No. 109, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

NEW MEXICO'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

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December 20, 1990

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New Mexico excepts to Chapter VII and the Recommended Decree of the Special Master's Report (October 15, 1990) ("Report").

STATEMENTS OF FACTS AND PROCEEDINGS

This case involves the parties' dispute over the Canadian River Compact, Act of May 17, 1952, 66 Stat. 74 ("Compact"). *See* Appendix A hereto. The facts and proceedings are stated in Chapters I, II, and III of the Report, which are adopted herein, except as corrected in this brief.

SUMMARY OF ARGUMENT

The Compact is a workable and fair document adapted to the particular physical and hydrological characteristics of the Canadian River basin. Article IV(a) of the Compact provides that New Mexico shall have "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." Appendix A. Article IV(a) sets no limitation on this right of use, which includes an unrestricted right to store water anywhere in New Mexico. Thus, New Mexico may store waters which have spilled over or have been released from Conchas Dam without limitation, because those waters "originate" above Conchas Dam. Article IV(b) of the Compact provides that New Mexico shall have "free and unrestricted use of all waters originating . . . below Conchas Dam," but it imposes a limit of 200,000 acre-feet on conservation storage of these waters. *Id.* This storage limitation does not apply to floodwaters which spill over Conchas Dam, because those waters do not "originate" below Conchas. The Report recommends, however, that the Article IV(b) 200,000 acre-foot limitation should be applied to Article IV(a) waters that

spill over or are released from Conchas. *See* Report at 46-88. To reach that result, the Report deletes "originating" language from Articles IV(a) and IV(b). *See id.* at 24, 58-59. This re-writing of Article IV disrupts the allocation agreed to forty years ago by Compact negotiators, and ratified by the respective States as well as consented to by Congress. The Report thus takes from New Mexico an important right it never relinquished. New Mexico excepts to the Report's recommendation on the meaning of Article IV(a) in Chapter VII, because the Compact provides no basis for making a restriction on use, including storage, of waters originating above Conchas Dam. *See* Point I(B) *infra.*

Moreover, New Mexico disputes the validity of the analysis used by the Report to reach its conclusions. The best evidence of the Compact's meaning is the language of the Compact itself. The Compact language simply does not support the Report's conclusion on Article IV(a). *See* Report at 24. If the language of the Compact is to be disregarded, the context of the Compact must provide a clear basis for doing so. Not only do the negotiating history, contemporaneous documents, and the Congressional intent in consenting to the Compact fail to give a clear reason to ignore the Compact language, they give clear support for the use of that language. Because the negotiating context supports (and certainly can be read reasonably to support) the Compact language, that language must be given full effect as the agreement of the parties. Therefore, the Court should reject the Report's recommendation on this point. New Mexico also comments on certain provisions of the Recommended

Decree and primary jurisdiction as recommended by the Report.

ARGUMENT

I. THE REPORT INCORRECTLY DELETES THE "ORIGINATING" LANGUAGE OF THE COMPACT AND, IN DOING SO, TAKES FROM NEW MEXICO A RIGHT IT NEVER RELINQUISHED

Article IV(a) of the Compact allows New Mexico "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." Water that spills from Conchas Dam must necessarily have originated above the dam—it begins flowing in the drainage basin above the dam before spilling. The Compact, therefore, gives New Mexico free and unrestricted use of the spills from Conchas Dam at any location in New Mexico. This free and unrestricted use includes the unlimited right to store as much of those spills as can be captured in available capacity at Ute Dam in the basin below Conchas Dam. New Mexico never bargained away that right, and should not now be deprived of it by inference.

New Mexico's direct reading of the Compact is supported by not only the words of the Compact, but by its strategy, its negotiating history, and Congressional intent. The language of the Compact should be given its full force and meaning, and the Report's contrary recommendation should be rejected.

A. The Compact's Allocation of Water Between the States Based on Storage of Waters From Different Sources is Drastically Changed by the Report's Incorrect Legal Conclusions

The Compact establishes the law of the river for three States in the Canadian River basin in a work-

able and well-functioning manner. The Compact works precisely because it allocates water in an innovative and sensible manner between the States, by providing limits only on conservation storage of quantities of water in the two upstream States—Texas and New Mexico.

Article IV of the Compact gives New Mexico free and unrestricted use of Canadian River waters, subject only to restrictions on storage of waters originating below Conchas Dam. Leaving aside years of unusually high flood flows, New Mexico stores and uses the water that originates above Conchas Dam at or above the dam, including diversions for use on the downstream Tucumcari Project and the separate Bell Ranch. *See* Agreed Material Facts B4-B7; Bureau of Reclamation Study of Water Supply for Tucumcari Project (1967, revised 1971) at 12 (quoted in N.M. Ex. 45 at 7); N.M. Ex. 45 at 2.

Approximately every forty years, however, floods on the river have occurred, causing spills from Conchas Reservoir. The largest known floods in history took place in 1941-42, less than a decade prior to the Compact. Minor spills took place in other years of the 1940s, prior to the full development of the Tucumcari Project. The next major spill from Conchas took place in 1987, after the recent enlargement of Ute Dam. This spill amounted to about 200,000 acre-feet of water, while the 1941-42 spill was about ten times as large. Also in 1987, plaintiffs filed the current lawsuit over the alleged excess capacity created by Ute Dam's enlargement. The combination of a major spill in 1987 and the filling of Ute Reservoir provided the first instance in which the "originating"

language of the Compact became important to construction of the rights of the States.

The enlarged Ute Reservoir, completed in 1984, was relatively empty prior to the 1987 flood, and was able to capture a quantity of water equivalent to 60% of the spill from Conchas. An amount of water equal to 40% of the water spilling from Conchas spilled over Ute and went downstream to Texas. *See* Tr. at 112 (Nov. 1, 1989). Had Ute been full of water when the 1987 flood occurred, the downstream states would have received a much larger amount of the Conchas spills. Had the 1941-42 spill occurred in 1987, more than 90% of the water would have spilled over Ute and proceeded to Texas. This graphically demonstrates that when the "originating" language is given its straightforward meaning and New Mexico is allowed its right to store what water it can of Conchas spills, the result is a *de facto* allocation giving each State a part of the spills.

The negotiators appropriately settled on a storage-based method of allocation to deal with an erratic and even ephemeral river, the flows of which cannot be predicted. This approach avoided many of difficulties inherent in administration of such "streamflow" compacts as the Pecos River Compact, 63 Stat. 159 (1949), and it avoided any major controversy between the parties for well over three decades. *See also* La Plata River Compact, 43 Stat. 796 (1922); Snake River Compact, 64 Stat. 29 (1950) (two of about two dozen "streamflow" compacts); Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams* at 88, 114, 190 (U.S. Dept. Int. 1956) (texts of cited compacts).

The Canadian River Compact was not a streamflow compact. It allowed each signatory State free and unrestricted use of the water inside its boundaries, subject only to certain restrictions on storage of water in the upstream States. Storage was undoubtedly selected as the allocative mechanism because any significant use of the highly erratic flows of the Canadian could be made only after storage of those flows. Much of the usable water of the Canadian River was not base flow, but unpredictable floodwaters. The Report aptly observes, for example, that "within accepted economic and environmental constraints, it promotes Article I's stated goal of 'conservation' of the waters of the Canadian River to permit New Mexico to construct as large a reservoir as is appropriate for a site in order to capture and regulate as much of the river's flood flows as possible, which flows otherwise might be wasted and not conserved for beneficial use." Report at 39. This is precisely what took place in regard to the construction and enlargement of Ute Reservoir.

Because of these special characteristics of the Canadian River, the negotiators did not find it necessary to make any restrictions on use of streamflow in the upstream states or any guarantees of streamflow to the downstream states. The negotiators were justly proud of their innovation in this regard and the relative ease and simplicity with which such a compact could be administered. *See* Raymond Hill's January 29, 1951 memorandum to the federal Chairman of the negotiating Commission, approved by the Commission ("Hill Memorandum") (N.M. Ex. 30) at 5-6. The Report, however, erroneously and inequitably treats the Compact as one meant to guarantee a level of stream-

flow to the downstream States. This improper strategy is shown by the Report's reliance on streamflow assessments made by the Bureau of Reclamation for the Sanford Project and the supposed Congressional intent in authorizing that project. Report at 57, 83-85. The Report's remaking of the Compact allocation into one assuring a streamflow level to the downstream States requires the Report to discard language expressly set out in the Compact itself.

Rather than making an interpretation of the Compact, the Report simply re-writes the Compact by deleting the "originating" language of Article IV. This Compact revision takes away a right New Mexico never relinquished in the Compact or otherwise. There is no basis for the Report to do so. The "originating" language presumptively means something in the Compact, but under the Report it means nothing.

