the costs to be included in the Decree; and

WHEREAS, the Additional Order stated that it is understood that any agreements reached between the States on the various costs issues will not preclude either State from filing exceptions to the Special Master's rulings on the legal issues regarding costs in his Orders or their subsequent inclusion in a Decree; and

WHEREAS, the States desire to reach agreement on the amount of costs to be included in the Decree based upon the Special Master's Orders regarding costs;

NOW, THEREFORE, the States agree as follows:

(1) The total amount of the costs through January 31, 2006, to be paid by Colorado to Kansas and to be included in the Decree is $1,109,946.73. The items of costs that have been agreed to by the States and the amounts for each item are as follows:

Kansas' share of the Special Master's fees and assessments to be reallocated to Colorado	$627,615.20
Witness costs, including expert witness attendance fees	$199,577.19
Exhibit costs	$30,417.38
Trial transcripts	$158,885.26
Deposition costs	$93,451.70
Total	$1,109,946.73

This agreement does not address costs incurred after January 31, 2006, including any Special Master's fees and expenses assessed against the States after that date.

(2) Kansas will rely on the good faith of Colorado to pay Kansas the agreed amount of $1,109,946.73 as soon as possible and before the Judgment and Decree is entered. If the agreed amount is not paid in full by the time that the Judgment and Decree is entered, the unpaid amount shall bear postjudgment interest.

(3) In accordance with the Additional Order, the agreements reached on the items and the amounts of the costs set forth in paragraph (1) shall not preclude either State from filing exceptions to the Special Master's rulings on the legal issues decided by the Special Master regarding costs, and both States reserve their right to file exceptions to the legal issues decided in the Special Master's Orders regarding costs. In the event that the U.S. Supreme Court grants an exception, whether in whole or in part, with respect to a legal issue or issues decided by the Special Master regarding costs, the States agree that the amount of the costs that have been agreed to by the States for that item or items will be re-determined in light of the Supreme Court's ruling, in which case, none of the assumptions or agreements that were made to agree upon costs for that item based upon the Special Master's ruling shall be binding on either State; but, the States agree that other items of costs and the amounts of those other items of costs, as set forth above, that are not affected by the Supreme

Court's decision shall be final and binding and shall not be subject to modification. For example, if the U.S. Supreme Court were to conclude that expert witness fees are not subject to the limitations set out in 28 U.S.C. §§ 1920 and 1821, then none of the assumptions and agreements that were made to determine witness costs as set forth in paragraph (1) shall be binding in determining witness costs based on the Supreme Court's ruling; however, if that were the only exception granted, the amounts for reallocation of Kansas' share of the Special Master's fees and assessments, exhibit costs, trial transcripts, and deposition costs, as set forth above, would be final and binding and not be subject to modification.

STATE OF COLORADO	STATE OF KANSAS
/s/ David W. Robbins	/s/ John B. Draper
David W. Robbins	John B. Draper
Counsel of Record	Counsel of Record