SCOTUSblog
SUPREME COURT OF THE UNITED STATES BLOG

# Opinion analysis: Bargaining in the shadow of equitable apportionment

*Posted Tue, March 3rd, 2015 9:36 am by Ryke Longest*

Two sharply differing views on the Court's role in handling disputes over interstate waters emerged last week. Justice Elena Kagan's approach endorsed the power of Court-appointed special masters to fashion equitable remedies in disputes that states cannot resolve on their own. Justice Clarence Thomas's approach warned the Court and its appointed special masters of the dangers posed by allowing equitable reformation over politically charged technical disputes between sovereign states. Justice Antonin Scalia specifically warned lawyers, judges, and special masters to stop assuming that modern Restatements are describing current law rather than revising it.

Last Tuesday, the Court announced its opinion in an original jurisdiction dispute between Kansas, Colorado, and Nebraska over flows of a common river: the Republican River. Justice Kagan's majority opinion underscores the basis for the Court's power to apportion interstate waters under equitable principles and to decide disputes between states over interstate compacts. The majority partially sided with Kansas by holding that Nebraska should be penalized under disgorgement for taking more than its share of water in 2006 and partially sided with Nebraska in revising the water accounting procedures to credit imported water. Justice Thomas's dissent asserts that the majority was illegally revising the compact to suit its preferences and subjective perceptions of fairness. Chief Justice John Roberts joined with the majority to order disgorgement but sided with the dissent on the question of reforming water accounting procedures.

Parties to interstate compacts can draw different lessons from the decision. Clearly, the Court's opinion endorses expansive powers for Court-appointed special masters to resolve disputes. Warring states are thus well-advised to do their best to win their case before special masters. Chief Justice Roberts' endorsement of the dissent's view on reformation should also guide states towards arguing around or under the language of existing technical documents rather than asking for reformation.

## The history of the Republican River dispute

Kansas, Colorado, and Nebraska had allocated the Republican River's flows on a percentage basis through an interstate compact in 1943, but they litigated the compact's application to groundwater pumping by Nebraskans in the 1990s. In 2000, Kansas successfully argued before the Court that groundwater pumping by Nebraska was diminishing surface flows in the Republican River. Further proceedings from the 2000 case led to a 2003 settlement stipulation. Kansas brought the current dispute to the Court over the terms of the 2003 settlement, seeking monetary and equitable relief upon an alleged excessive withdrawal by Nebraska. Nebraska countered that the water supply models used to calculate its share were wrong and sought to change the formulas so that imported water did not get charged to it. The Court appointed Judge William J. Kayatta, Jr., of the U.S. Court of Appeals for the First Circuit to serve as special master over the dispute. Judge Kayatta's report drew exceptions from Kansas and Colorado. The United States supported the report's recommendations.

## The Court' s endorsement of the special master's report

Justice Kagan's opinion for the Court canvasses the history of equitable apportionment cases, explaining the need for states to use the original jurisdiction of the Supreme Court to settle disputes between them. The Court's opinion cites extensively from the prior interstate water compact dispute case between Texas and New Mexico. The Court emphasizes that compacts to resolve interstate water allocations are bargains struck "in the shadow of our equitable apportionment power—that is, our capacity to prevent one State from taking advantage of another." The Court reasons that it is difficult to conceive that a downstream state would trade away its right to the Court's equitable apportionment jurisdiction under a compact which would deprive the court of equitable powers over the dispute.

The Court explains:

> "And that remedial authority gains still greater force because the Compact, having received Congress's blessing, counts as federal law. See *Cuyler v. Adams*, 449 U. S. 433, 438 (1981) ("[C]ongressional consent transforms an interstate compact . . . into a law of the United States"). Of course, that legal status underscores a limit on our enforcement power: We may not "order relief inconsistent with [a compact's] express terms. *Texas v.New Mexico*, 462 U. S., at 564. But within those limits, the Court may exercise its full authority to remedy violations of and promote compliance with the agreement, so as to give complete effect to public law. "

The Court then analyzes Nebraska's conduct and agrees with both Kansas and Judge Kayatta that Nebraska's conduct in 2006 constituted intentional breach and that disgorgement is an appropriate remedy. The majority endorses the special master's figure for the disgorgement award while noting that: "Truth be told, we cannot be sure why the Master selected the exact number he did—why, that is, he arrived at $1.8 million, rather than a little more or a little less." The Court notes that Nebraska has come into compliance since 2006 and rejects Kansas's request for an injunctive order so as to tee up Nebraska for contempt proceedings in the event of future violations.

Lastly, the Court reviews Nebraska's contentions regarding the problem posed by counting water imported from the Platte River basin into the Republican River being counted against Nebraska's share of the Republican. The correction for this problem proposed by the special master as advocated by Nebraska involves changing the water accounting procedures of the 2003 Settlement Stipulation to include a new "five run formula. The Court notes the difficulties in accounting for such a fugitive resource. Adding one more pun to an opinion already brimming with them, the Court observes, " One complexity of that project arises from water's . . . well, fluid quality." The Court goes on to adopt a change in the accounting procedures to correct the inaccuracy. In so doing, it maintains that it is not reforming the 1943 compact, but instead an ancillary agreement to make sure it accurately implemented the 1943 compact's apportionment.

**The dissent argues that states are sovereigns over their waters**

Justice Thomas's dissent lambasted the majority for its failure to adhere to precedent and for allowing the hardship of the case as it invoked equitable powers without using equitable principles applicable. Justice Thomas argues that this dispute is essentially a contract question, but that the majority has authorized an arbitrary award of disgorgement and invented a new theory of contract reformation. Justices Scalia and Alito joined this dissent in full, with the Chief Justice joining Part III of the dissenting opinion. Justice Scalia wrote separately to take a swipe at the role of "modern Restatement," which in his view are of questionable value.

Justice Thomas argues forcefully that the majority got it backwards to argue that its equitable powers grow in the shadow of equitable apportionment. Justice Thomas invokes state sovereignty over water to support his argument, writing:

> "This case, by contrast, involves the inherent authority of sovereign States to regulate the use of water. The States' "power to control navigation, fishing, and other public uses of water" is not a function of a federal regulatory program; it "is an essential attribute of [state] sovereignty." Tarrant Regional Water Dist., 569 U. S., at ___ (slip op., at 15) (internal quotation marks omitted). Thus, when the Court resolves an interstate water dispute, it deals not with public policies created by federal statutes, but pre-existing sovereign rights, allocated according to the mutual agreement of the parties with the consent of Congress. Although the consent of Congress makes statutes of compacts, our flexibility in overseeing a federal statute that pertains to the exercise of these sovereign powers is not the same as the flexibility Porter claimed for courts engaged in supervising the administration of a federal regulatory program. Authority over water is a core attribute of state sovereignty, and "[f ]ederal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States." Missouri v. Jenkins, 515 U. S. 70, 131 (1995) (THOMAS, J., concurring)."

The dissent goes on to emphasize that the Court's approval of disgorgement is not justified under the facts found and that the disgorgement award itself is arbitrary. Queuing up Scalia's swipe at modern restatements nicely, Justice Thomas argues that the Court has never endorsed the disgorgement approach offered up in Third Restatement of Restitution and Unjust Enrichment published in 2010. The dissent argues that disgorgement is strong medicine and should be used sparingly, and not under the facts presented wherein Nebraska acted knowingly, but did not violate the compact deliberately. Lastly the dissent argued against the "five run solution" proposal. The dissent reasoned that the existing accounting procedure is imperfect, but not so flawed as to support equitable reformation.