B. The Context of the Compact and the Legislative History Show that the "Originating" Language was Intended to Have Full Force and Effect

The Compact negotiations provide contextual background for the Compact. The evidence of these negotiations is largely in the Hill Memorandum, particularly the four major drafts of the Compact attached to the Hill Memorandum as exhibits. N.M. Ex. 30. Other important parts of the Compact's context are the negotiators' contemporaneous words describing their agreement, and the legislative history of Congressional consent to the Compact. The Compact negotiating history shows that the "originating" language of the Compact was chosen intentionally. Because the Compact's context can be read to (and in fact does) support the words used by the Compact, there is no need to search the record for indications

which would contradict the one reasonable meaning of the Compact by deleting important parts of its language. *Bone v. Refco, Inc.*, 774 F.2d 235, 241 (8th Cir. 1985); *Swanson v. Baker Industries, Inc.*, 615 F.2d 479, 484-85 (8th Cir. 1980).[1]

At the October 11, 1950 meeting of the Compact negotiators, the Engineer Advisors drafted proposed provisions and submitted these to the Commission. The October 11 draft described the rights of the States in separate sections dealing with the "North Canadian River" and the "South Canadian River" (subsequently corrected to "Canadian River"). The October 11 draft provided that "New Mexico shall have free and unrestricted use of all water in the drainage basin of North Canadian River in New Mexico," and that "[e]ach state shall have free and unrestricted use of the flow of South Canadian River and its tributaries within its own boundaries, subject to [certain] limitations on storage." N.M. Ex. 30, Ex. A at 1.

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[1] Throughout this case, New Mexico has made this point in terms of the parol evidence rule, arguing that the negotiating history may not be used to contradict or rewrite the language of the Compact. The Report answers this argument by characterizing it as "a minority view," and arguing that negotiating history may be used to interpret the Compact. Report at 48-49. The Report mischaracterizes New Mexico's position. New Mexico has never argued that the parol evidence rule excludes the use of negotiating history to determine whether the words of this Compact can be interpreted reasonably in accordance with their context. What New Mexico argues, and the Report fails to acknowledge, is that the analysis and recommendation of the Report does not "interpret" Compact language. Instead, The Report uses evidence to delete Compact language. This is improper under the parol evidence rule.

Raymond Hill's draft of October 13, 1950, suggested a more cohesive structure for the Compact by treating the rights of each State in both the North Canadian and Canadian Rivers. N.M. Ex. 30, Ex. B. New Mexico's right to impound "any of the waters of Canadian River, which originate outside of the drainage basin of North Canadian River" was limited to the capacity of all existing conservation storage reservoirs in New Mexico at the end of 1950, plus an additional 50,000 acre-feet of conservation storage "in the drainage basin of Canadian River above Conchas Reservoir," and also "[w]hatever amount of water shall be or could have been at the same time in conservation storage" in the Canadian River basin in Texas, an amount assumed to be 300,000 acre-feet "unless and until greater reservoir capacity shall be provided." *Id.* at 3-4. The October 13 draft would have allowed New Mexico 300,000 acre-feet of conservation storage for Canadian River water (regardless of origin), in addition to existing reservoirs including Conchas Reservoir in the upper basin, and an additional 50,000 acre-feet of conservation storage above Conchas Reservoir. It is inconceivable that New Mexico would have accepted, without comment, a flat 200,000 acre-foot conservation storage limit instead, unless that limit were truly restricted to waters originating below Conchas Dam. Neither the plaintiffs nor the Report have shown why New Mexico would have been so inclined.

An Assistant Attorney General for Texas prepared the next draft of the Compact, dated November 14, 1950. N.M. Ex. 30, Ex. C. This draft omitted specific descriptions of the storage limitations to be imposed. In reference to New Mexico, Article IV of the draft

declared that "New Mexico shall have free and unrestricted use of all water in the drainage basin of Canadian River in New Mexico, subject to the limitations upon storage of water" to be defined later. *Id.* at 3.

These early drafts established free and unrestricted use of Canadian River water in New Mexico, subject to certain geographic restrictions on storage. The October 11 draft restricted New Mexico's storage, in addition to existing reservoirs, to "storage *in* the drainage basin . . . above Conchas Reservoir" of 50,000 acre-feet, and an additional 300,000 acre-feet or more elsewhere. *See* N.M. Ex. 30, Ex. A at 2. The October 13 draft repeated these provisions. *See id.*, Ex. B at 3-4. The November 14 draft did not include limitations on storage in the upstream states, pending additional drafting.

At the next meeting of the negotiating Commission, the Commissioners produced a draft of the Compact dated December 5, 1950, which incorporated elements of both Hill's draft of October 13, 1950, and the Texas draft of November 14, 1950, but which differed in important respects from both earlier drafts. *See* N.M. Ex. 30, Ex. F. The December 5 draft included a new provision on New Mexico's rights and duties which gave New Mexico free and unrestricted use of all Canadian River waters "in New Mexico," subject to a restriction on storage "in New Mexico" regarding "those waters . . . which originate in the drainage basin of Canadian River below Conchas Dam." *Id.* at 2. In all these drafts, a preamble describing New Mexico's rights to use of Canadian River water "in New Mexico" was used. *See* Point I(C) *infra.*

The December 5, 1950 draft of the Compact preceded the actual Compact signing by just one day. In that draft, the first sentence describing New Mexico's rights stated that:

> New Mexico shall have free and unrestricted use of all waters of the Canadian River in New Mexico, subject to the following limitation upon storage capacity:
>
> (a) The amount of conservation storage in New Mexico available for impounding those waters of the Canadian River which originate in the drainage basin of the Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre feet.

N.M. Ex. 30, Ex. F at 2.

Article IV of the Compact as it was signed the next day did not change the meaning of the December 5 draft. A new provision, Article IV(c), was inserted, providing an additional limitation on New Mexico's right "to provide conservation storage in the drainage basin of North Canadian River." Article IV(a), a new provision dealing specifically with waters originating above Conchas Dam, was inserted, using the language of the first sentence of the December 5 draft. Both sentences of the December 5 draft were combined to create Article IV(b) of the Compact by the insertion of the words "provided that" between the two sentences, and words referring specifically to the waters originating below Conchas Dam. The meaning of the Compact as signed on December 6 thus did not differ from the meaning of the draft considered on December 5, except with the addition of the North Canadian storage restriction, which is not at issue in this law-

suit. In both the December 5 draft and the Compact, New Mexico's right to "free and unrestricted use of all [Canadian River] waters" is limited only by a restriction on storage of "waters which originate in the drainage basin . . . below Conchas Dam."

The Report correctly states that the differences between the December 5 draft and the Compact, with respect to the use of the word "originating" in Article IV(a), are stylistic. Report at 74. What the Report fails to acknowledge, however, is that the"originating" language had a substantive meaning in the December 5 draft, which substantive meaning was carried over into the Compact. In the December 5 draft the word "originate" defined the waters to which the storage limitation would apply—those which "originate" below Conchas Dam. When the word "originating" was extended to Article IV(a) in the Compact, it guaranteed this substantive meaning of the December 5 draft, by defining the waters to which the storage limitation would *not* apply as "all waters originating in the drainage basin of Canadian River above Conchas Dam." The extension of the "originating" language into Article IV(a), therefore, was stylistic in the sense that it did not change the meaning between the two drafts. The fact that the extension was stylistic, however, does not make the language itself meaningless, and the Report is incorrect to suggest that it does.

Had the negotiators intended to arrive at the result stated in the Report, it would have required only a minor change in the December 5 draft as follows:

> (a) The amount of conservation storage in New Mexico [~~available for impounding those~~

~~waters of the Canadian River which originate in the drainage basin of the Canadian River~~] below Conchas Dam shall be limited to an aggregate of 200,000 acre feet.

N.M. Ex. 30, Ex. F at 2 (Deleted language of Dec. 5 draft in brackets).

The negotiators, however, retained the origination language of the December 5 draft and extended it to describe the basin above Conchas Dam, thus assuring to New Mexico free and unrestricted use of the water originating above Conchas Dam including use and storage of that water in the basin below Conchas Dam. *See* Appendix A. It is apparent from the negotiating history, therefore, that had the negotiators intended to impose restrictions on New Mexico storage which were based on the geographic locations of storage facilities rather than the source of the water being stored, they knew very well how to do so. *See* N.M. Ex. 30, Exs. A and B. But they did not do so. The only reasonable conclusion is that they meant their words to be taken literally.

The fact that the Compact was meant to be understood on its own terms with regard to possible spills over Conchas Dam was confirmed almost immediately. The day after the Compact was signed, when the meaning of Compact provisions could be expected to be uppermost in the negotiators' minds, New Mexico Commissioner Bliss wrote to Senator Anderson of New Mexico enclosing copies of the signed Compact, and commented on the meaning of its terms in the following language: "Under [the Compact] New Mexico has free and unrestricted use to all water above and below Conchas Dam, the only restriction being

that total storage capacity for conservation purposes of the waters rising below the dam (*not including spills*) shall not exceed 200,000 acre feet." N.M. Ex. 34 (emphasis added).

The Bliss letter is the only contemporaneous comment by one of the Compact negotiators on the meaning of Articles IV(a) and IV(b) regarding Conchas spills, and it shows that Bliss understood the "originating" language of those Articles to be intentional and clear. Plaintiffs have introduced no direct evidence to the contrary on the negotiators' intent.

Legislative history shows that Commissioner Bliss' understanding was also the intent of Congress. Senator Anderson introduced the bill in Congress, for himself and for the other five Senators from the three States party to the Compact, which became the legislation consenting to the Compact. S. 1798, 82d Cong., 1st Sess. (1951). Senate Report No. 1192, submitted by Senator Anderson, accompanied that bill and explained the Congressional understanding of the terms of the Compact. That Report expressed the will of Congress that "New Mexico is granted unrestricted use of all water originating in that State above Conchas Dam." Then the Report went on to say that "New Mexico is granted the *further right* to use all waters originating in the State below Conchas Dam and may provide *for this purpose* an aggregate storage not exceeding 200,000 acre-feet." S.Rep.No. 1192, 82d Cong., 2d Sess. at 2 (N.M. Ex. 29) (emphasis added). A clearer expression of Congressional intent would be difficult to imagine; Congress expressly differentiated "unrestricted use" of water originating above Conchas from the further right to use waters originating below Conchas, subject only to a storage

limitation for the latter purpose. A "further right" cannot be construed as a limitation on the first right, and the Report is wrong to suggest that it can be so construed.

Congress therefore approved the negotiators' choice to allocate storage of water to New Mexico based on its origin in different parts of the river basin in that State. Certainly,the intent of Congress did not negate the agreement of the parties in this respect. Therefore, the Compact itself, the objective expression of the agreement between the States, must control. Because the context of the Compact, the contemporaneous interpretation, and the legislative history all show that the language of the Compact is clear and reasonable on its face, there is no need to go behind the Compact to construe it. The Report not only erred in going behind the Compact, it also incorrectly analyzed the context of the Compact itself, as well as the will of Congress.

The States regard compacts as binding agreements and should be entitled to rely on them as such. Particularly in the current atmosphere of increased litigation between states over compact questions, the Court should give weight to the role of compacts as agreements between sovereigns which are not to be lightly disregarded or reinterpreted in the absence of changed physical circumstances, mutual mistake of fact, or other compelling concerns. The parties themselves or Congress can address newly arisen problems in compacts if they so choose. *But see* Report at 29.

Courts should be especially cautious, in construing a statute which is also a contract between States, to effectuate the objective intent of the agreeing parties. *Cf.* Wilkinson & Volkman, *Judicial Review of Indian*

Treaty Abrogation, 63 Calif.L.Rev. 601, 647 (1975) ("[i]n areas of sensitive intergovernmental relationships and in questions relating to sovereign immunity, courts have vigilantly required explicit legislative action.") The appropriate inquiry in this case is to ascertain what the negotiators did in fact arrive at as the objective expression of their efforts. It is the objective, not the subjective, intent of the parties to a contract which controls, and courts will enforce the intent of the parties as expressed in the writing of the agreement, the instrument alone being deemed to express that intention. *Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir. 1982); *see Consolidated Gas Co. v. FERC*, 745 F.2d 281, 289 n.18 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

Statutory construction of a compact must be integrated consistently with contract-law interpretation. Ratification of a compact by Congress ratifies the expressed intent of compact negotiators, unless Congress changes that compact. Any more "activist" role by the Court is a judicial revision of the compact under the guise of statutory interpretation, an activity repugnant to principles of wise judicial administration. It is not the function of a court to alter a contract's terms in the process of interpretation to make those terms accord with the court's sense of justice or equity. *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 947 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981); *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1013 (3d Cir. 1980). This Court, similarly, has repeatedly stated that it will not substitute its judgment for that of Congress. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 568 (1983); *Rosebud Sioux Tribe*

v. Kneip, 430 U.S. 584, 615 (1977); *Arizona v. California*, 373 U.S. 546, 565-66 (1963).

The Canadian River Compact is not only an agreement between States, it is a federal statute by virtue of the Congressional consent to the Compact enacted in 1952. However, the rules of statutory interpretation familiar to this Court in cases such as *Public Citizen v. United States Dept. of Justice*, 109 S.Ct. 2558 (1989), should reach the same result as application of the canons of contract law. In *Public Citizen*, the statutory language did not have a definite meaning and a "literalistic reading" of the Act would lead to absurd consequences. *See id.* at 2565-66, 2571. In the current case, contrary to the Report's conclusions, the Compact's "originating" language has a definite accepted meaning, and the only reasonable interpretation of the Compact does not lead to "patently" absurd consequences. *Id.* at 2575 (J. Kennedy, dissenting). *But see* Report at 52.

The Report's statutory analysis is simply not correct. The Report declares that "neither the language of the federal consent legislation nor its relatively sparse legislative history shed any light on [the Article IV(a)] issue." Report at 77. To the contrary, the Senate Committee Report that accompanied the consent legislation not only specifically stated that New Mexico's use of the water originating above Conchas Dam was "unrestricted," but also that New Mexico had the "further right" to store the water originating below Conchas Dam for use. S. Rep. No. 1192, *supra*. The Senate Committee Report is the most reliable indicator of Congressional intent except the language of the Act (in this case, the Compact) itself. *See Menominee Tribe v. United States*, 391 U.S. 404, 410

(1968); 2A Sands, *Southerland Statutory Construction* §§48.06-48.08 at 308-16 (1984). Therefore, the legislative history is not opaque on this question, and it fully supports New Mexico's view.

C. The Report Incorrectly Finds Ambiguity in Article IV(A) Because the Provision Has Only One Reasonable Meaning

The Report treats the Compact, which has no ambiguity, as an ill-drafted and ambiguous document. This is a fundamental mistake of the Report. This asserted ambiguity or absurdity is relied on to remove the unambiguous "originating" words of Article IV(a). This reliance is misplaced as a matter of law.

The Report offers four rationales for its finding that the Compact is ill-drafted, ambiguous, or absurd. First, the Report remarks that the Compact was relatively hastily drafted, implying that the language of the Compact therefore should have less force that it would if the negotiators had spend more time on it. Report at 53. This argument ignores the fact that the document was not only solemnly agreed to by the negotiators, but also reviewed, discussed, and enacted by Congress. Moreover, there is absolutely nothing to suggest that haste in negotiations had any bearing on the issues involved here. The Compact made a sensible and efficient allocation of water between the States, and the quickness with which it was negotiated is irrelevant to that allocation.

The second rationale for the Report's rejection of the Compact language is the Compact's supposed ambiguity. The Report suggests that the Compact, as written, could give New Mexico a claim on waters located in Colorado or Texas. *Id.* at 56. The Report suggests that the supposed ambiguity that results

from lack of the phrase "in New Mexico" in Article IV(a) of the Compact is so significant that the Compact cannot "bear its literal meaning." *Id.* at 48; *see id.* at 57. This is wrong both because the Compact language is not in fact ambiguous, and because the supposed ambiguity is not material to the issues of this lawsuit.

Virtually all reported decisions agree on the test for contract ambiguity; a contract that is reasonably susceptible of two or more different meanings is ambiguous. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1360 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 865 (1989); *Broad, supra*; *Mellon Bank, supra.* Under the above test, the Compact is not ambiguous because it is not reasonably susceptible of different meanings. Simply because a party later disputes the meaning of a contract does not render it ambiguous. *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 955 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1241 (1984); *International Union of Bricklayers v. Martin-Jaska*, Inc., 752 F.2d 1401, 1406 (9th Cir. 1985); *Boudreau v. Borg-Warner Acceptance Corp.*, 616 F.2d 1077, 1079 (9th Cir. 1980).

The Report does not suggest a different meaning for the "originating" language. No reasonable meaning exists apart from its ordinary meaning of "arising" or "beginning." *See* 7 Oxford English Dictionary at 203 (1933) (Originate: "To give origin to, give rise to, cause to arise, initiate, bring into existence"). Thus the Report has found no ambiguity in this language but has merely rejected it.

The Compact is clear in material respects. Unless the words used by the parties to a contract are found

to be ambiguous in some material respect, courts should give those words legal effect according to their ordinary and natural meaning. *Florom v. Elliott Mfg.*, 867 F.2d 570, 575 (10th Cir. 1989). Even if the Court finds that the lack of "in New Mexico" in Articles IV(a) and IV(c) does create an ambiguity, it is not *material* to the dispute before the Court. New Mexico does not claim rights to water in Colorado or the right to reach into Texas for water. *See* Report at 55.

As to Colorado, because only New Mexico, Texas, and Oklahoma had interests in the Canadian River waters that justified the substantial effort of an interstate compact dealing with water allocation, those three states alone were parties to the Compact. No reasonable person would expect the Colorado Congressmen to consent to a compact between three other states allocating Colorado waters. It defies common sense to suggest that the Compact might allocate water in a non-party State to one of the States signing the Compact. The only reasonable reading of the Compact, therefore, is that it addressed New Mexico's rights to Canadian River water "in" New Mexico. Congress clearly shared this understanding. S. Rep. No. 1192, *supra* (Compact gives New Mexico free use of "waters originating *in that state* above Conchas Dam") (emphasis added). *But see* Report at 55 n.38. Congress also affirmed the negotiators' clear intent to allow New Mexico use of "water originating in that State." S. Rep. No. 1192, *supra*. There is only thus one reasonable reading of "originating" on its face.

Any ambiguity is cured with respect to Texas and Oklahoma by the overriding provisions of Articles V

and VI. Article V of the Compact gives Texas free and unrestricted use of Canadian River water "in" Texas, subject to certain storage limits. This provision, when read consistently with Article IV(a), means that New Mexico has no rights to water originating above Conchas Dam once it reaches Texas, because that water is now "in" Texas and subject to Texas' rights.

A reading of the Compact based on New Mexico's supposed claim to water in Texas violates the basic canons of statutory and contract interpretation that all provisions of the Compact must be read together to result in a cohesive and meaningful whole. *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir. 1988); *Deauville Corp. v. Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1193 (5th Cir. 1985); *Cherry Hill Sand & Gravel Co. v. United States*, 7 Cl.Ct. 357, 360 (1985).

The Report rejects New Mexico's argument that Article V removes the supposed ambiguity of Article IV(a) with respect to waters in Texas. Report at 56. The Report asks what has become of Colorado's claims to water *in Texas*, but this question does not make sense. *Id.* The water "in" Texas which arose in Colorado is, when it reaches Texas, allocated by the Compact to Texas, and Colorado would not have a claim to it whether or not New Mexico's interpretation of Article IV(a) is upheld. Likewise, Colorado has no claim to water in New Mexico that has flowed across the Colorado-New Mexico boundary.

Article II(a) of the Compact defines the Canadian River as "arising" in New Mexico and flowing into Texas and Oklahoma. The geographic scope of the Compact was limited to those three states. Article

II(a) included all tributaries of the Canadian in its definition of that river, and even though minor parts of the tributaries of the Canadian originate outside the three states, a reasonable and common-sense construction of the Compact is that it meant to treat the Canadian River waters only to the extent the three signatory states had interests in these waters.

The Report's third rationale for ignoring the language of the Compact is the assertion that reading the Compact on its own terms gives New Mexico a "massive windfall" that Congress could not possibly have intended. *Id.* at 67. This contention is just not true. The Compact language, viewed from a practical standpoint, divides spill waters from Conchas Reservoir in an equitable way. New Mexico's storage in reservoirs below Conchas Dam of water spilling from that dam will be limited to the amount of storage capacity available below Conchas at the time of the spill. Because massive floods occur only once about every forty years, it is neither prudent nor economically justified for New Mexico to build surplus empty capacity to attempt to catch such floods entirely.

New Mexico's stake in this lawsuit is the right given to it by the Compact to capture the spills from Conchas in whatever extra reservoir capacity happens to be available at that time. The remainder of such spills would go to the downstream states. The result reached by the Report, by contrast, denies New Mexico any share of the spills over Conchas Dam under Article IV(a), in defiance of the Compact's language. Therefore, the Report is incorrect in stating that the Compact, read straightforwardly, would give New Mexico a "massive windfall." *Id.* It is the Report, in fact, which gives Texas a "massive windfall" by rec-

ommending that New Mexico be denied its Compact apportionment of the floodwaters of the Canadian River.

The fourth rationale identified by the Report is the effect of New Mexico's Compact interpretation on the potential inflow of water for the Sanford Project in Texas. *Id.* at 57-58. This effect, the Report says, "while, perhaps not 'absurd,' appears to run counter to the Congressional intention in conditioning funding of the Sanford Project on execution of the Compact and in subsequently approving the Compact." *Id.* at 57. To the contrary, the Congressional intent in imposing the conditions on funding of the Sanford Project was to protect the neighboring states' claims to an adequate water supply which might otherwise be demanded by the Sanford Project, by far the largest reservoir development in the basin. S.Rep.No. 1192, *supra*; Agreed Material Facts C3-C5. The interpretation of the Compact offered by New Mexico would clearly effectuate Congressional intent with respect to the Sanford Project, not subvert it. It is the Report which turns its back on the history of Congressional involvement in the Canadian River basin when it suggests that"there is absolutely no basis for concluding that Congress intended" that the Compact give New Mexico the rights provided by an unstrained reading of Compact language. Report at 58. Congress consented to the Compact after considering it in committee and issuing a report describing its terms, so that there is an ample basis for concluding that Congress intended what it said. *See* S. Rep. No. 1192, *supra.*

There is no support for the Report's suggestion that Congress intended that spills over Conchas Dam

should go to the Sanford Project. In fact, the Report itself concedes that "the 'safe annual yield' water supply determination used to determine the economic feasibility of the Sanford Project and the repayment obligations of its beneficiaries adopted a conservative approach which did not rely on any possible Conchas spills". Report at 85 n.52. Because the Sanford Project did not rely on Conchas spills, Pls. Ex. 102 at 62-63, then Congress could not have implied any intent with respect to Conchas spills when it approved the Sanford Project.

Within two pages of this discussion, moreover, the Report refutes its own suggestion that to give "originating" any meaning would work a hardship on the two downstream states that Congress could not have intended. Commenting on the result of its recommendation to deny "originating" any meaning, and thus deny New Mexico the power to store above-Conchas water below Conchas dam without chargeability under Article IV(b), the Report remarks:

> A natural question is why New Mexico should be permitted to capture all water originating above Conchas Dam in New Mexico and put it to use above Conchas and on the downstream Tucumcari Project, but not put it to use elsewhere below Conchas Dam without chargeability under Article IV(b) *when the impact on Texas and New Mexico* [*sic-Oklahoma*] *is the same in each case.* The short answer is that such was the intent of the Compact framers and was apparently the result of negotiations based on the assessment of probable future development scenarios.
>
> Report at 60 (emphasis added).

This remark acknowledges that even under the recommendation of the Report, Article IV(a) gives New Mexico the right to build or enlarge a dam to capture all water which would otherwise spill over Conchas Dam—the only restriction is that this new dam or enlargement must be built at or above Conchas, rather than below it. But the impact on Texas and Oklahoma is the same, no matter where the dam or enlargement is located. In other words, the Report's revision of Compact language gains nothing for the downstream states. Whether the Compact is read according to its terms or rewritten to eliminate the "originating" words, there is no "massive windfall" to New Mexico.

Whether New Mexico wins or loses, it has the right under the Compact to prevent any flood water originating above Conchas Dam from reaching Texas and Oklahoma, by building a new dam and holding it empty in order to capture that floodwater. As discussed above, however, New Mexico will not build an empty dam to capture forty year floods, either in the upper or the lower basin. That is the relevant "probable future development scenario." The overwhelming likelihood—as the negotiators can be presumed to have known—is that New Mexico will capture what it can of floodwater in whatever capacity happens to be empty at the time, and the remainder will go to the downstream states. This is a workable and fair result. It gives all states a share in the floodwaters. It is also, unlike the Report's recommendation, in accordance with the straightforward meaning of the words used in the Compact.

The Compact as it is written is clear, workable and fair to the parties. The fact that the plaintiffs now argue for a different division, one which they claim

is more fair, in which they should get almost all Canadian River floodwaters and New Mexico little or none, is not grounds to rewrite the language agreed upon. As this Court declared in *Texas v. New Mexico, supra*, 462 U.S. at 568, citing *Arizona v. California, supra*, 373 U.S. at 565-566: "Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment for the apportionment chosen by Congress.' "

Because there is only one *reasonable* meaning of the Compact, there is no ambiguity. Because there is no ambiguity, the words referring to water "originating above Conchas Dam" should be read to mean what they say and should not be deleted by resort to unclear extrinsic evidence. *See Trujillo v. CS Cattle Co.*, 109 N.M. 705, 709, 790 P.2d 502, 506 (1990). The Court erred as a matter of law, therefore, when it found the Compact ambiguous and re-wrote it.

II. THE REPORT IMPROPERLY SHIFTS THE BURDEN OF PROOF IN THIS CASE TO NEW MEXICO ON THE ABOVE-CONCHAS WATER ISSUE.

Texas and Oklahoma carry the burden of proof in this case. Report at 86-88. The Report finds that the plaintiffs met that burden. *Id.* at 87. New Mexico objects to that finding. The language of the Compact is contrary to the plaintiffs' position, and the plaintiffs have proffered no evidence that supports their claimed understanding of the Compact. Under these circumstances the Report's finding that the plaintiffs have met their burden is completely incorrect.

The Report's alternative suggestion that the Article IV(a) issue arose as an affirmative defense is in error. *See* Report at 87 n.54. New Mexico's Answer set out

numerous denials of the allegations of plaintiffs' Complaint. In the second paragraph of Paragraph 9 of these denials, New Mexico expressly addressed Article IV(a) as a legal defense to plaintiffs' allegation that "Article IV(b) of the Compact refers to storage capacity physically in place below Conchas Dam." *Compare* N.M. Answer at 4 (¶9) (Dec. 4, 1987) *with* Complaint at 4 (¶9) (Apr. 16, 1987). New Mexico's Answer also contained affirmative defenses, one of which referred again to Article IV(a) and discussed the large amount of water stored at Ute Reservoir which had "originated above Conchas Dam [and] reached Ute Reservoir as a result of [the] spills and releases from Conchas Dam which were commenced on February 6, 1987." New Mexico's Answer at 9 (2d Affirmative Defense) (Dec. 4, 1987). New Mexico quantified this "above Conchas Dam" water at over 180,000 acre-feet. *Id.* New Mexico intended to show that, as a factual matter, water originating in the basin above Conchas had been stored in Ute and later released so that, even if plaintiffs were to focus on storage of water rather than gross reservoir capacity, they would lose. This was a fact-based mootness defense which had nothing to do with the meaning of Article IV(a), but with the amounts of Article IV(a) water in Ute Reservoir.

The discussions of evidence in the Report demonstrate the complete lack of any direct evidence in support of plaintiffs' position. With respect to negotiating history and the position of the Bureau of Reclamation, the Report takes essentially ambiguous or neutral evidence and construes it in a manner which is adverse to New Mexico, shifting the appropriate burden. With respect to the understanding of the

Compact demonstrated after its ratification by the parties, the Report minimizes and sets aside affirmative evidence of the correctness of New Mexico's position, while citing *no* direct evidence to support the view that the plaintiffs in this lawsuit disagreed with the language of the Compact for the first thirty-seven years of its existence. The shift of the appropriate burden to New Mexico mandates rejection of the recommendations of Chapter VII of the Report.

A. The Report Improperly Construes Against New Mexico Evidence From the Negotiating History and Statements of the Bureau of Reclamation

The Report contradicts its own claim that the negotiating history conflicts with the Compact language, when it admits that negotiating history does not address the issue of spills over Conchas Dam. The Report states that "If [Conchas] spills were captured. . . by a downstream reservoir [in New Mexico], an event considered unlikely at the time but which has come to pass with New Mexico's construction of Ute Dam, there is nothing in the negotiating history of Article IV to suggest that conservation storage of such waters would not be chargeable against the 200,000 acre-foot limitation of Article IV(b). The most that can be said about the Engineer Advisors' treatment of Conchas spills is that they apparently did not project that they would recur with the frequency and magnitude that they subsequently have." Report at 67.

This language demonstrates that the plaintiffs did not carry their burden and that, instead, the burden was improperly shifted to New Mexico. The Report states that the negotiating history is silent about spills, and that the Engineer Advisors simply did not address them. Silence, however, should be neutral to

the issues of this suit, unless it is construed against the party who has the burden of persuasion. If there is no reason from the negotiating history to believe that spills would not be chargeable under Article IV(b), there is equally no reason to believe that spills would be chargeable under Article IV(b). The negotiating history does not expressly address the point. In the absence of evidence one way or the other from the negotiating history, the language of the Compact should prevail.

In a similar shift of burden, the Report misconstrues the evolution of Article IV. *Id.* at 68-74. After a discussion of that evolution, the Report can conclude only that "[t]here is noevidence that the use of the 'origination' language was intended to have any . . . substantive significance," and that "there is no support" for reading the Compact on its own terms, which would give New Mexico a share of water that spills or is released over Conchas Dam. *Id.* at 74. This is not evidence supporting the plaintiffs' position. It is neutral to the issues of this lawsuit, and should be either construed against the plaintiffs who have the burden, or should be ignored as unhelpful. The Report, however, construes the silence of the negotiating history against New Mexico.

The Report next suggests that it would be a complex matter, contrary to the simplicity for which the negotiators had hoped, to administer the Compact under a natural reading of its terms. This conclusion of fact, which is material to the plaintiffs' motion for summary judgment, is disputed and lacks support in the record, as New Mexico argued before the Special Master. The parties did not agree that this issue was

undisputed. *See* Tr. at 195-96 (June 19, 1990); *contrast id. with* Report at 4.

If the Report is correct that no state sought the spills in the negotiating process, then the disposition of those spills cannot be determined on the basis of what was sought in the negotiating process. The Report, however, argues that because New Mexico did not say it was seeking spills, New Mexico should have no share in those spills. The Report does not explain why it fails to apply this argument to the plaintiffs, who also said nothing. This failure places an improper burden on New Mexico.

The Report also comments that New Mexico's "only real complaint appears to be that it will be forced to share some of the Conchas Reservoir spills." *Id.* at 68. This is not only false, it again points up the contrast between the Report's treatment of New Mexico and its treatment of the plaintiffs. New Mexico's real complaint in this case is that the "originating" language of the Compact, on which it has relied in impounding Conchas spills at Ute Reservoir, is being removed and rewritten. New Mexico believes that the Compact results in a *de facto* sharing of Conchas spills. It is the plaintiffs, by contrast, who argue that they should be permitted to take virtually all such spills. The Report fails to acknowledge that the issue is the plaintiffs' claim to nearly 100% of Conchas spills. This failure demonstrates the Report's improper shift of the burden from the plaintiffs to New Mexico.

The Report's improper use of neutral evidence against New Mexico is also evident in the Report's discussion of supposed Compact construction by the Bureau in assessing likely streamflows for the San-

ford Project in Texas. The Report misconstrues an assessment of probabilities as a legal interpretation. In fact, all the statements by the Bureau on spills over Conchas were either neutral or ambiguous, but the Report construes all of them against New Mexico.

In discussing the statements of the Bureau on this issue, the Report concedes that "[i]t is not usually appropriate to give much weight to the construction of a compact or statute by an agency not charged with its administration." Report at 84. The Report's departure from this rule demonstrates the flaws in the Report's analysis. The Report defends its reliance upon the Bureau's supposed subsequent construction of the Compact in a manner which flatly contradicts the Report's own conclusions. The Report states that the "fact that the Bureau may have had an interest in advancing a construction that would be conducive to providing the maximum water supply for the Sanford Project should not influence the weight to be given that construction," because "the 'safe annual yield' water supply determination used to determine the economic feasibility of the Sanford Project and the repayment obligations of its beneficiaries adopted a conservative approach which did not rely on any possible Conchas spills." *Id.* at 85 n.52.

On the one hand, the Report claims that the Bureau is not biased on the issues in this lawsuit, because it did *not* rely on spills for the Sanford Project. On the other hand, the Report construes Bureau documents to mean that the Bureau *did* expect spills from Conchas as part of the water supply for the Project, and that therefore the Bureau held the legal opinion that the downstream states were entitled to nearly 100% of Conchas spills. This makes no sense.

The only way to understand the fact that the Bureau both did not rely on spills and did consider that spills might be possible is to recognize that the Bureau was not making a legal interpretation, but was instead making a practical assessment of probabilities. The practical reality is that whether "originating" is retained or discarded in the Compact, a share of spills will reach the Sanford Project. As discussed *supra*, for example, about 90,000 acre-feet of water spilled over Ute Dam on its way to Lake Meredith in 1987, even though New Mexico captured a share of those spills in its available empty capacity at Ute Reservoir. Thus the Bureau was absolutely correct to consider spills as a possible water supply for the Sanford Project. That fact, however, does not address the legal issue of the meaning of "originating," nor does it represent a legal position on the part of the Bureau.

In suggesting that the Bureau has construed the meaning of Article IV of the Compact, the Report misconceives the Bureau's entire approach. In both the 1954 and 1960 Definite Plan Reports, the Bureau was considering *streamflow*; that is, the likely yield of the Canadian River in ordinary years, which is important to the Bureau for planning purposes. Report at 85. The Bureau was not commenting on the disposition of floodwaters in its Definite Plan Reports, as no prudent engineer would consider the sporadic spills from Conchas as part of a reliable water supply. Thus it is incorrect to read the Bureau's practical assessment of water supply likely from New Mexico in ordinary years as a legal interpretation of how the Compact would operate in the rare event of substantial spills over Conchas dam.

The Report improperly burdens New Mexico in saying that New Mexico's failure to object to the Bureau's 1954 and 1960 Definite Plan Reports was "significant." *Id.* The Bureau, contrary to the Report's statement, did not circulate these reports to New Mexico for comment. Definite Plan Reports are internal documents for administrative use, and are not subject to circulation for comment under the Bureau's practice. *See* Flood Control Act of 1944, ch. 665, §1(c), 58 Stat. 887 (1944).

Moreover, New Mexico had formally commented in February 1950, as Compact negotiations were beginning in earnest, on the 1949 Sanford Project planning report, which said that the project would be subject to the Compact. New Mexico indicated it was satisfied at that time that the Bureau's water-supply studies "considered that no water originating above Conchas Dam would be usable by the Texas Project." H.R. Doc. No. 678, 81st Cong., 2d Sess. at XIII-XV (letters from Governor Mabry and New Mexico Compact negotiator John Bliss). *See id.* at VI (comments of Bureau of the Budget describing New Mexico view). After the signing of the Compact, New Mexico reasonably relied on the Compact to protect New Mexico's rights. *Contrast* Report at 85 n.53.

B. The Report Minimizes Affirmative Evidence Supporting the "Originating" Language of the Compact, but Suggests No Evidence Supporting Deletion of That Language.

In addition to relying on the Compact's language in this case, New Mexico proffered direct evidence that the Compact negotiators understood how that language would affect the issue of spills from Conchas Dam—the Bliss letter to Senator Anderson of Decem-

ber 1950, discussed *supra*. This piece of evidence, as described earlier, is the best and only contemporaneous evidence of the negotiators' own understanding of the application of the"originating" language in the Compact they had just signed. There is no evidence that any other Compact negotiator at any time expressed a contrary view. Thus, the Bliss letter should be entitled to great weight, as the only evidence on the point at issue from an authoritative source.

Inexplicably, the Report gives the Bliss letter little or no weight. The Report first suggests there is doubt about whether the spills referred to in the letter are spills over Conchas Dam, an obscure and erroneous suggestion since Conchas was the only significant dam in the area at the time. *See* Report at 75. The Report then goes on to say that, had Mr. Bliss actually meant what he said in this letter, he would also have said it in another letter written in the same week to his Governor. *Id.* This standard, that every serious position must be continuously stated, is an impossible standard to meet.

The Report dwells on later expressions of various New Mexico officials that 200,000 acre-feet of storage of below-Conchas water was sufficient to allow for present and future development in New Mexico, as if that position were in conflict with the view that New Mexico had a right to Conchas spills. *Id.* at 76-77. There is no such conflict. In assessing the outcome of the Compact, New Mexico officials, like the Bureau of Reclamation, prudently did not consider these sporadic spills as a water source upon which reliance could be placed. That prudence does not indicate a relinquishment of a right to those spills, especially in light of Mr. Bliss' letter showing that New Mexico

believed that spills were not included in the Article IV(b) limitation.

The Report's analysis also places burdens on New Mexico not placed on plaintiffs. The plaintiffs have provided absolutely no evidence that, although they signed the Compact, they did not at the time really mean the "originating" words to apply to the water spilling over Conchas Dam. No documents in the record even suggest that the plaintiffs held that reservation about the final Compact language. If they did hold such a reservation, it should be of no effect, *as they did not inform New Mexico of it.*

Courts are bound to give contract language its ordinary meaning, and a party contesting the reasonable construction of a contract must show either that both parties had a contrary intent, or that the party (or parties) seeking relief has no reason to know of that reasonable construction at the time of the making of the agreement. *NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695, 697 (8th Cir. 1985); *City of Oxnard v. United States*, 851 F.2d 344, 347 (Fed. Cir. 1988). *See Sun Vineyards v. Luna County Wine Development Corp.*, 107 N.M. 524, 582, 760 P.2d 1290, 1294 (1988). Not only was there no showing of a contrary intent by the parties at the time the Compact was made, Oklahoma knew quite well of the reasonable construction of "originating" now advanced by New Mexico, as shown by Article V of the October 13 draft of the Compact, which Oklahoma later approved. *See* N.M. Ex. 30, Ex. C at 5-6; *id.*, Ex. F, at 3.

The Report has this exactly backwards, and mentions several times that New Mexico did not make its position on Conchas spills clear to Texas and Oklahoma during the negotiations. *See id.* at 78, 80. This

is false. *See* S.Rep.No. 1192, *supra*. Even if it were true, however, the Report does not explain why New Mexico had that duty, inasmuch as the words of the Compact gives those spills to New Mexico. Neither does the Report explain why it would be necessary for New Mexico to go out of its way to assert the language of the Compact, inasmuch as there was no controversy over spills until thirty-seven years later. Finally, the Report places no corresponding duty on the plaintiffs to inform New Mexico of their supposed theory that New Mexico had no right to capture Conchas spills, despite the Compact language. It is the plaintiffs who seek to change the language of the Compact, and it must therefore be the plaintiffs who carry a burden to have notified New Mexico of any understanding contrary to that language, prior to ratification and consent. Plaintiffs cannot do so, as no contrary understanding existed.

Another piece of evidence, dating from six years after the Compact was signed, also directly supports New Mexico's position. The Twenty-Second Biennial Report of the State Engineer of New Mexico (1956) ("1956 Biennial Report") reads:

> The limit of 200,000 acre-feet evidently applies only to waters originating in the drainage basin below Conchas Dam and does not include waters originating above Conchas which pass through the reservoir. From 1945 through 1953 an average 21,000 acre-feet of water passed the gaging station below Conchas. It is assumed that sufficient storage, in addition to the 200,000 acre-feet set forth in Article IV, Section (b), could be provided to

> regulate water originating above Conchas Dam without violating terms of the Compact.
>
> Pls. Ex. 112 at 79.

Again, this is positive direct evidence on the precise question at issue here—how the language of the Compact was understood to apply to spills. The plaintiffs have presented no indication of their contrary understanding until after this lawsuit began. Thus the 1956 Biennial Report should be entitled to great weight. Unaccountably, however, the Report says that "there is no evidence that this lower level staff engineer's interpretation was ever approved by the State Engineer's office or its legal counsel or replied on by New Mexico's Governor or legislature at any time during the period that the Ute Dam site was selected and the project authorized for construction." Report at 79.

There is no basis for this assertion. Ute Dam was first authorized for construction in 1957. Agreed Material Fact E1. The "interpretation" of the 1956 Biennial Report was the official report of the State Engineer and Interstate Stream Commission. The state law mandating reports by the State Engineer requires that "the state engineer shall prepare and deliver to the governor . . . a full report of the work of his office . . . with such recommendations for legislation and appropriation as he deems advisable." 1978 N.M. Stat. Ann. §72-2-5 (1985 Repl.Pamp.) (Laws 1907, Ch. 49, §8, as amended). The 1956 Biennial Report, therefore, must have been relied on when Ute was authorized for construction, with an ultimate capacity of 272,000 acre-feet; indeed, the thing speaks for itself. The official report of the State Engineer to the Governor and Legislature is not "lower level"

in nature, and no such report is made without full review of the State Engineer's staff.

The Report's rejection of this evidence is not warranted, particularly because the plaintiffs are unable to offer any authoritative evidence even roughly contemporaneous with the Compact which indicates a contrary view. It is clear, therefore, that the Report not only did not require the plaintiffs to meet their burden in this lawsuit, but also improperly shifted the burden to New Mexico.

III. PARAGRAPHS 1,4, AND 9 OF THE RECOMMENDED DECREE REQUIRE MODIFICATION REGARDLESS OF THE COURT'S DISPOSITION OF NEW MEXICO'S OTHER OBJECTIONS

A. Paragraph 1 of the Recommended Decree Contains Ambiguities and Should Be Corrected.

Paragraph 1 of the Recommended Decree states the following: "Under Article IV(a) of the Canadian River Compact ("Compact") New Mexico is permitted free and unrestricted use of the water of the Canadian River and its tributaries in New Mexico above Conchas Dam, *such use to be made above or at Conchas Dam*, including diversions for use on the Tucumcari Project." Report at 112 (emphasis added). No provision similar to Paragraph 1 of the Recommended Decree was included in the draft recommended decree attached to the Draft Report. *See* Draft Report at 104. Thus this is New Mexico's first opportunity to comment on this paragraph, and New Mexico had no previous opportunity to object.

The emphasized words of Paragraph 1, taken on their face and in isolation, could be interpreted to prohibit any use by New Mexico below Conchas Dam, except for use on the Tucumcari Project, of Canadian

River water "originating" above Conchas Dam. This interpretation of the words of Paragraph 1 restricts use of Canadian River waters originating "above Conchas Dam" to the area "above or at Conchas Dam" only. If this is the meaning of Paragraph 1, the Compact has been radically rewritten to impose both use and storage restrictions on Canadian River water in New Mexico, in defiance of the fact that the Compact expressly states that there are no use restrictions on that water at all. If this is indeed the meaning of Paragraph 1, New Mexico objects, for the following reasons.

The Compact places no limitation of any kind on New Mexico's use of the flow of the Canadian River, whether above or below Conchas Dam. The Compact also explicitly employs this strategy with respect to Texas' allocation under Article V, which states in part: "Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below." In keeping with the general strategy of the Compact, uses of the flow of the river are entirely unrestricted, with the only limitation being upon storage. Thus an interpretation of Paragraph 1 that leads to a restriction of New Mexico's use of Canadian River waters, either above or below Conchas Dam, is incorrect under any reading of the Compact.

Such an interpretation of Paragraph 1 also conflicts with evidence of the Compact's negotiating history. Raymond Hill, in his interpretive memorandum, summarizes the Compact with regard to this point:

> In general, it was found by the Engineer Advisors that the interests of all three sig-

> natory States in the waters of Canadian River would be amply protected if reasonable limitations were placed upon the amount of conservation storage in New Mexico and in Texas. It was the considered opinion of those participating in the negotiations that no restrictions should be placed upon the use of the unregulated flow of Canadian River or any of its tributaries.
>
> N.M. Ex. 30 at 5.

Thus, a restriction on New Mexico's use of Canadian River waters, as distinct from New Mexico's right to store those waters, is in direct contradiction to the negotiators' understanding.

Moreover, an interpretation of Paragraph 1 which restricts use of above-Conchas water would contradict the fundamental thrust of the Report. It would reflect that the Report agrees with New Mexico that the Compact refers to water "originating" above and below Conchas Dam in the natural sense of those words. Only if the word "originating" has a substantive significance would it make sense to restrict New Mexico's use of that water to uses made at or above Conchas. An interpretation of Paragraph 1 which restricted New Mexico's use of water based on where that water originated would thus flatly contradict the recommendations of the Report.

Therefore, New Mexico has a different understanding of Paragraph 1. New Mexico understands Paragraph 1 to mean that New Mexico may have free and unrestricted use under Article IV(a) of all waters at or above Conchas Dam. When those waters are released or spilled from Conchas Dam, however, they

are then governed by Article IV(b). Article IV(b) also gives New Mexico free and unrestricted use of those waters, subject only to a storage limitation of 200,000 acre-feet. The net result is that New Mexico has free and unrestricted use of Canadian River water, whether under Article IV(a) or Article IV(b), subject only to the storage limitations of Articles IV(b) and IV(c).

Contract law supports New Mexico's view that, given the assumptions and reasoning of the Report, New Mexico's understanding of Paragraph 1 of the Decree is more reasonable. An interpretation of a contract effectively deleting much of the contract cannot be sanctioned; contract clauses are always to be construed together. *Avedon Corp. v. United States*, 15 Cl.Ct. 771, 776 (1988); *American Bankers Life Assur. Co. v. United States*, 12 Cl.Ct. 166, 171 (1987). The interpretation of Paragraph 1 restricting use of water in the lower basin contravenes these basic contract-law rules, in that it would remove the "free and unrestricted use" language of the Compact.

B. Paragraph 4 of the Recommended Decree Omits Language of Reasonableness Used in Similar Provisions of Other Paragraphs; Identical Language Should Be Added To This Paragraph to Show That the Omission Was Not Intentional.

Paragraph 4 of the Recommended Decree states in part that "[n]o change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without approval of the Commission." Report at 113. In Paragraph 5, a similar requirement of Commission approval is qualified with the parenthetical phrase

"which approval shall not be unreasonably withheld." *Id.* No such qualifying language appears in Paragraph 4. The omission was probably inadvertent, because there is no apparent reason why the Paragraphs should be treated differently. New Mexico asks that the Court add the language "which approval shall not be unreasonably withheld" as stated in New Mexico's Proposed Decree. *See* Appendix B at ¶11.

C. Paragraph 9 Refers to Violation, or Breach, of the Compact and Thus Has Inappropriately Prejudged an Issue Not Yet Before the Court; Even Under the Report's Reasoning and Assumptions, Paragraph 9 is Incorrect and Should Be Withdrawn

Paragraph 9 of the Recommended Decree has two serious flaws which require correction whether or not the Court denies New Mexico's other objections to the Report. *See* Report at 114.

The summary judgment proceedings in this case to date have only determined questions of Compact interpretation, or New Mexico's obligation in regard to the law under the Compact. Issues of the extent of violation, if any (that is, any *breach* of New Mexico's obligation), and the proper remedy to be imposed if a violation were found, were reserved for subsequent proceedings. The parties agreed and the Special Master stated in the proceedings herein that all questions of the extent of New Mexico's violation and the appropriate remedy therefor would be deferred until the Court's decision on the Compact interpretation phase of the case, which is the matter currently pending. *See* Pre-Trial Order No. 2 (December 1, 1988); Tr. at 42-44 (November 4, 1988).

The Decree of this Court should be concerned at this point only with interpretation of the Compact. If

New Mexico's exceptions to the Report are sustained, the matter will not need to be remanded, because New Mexico cannot be found to be in violation under any conceivable set of facts. If plaintiffs prevail, however, the nature of the Decree will be interlocutory and the matter will be remanded for determining the extent of New Mexico's violation, if any, and the appropriate remedy to the downstream states. Those proceedings on remand could indicate that New Mexico has not, in fact, been in violation. The Decree should not prejudice this possibility.

Paragraph 9 also can be read to find that New Mexico has been in continuous violation of the Compact since the spring of 1987, a conclusion which could be shown to be contrary to fact even under the Report's assumptions. The Report's conclusions were based on a capacity survey of Ute Reservoir made in 1983. The violation found by the Report on June 23, 1988 was only 1,800 acre-feet of excess storage. *Id.* at 111. The June 23, 1988 date was apparently chosen by the Report because the parties had stipulated that Ute Reservoir contained 232,000 acre-feet of water (excluding sediment) on that day, based on the 1983 reservoir capacity survey. It is almost certain that the extra sedimentation in Ute Reservoir by June of 1988, nearly five years after the 1983 capacity survey, would have increased the silt in Ute and reduced its capacity to store water by some 6,000 acre-feet, particularly in view of the high levels of sediment that could be expected to accompany the 1987 floods. *Id.* at 16-17 (annual approximate sediment inflow to Ute Reservoir agreed to be 1246 acre-feet per year). Thus, under a more recent capacity survey, New Mexico might not have been in violation of the Compact.

Therefore, New Mexico requests that if Paragraph 9 of the Recommended Decree is retained, it be modified to refer only to questions of Compact interpretation, with violations, if any, determined on the basis of facts to be presented on remand. The provisions of Paragraph 9 should be removed and replaced with provisions addressing only the issues currently before the Court. *See* Appendix B (New Mexico's Proposed Decree).

IV. A GOOD FAITH REQUIREMENT IS COUNTERPRODUCTIVE, BUT PRIMARY JURISDICTION MAY BE HELPFUL ON SOME ISSUES IF GUIDED BY WELL-DEFINED STANDARDS.

A. Imposition of a Requirement of Good Faith Negotiation in Original Actions Would Not Reduce Litigation

The Report accurately states that Congressional consent to the Compact, as well as contract law, "imposes an implied duty on the part of the compacting states to participate in good faith in the implementation of the compact plan to carry out its purposes." Report at 31. The duty to make a compact work does not, however, either as a matter of implicit Congressional intent or as a matter of contract law, mean that parties to a contract should not have access to judicial relief without engaging in efforts to negotiate a settlement, let alone the further requirement that these efforts be certified to be in good faith.

With respect to Congressional intent the Report acknowledges the fact that many compacts, such as the one at issue here, require unanimous agreement by the members of the Compact Commission on any issue of compact interpretation or implementation. *Id.* at 30. From this it may reasonably be inferred that Congress did *not* create the Commission as a forum

that could effectively resolve all disputes between the states, and instead contemplated the invocation of this Court's original jurisdiction. *See Texas v. New Mexico, supra*, 462 U.S. at 564 (1983). The requirement of good faith under contract law is defined by the Uniform Commercial Code (1972) at §1-201(19) as "honesty in fact in the conduct or transaction concerned". *See* Restatement (Second) of Contracts §205 (1979). Nothing in contract law suggests that a party, in order to show its honesty in fact, must engage in certified good faith negotiation whenever there is a dispute, no matter how incorrect it believes the other party to be legally, or how harmful delay caused by negotiation could be to its interests.

The present case provides an example of how the Report's suggestion could do much harm and little good. The issue which precipitated the present case was a disagreement concerning Compact interpretation arising from New Mexico's decision to enlarge Ute Reservoir. The plaintiffs argued that the Compact limited the amount of physical storage capacity New Mexico could build in the Canadian River basin below Conchas Dam. New Mexico took the view that the limitations of the Compact went not to physical storage capacity, but only to the amount of water stored. As the record of this case reflects, the members of the Commission discussed the controversy prior to litigation and made their positions clear. Report at 19-22. It was an all or nothing question—whether the Compact permitted the enlargement of Ute Reservoir to the size New Mexico wished.

Despite eighteen years' notice that New Mexico built Ute Dam to be enlarged, the plaintiffs did not voice an objection to the enlargement until 1982, when

New Mexico had already committed significant time and money to the project. *Id.* at 19. In New Mexico's view, the fact that the Texas and Oklahoma members of the Commission failed to raise any objection to the enlargement of Ute Reservoir until construction bids were already submitted demonstrates that, for most of that time, the plaintiffs agreed with New Mexico that such a reservoir was within New Mexico's rights. Plaintiffs' last-minute objections put New Mexico in the extremely difficult position of having to choose between losing time and money by delaying the Ute Reservoir project, or incurring the risk that the plaintiffs' interpretation of the Compact would be found to be correct. Weighing these factors, New Mexico decided to take that risk and proceed with construction. New Mexico's decision has been vindicated by the Report's recommendation that the plaintiffs' position on the capacity issue be rejected. *Id.* at 24.

The Report seems to imply that New Mexico was unreasonable in that it would not "at least agree to delay" the building of Ute Reservoir pending further negotiations. *Id.* at 20. Such an implication completely ignores how much that delay would have cost New Mexico. As a practical matter New Mexico had a window of opportunity within which political and funding considerations were favorable for the enlargement of Ute Dam. A delay would certainly have been expensive and might have been fatal to the project.

A requirement of good-faith negotiations would not have usefully addressed this real-world situation. Assuming that New Mexico would not have been permitted to proceed with the enlargement of Ute Dam pending negotiations, the Report's scheme provides

no relief to New Mexico, but would instead unfairly impose further delay. New Mexico would have been required to take risks and to pay costs of a delay which would cost the plaintiffs nothing to impose. New Mexico would have had to incur those risks and costs in order to negotiate a legal question of contract interpretation with respect to which the Report indicates New Mexico was entirely correct. Thus, because of the nature of the capacity issue, a requirement of good faith negotiation would have harmed New Mexico, with no guarantee of success. Under these circumstances, swift access to the Court should not be barred. *New Mexico Assoc. for Retarded Citizens v. New Mexico*, 678 F.2d 847, 850 (10th Cir.1982). See *United States v. Philadelphia National Bank*, 374 U.S. 321, 353-54 (1962) (where the Court refused to apply the doctrine of primary jurisdiction where it would uselessly postpone Court action).

A State's responsibility to be both fair to its sister states and zealous for its own citizens is not so inherently untrustworthy that it must be ensured by the threat of sanctions and the certification of its attorney general. New Mexico considers that it has an obligation under all interstate compacts to conduct good faith discussions on matters of mutual interest with the other parties. New Mexico fulfilled this responsibility in this case. *See generally* Tr. (September 29, 1982). Within the ambit of this responsibility, a sovereign State should be presumed to be acting in good faith in making a decision, whether that decision is to adhere to its legal opinion in a dispute, to negotiate a compromise, or to file suit.

B. The Application of a Doctrine of Primary Jurisdiction, if Well-Defined in Basis and Scope, Could be Beneficial in These Cases, Depending on the Nature of the Issues

The doctrine of primary jurisdiction is designed to serve two purposes. First, the doctrine is grounded in the necessity for administrative uniformity. *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907). Second, the doctrine places issues requiring technical expertise for their solution in the hands of a "body of experts" capable of dealing with "intricate facts." *Great Northern R.R. v. Merchants Elevator Co.*, 259 U.S. 285 (1921). Thus, the doctrine of primary jurisdiction is not invoked where there is no pervasive regulatory scheme requiring uniform application. *United States v. Radio Corp. of America*, 358 U.S. 334, 346-52 (1959). Nor will the doctrine be invoked where the nature of the particular controversy means that jurisdiction in the courts will place no obstacle to an agency's mission. *Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 202-03 (1977).

In the present case, the capacity issue and the issue of above-Conchas water are both compact interpretation questions, rather than parts of a uniform administrative scheme or proper subjects for expert analysis. The doctrine of primary jurisdiction, therefore, is not especially appropriate with respect to these issues. As the Report suggests, the Court could nevertheless invoke the doctrine for the purpose of having the Commission compile the record in these controversies. Report at 32. Such a procedure could be followed, but its benefits over an outside party such as a Special Master are not clear.

With respect to issues that are more technically oriented, the use of the doctrine of primary jurisdiction in the Commission is both more justified and more likely to produce useful results for the Court. For example, the technical issues surrounding New Mexico's establishment of a desilting pool at Ute Reservoir, unlike questions of compact interpretation, call for the kind of agency expertise that the doctrine of primary jurisdiction is intended to invoke. Also, unlike the issue of whether the word "originating" in the Compact is to be disregarded, questions such as whether a desilting pool falls within the spirit of the Compact's intended meaning are likely to recur before the Commission and should be dealt with in a consistent way. This also argues for primary jurisdiction with respect to technically oriented questions.

For the process to be workable, the procedures and standards for primary jurisdiction should be carefully set out. For example, the compilation of an intelligible record for the benefit of the Court would be aided by some objective legal expertise. Thus, the Court may prefer that a referee be appointed to assist the Commission both in compiling the relevant evidence and in organizing for the Court a third-party picture of the Commission's conclusions. The precise authority of that referee should be made clear. New Mexico suggests that the referee have plenary control over the composition of the record, and of evidentiary procedures, but confine any comments on the merits to summaries of Commission positions for the benefit of the Court. If the Court deems it advisable, the referee could be required separately to make recommendations on issues remaining open. The advantage would be that this referee would have the benefit of the

participation of the Commission in proceedings to which the Commission's contribution of experience with this Compact and technical expertise would be valuable. *De novo* review in this Court, or by its Special Master, would preserve all States' access to the original jurisdiction of this Court.

With these or similar procedures in place, the doctrine of primary jurisdiction could be a helpful device whereby the Court could obtain the experience and expertise of a Commission. New Mexico supports the use of the doctrine on issues that are technically oriented and in particular supports the use of the doctrine with respect to the desilting pool issue in the present case.

CONCLUSION

For the reasons stated above, New Mexico objects to the conclusions in Chapter VII of the Report, and requests the Court to reject those conclusions. The Recommended Decree should be replaced by New Mexico's Proposed Decree, attached as Appendix B. If not, Paragraphs 1, 4, and 9 of the Recommended Decree should be deleted or modified in any event. A doctrine analogous to primary jurisdiction should be guided by articulated standards if it is to be useful.

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December 20, 1990

APPENDIX

APPENDIX A

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss, for the State of New Mexico, E.V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this compact:

(a) the term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexico and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River;

(b) the term "North Canadian River" means that major tributary of Canadian River officially knows as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River;

(c) the term "Commission" means the agency created by this Compact for the administration thereof;

(d) the term "conservation storage" means that portion of the capacity of reservoirs available for the storage of

water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tri-

butaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food and feed for the householders and domestic livestock actually living or kept on the property;

(b) Until more than 300,000 acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of Northern Canadian River, shall be limited to 500,000 acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to 200,000 acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b);

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or

reservoirs in which such excess water is being held; and provided further that on demand by the commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve months; and provided further that no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three Commissioners, and one from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional

Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the three signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualified independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

(1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation

of factual data, for the maintenance of records, and for the preparation of reports;

(3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

(1) cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper administration of the Compact, independently or in cooperation with appropriate governmental agencies;

(2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;

(3) Make available to the Governor of any signatory State, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the states, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency,

municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States. The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed four counterparts hereof, each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss
John H. Bliss
Commissioner for the State of New Mexico

/s/ E. V. Spence
E. V. Spence
Commissioner for the State of Texas

/s/ Clarence Burch
Clarence Burch
Commissioner for the State of Oklahoma

APPROVED:
/s/ Berkeley Johnson
Berkeley Johnson
Representative of the United State of America

APPENDIX B

NEW MEXICO'S PROPOSED DECREE

1. Under Article IV(a) of the Canadian River Compact (Compact), New Mexico has free and unrestricted use in New Mexico of the water of the Canadian River originating above Conchas Dam. Water originating in the Canadian River drainage basin in New Mexico above Conchas Dam is not subject to Article IV(b) of the Compact.

2. Under Article IV(b) of the Compact, New Mexico is limited to an aggregate of 200,000 acre-feet of conservation storage of water originating in the Canadian River drainage basin in New Mexico below Conchas Dam for any beneficial use, exclusive of the exempt purposes specified in Article II(d) of the Compact.

3. Quantities of water stored for flood protection, power generation, or sediment control are not chargeable as conservation storage under the Compact even though incidental use is made of such waters for recreation, fish and wildlife, or other purposes not mentioned in the Compact. In situations where storage is made predominantly, though not exclusively, for an exempt purpose, nothing in the Compact precludes the Canadian River Commission (Commission) from exempting all or an appropriate portion of such storage from chargeability as conservation storage.

4. Water stored at elevations below a dam's lowest permanent outlet works is not chargeable as conservation storage under the Compact. If other means of water discharge, such as pumps, are employed below the permanent outlet works, water stored above the elevation of the lower water discharge is chargeable as conservation storage, unless the Commission approves otherwise. No change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without approval of the Commission. Water stored

for non-exempt purposes behind a dam with no outlet works is chargeable as conservation storage.

5. Future designation or redesignation of storage volumes for flood control, power production or sediment control purposes will not be exempt from conservation storage unless approved by the Commission.

6. All water originating below Conchas Dam stored in Ute Reservoir is conservation storage, except water in dead storage below elevation 3725 and such portion of the water stored between elevations 3725 and 3741.6 as the Commission or this Court may determine, pursuant to paragraph 10 of this decree, is reasonably stored for sediment control.

7. There are eleven reservoirs other than Ute Reservoir within the drainage basin of the Canadian River below Conchas Dam in New Mexico with capacities greater than 100 acre-feet with a total capacity of 6,670 acre-feet, including undetermined sediment accumulation. All water stored in these reservoirs is conservation storage.

8. There are 63 small reservoirs in New Mexico with capacities less than 100 acre-feet with a total capacity of about 1,000 acre-feet, which the Commission has treated as de minimis. Water stored in these reservoirs is not chargeable as conservation storage.

9. The amounts of water and sediment contained in any reservoir in the Canadian River basin below Conchas Dam shall be determined by the latest reservoir capacity survey approved by the Commission.

10. The States are directed to enter into appropriate proceedings before the Commission to determine whether and to what extent water may be stored in the desilting pool portion of the Ute Reservoir sediment control pool without chargeability as conservation storage. In making such determination, the States shall request the chairman of the Commission to enlist the assistance of the Bureau

of Reclamation, the Corps of Engineers, and other appropriate federal or state agencies. The States, through the Commission, shall compile a record of the documents, written legal arguments and any transcripts of testimony or argument on which its deliberations and decision, if any, are based. If unanimous Commission action cannot be achieved within one year of this decree, any State may petition this Court to resolve the dispute. Consideration of the dispute by this Court shall be limited to the administrative record developed before the Commission.

11. In all instances in this Decree where Commission approval or exemption is required or permitted, such approval or exemption shall not be unreasonably withheld.

12. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of this decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.